

REVISTA DE PROCESSO

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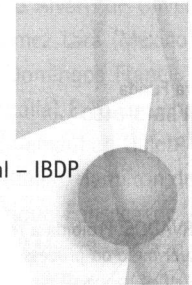
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DELAYS AND BACKLOGS IN CIVIL PROCEDURE

A (SOUTH EAST) EUROPEAN PERSPECTIVE

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RESUMO: Este artigo trata da situação da demora dos processos na Croácia e suas causas. Na primeira parte, fala-se do excesso de processos e de trabalho do Judiciário. Na segunda parte, fala-se da responsabilidade dos advogados e das partes por essa demora. As tentativas no sentido de tornar mais sérias as consequências pelo abuso do processo são descritas e avaliadas. Dá-se, como exemplo, sanções criadas para combater pedidos manifestamente infundados para transferência de competência e alguns outros. Finalmente, o artigo discute o impacto do atual sistema de remuneração dos advogados e se aspectos de ordem cultural podem influir nessa morosidade.

PALAVRAS-CHAVE: Processo civil – Morosidade do processo – Sobrecarga dos tribunais – Abuso do processo – Honorários de advogado – Cultura jurídica – Aspectos culturais da vida jurídica.

ABSTRACT: This paper presents the current situation of procedural delays in Croatia and its origins. In the first part, a number of indicators of judicial crisis caused by high backlogs and delays are presented. The second part inquires into responsibility of the parties and their lawyers for procedural delays. The attempts to strengthen procedural discipline and introduce stricter sanctions for abusive and vexatious behaviour in the past decade are outlined and assessed, eg. related to limitation of abusive challenges of judges, manifestly ill-founded requests for the transfer of jurisdiction and the restrictions on introduction of new facts and evidence. Finally, the paper discusses the impact of the current system of lawyers' fees and whether legal culture can be taken as an important generator of delays in civil procedure.

KEYWORDS: Civil procedure – Procedural delays – Court backlogs – Abuse of proceedings – Lawyers' fees – Legal culture.

SUMMARY: I. Introduction: a) Short personal note; b) Croatian civil justice system: the background of delays; c) Delays and backlogs in the context of Croatian Accession to the EU; d) Length of proceedings before civil courts: the current state of affairs – II. The responsibility of parties and their lawyers for procedural delay and the corresponding sanctions: a) Sanctions for abuses of procedural rights and the reasons for their practical failure; b) Avoiding vexatious motions on delegation of court jurisdiction and challenge of judges; c) The battle for concentration of proceedings (preclusion of new evidence, limitation of remittals and limitation of the number of hearings) – III. Lawyers' fees and interests as a delaying factor – IV. Legal culture as the generator of delays?

Optimum and foreseeable length of proceedings should be within the responsibility of all institutions and persons who participate in the design, regulation, planning and conduct of judicial proceedings, in particular by taking into account ethical rules.
SATURN Guidelines, 2013 (I.E.2.)

I. INTRODUCTION

a) Short personal note

From¹ 2003 to 2006 I was the Croatian national delegate to the European Commission for the Efficiency of Justice (Cepej) and the Chair of the Task Force on Timeframes of Proceedings (Cepej-TF-DEL). The Task Force was established after the initial idea of the setting-up of an “observatory” of judicial procedure timeframes was abandoned due to opposition from several countries that feared it would transcend the mandate of Cepej and take on the aspect of monitoring (what some countries viewed as unacceptable).² The mandate of the Task Force was “to examine the timeframes for judicial procedures in the member states, by type of case and, on that basis, to provide an analytical tool (including for comparative analysis) for use by member states with a view to possible reforms”.³ To carry out its mandate, the Task Force was to consist of six members with an “in-depth knowledge in the field of procedural timeframes”.

My own expertise in the field of procedural timeframes could at that time be barely described as an “in-depth knowledge”. However, it seemed that the description of desirable qualities was a bit of an overstatement for all of those who were concerned. The evaluation work of Cepej showed repeatedly that the European countries generally have little comparable data on the duration of judicial proceedings, so that knowledge on judicial timeframes was generally lacking. The special quality that I had for membership in the Task Force (which eventually led to my chairing function for a period of time) was not one of strength, but one of weakness: already for an extended period of time I had been interested in the

1. This paper is based on the contribution prepared for the conference *Delay in civil procedure. Responsibility and cooperation of parties and lawyers*, held at the Supreme Court of Hungary (Kuria), on 26-27 June 2014.
2. The intention to give a bit more prominent position to this group was partly realized in 2007 when TF-DEL changed its name to “Steering group of the Saturn Centre for judicial time management”. The new name did not, however, change its content or methods of work, even though the new terms of reference of Cepej now state that the Saturn Centre will act as “European Observatory of judicial timeframes” (see 2014-15 Cepej Activity Programme, [www.coe.int/t/dghl/cooperation/Cepej/Delais/mandat_2014_2015_en.asp]).
3. From the Terms of Reference of the TF-DEL, agreed at the 4th Cepej Plenary, see Cepej-BU (2004), at 23.

systemic problems and deficiencies of my home jurisdiction in coping with the length and delays of procedure in civil cases.

While being in a position to contribute to the work of Cepej, I was in particular encouraging the development of some tools and instruments that would enable comparisons between various European and global jurisdictions in the area of timeframes. For that purpose I contributed to the drafting and formulation of several documents, such as *Time management checklist*, *Best practices compendium*,⁴ *Saturn Guidelines*⁵ and *Eugmont*.⁶ All of these documents had a common function – to put the evaluation and analysis of the duration of judicial proceedings on objective foundations, which could eventually lead to judicial procedures that are user-oriented and fundamentally predictable in their length and outcome.⁷

The background is, indeed, one of divergences. Different European civil justice systems, even within the common “area of justice” of the European Union, have different levels of quality, user-friendliness and speed of processing. In particular, the length of proceedings may be the decisive field for comparisons, where great variances between individual civil justice systems – especially those of the European North and South – can be observed.⁸

In the following text, which is based on the elaboration of questions asked by the organizers of the 2014 Budapest Conference (but also on some of my previous work and expert opinions),⁹ I will present a critical perspective on the topic of delays in Croatian civil procedure, which may be relevant also for some other South East European jurisdictions. It may be a perspective that is not shared universally, also

4. Compendium of “best practices” on time management of judicial proceedings, Cepej (2006) 13, Strasbourg, 8 December 2006, see [www.coe.int/t/dghl/cooperation/Cepej/Delais/default_en.asp].
5. Saturn Guidelines for judicial time management (last version: Cepej (2008) 8 Rev 3 of 25 September 2013).
6. European Uniform Guidelines for Monitoring of Judicial Timeframes (now distributed as an integral part of Saturn Guidelines).
7. See Uzelac, “Turning Civil Procedure Upside Down: From Judges’ Law to Users’ Law”, in: *Tweehonderd jaar/Bicentenaire Code de Procédure civile*, Kluwer uitgevers, 2008, p. 297-309.
8. For a model discussion on this topic, see Uzelac, “Reforming Mediterranean Civil Procedure: Is There a Need for Shock Therapy?”, in: C.H. van Rhee & A. Uzelac (eds.), *Civil Justice between Efficiency and Quality: From Ius Commune to the Cepej*, Antwerp/Oxford/Portland (Ius Commune Series), 2008, p. 71-99.
9. See for instance: Uzelac, “The Rule of Law and the Croatian Judicial System: Court Delays as a Barrier on the Road to European Accession”, in: Frosini/Lupoi/Marchesiello (eds.), *A European Space of Justice*, Ravenna, 2006, p. 87-108; Uzelac, Kann die Effizienz der Justiz gemessen werden? – Versuch eines Vergleichs der europäischen Justizsysteme, in: Gottwald, P. (ed.) *Effektivität des Rechtsschutzes vor staatlichen und privaten Gerichten*, Bielefeld (Giesecking), 2006, p. 41-72.

not by some stakeholders within my national justice system. This should not come as a surprise. Within a particular judicial environment specificities and anomalies become habits, and even the unexpected and the unforeseeable start to appear as normal and regular. However, the following analysis does not have a pretension on the ultimate truth – it is just another subjective perspective. The objective assessment of the accuracy of subjective perspectives is thorough comparative and empirical research, which is so far lacking.¹⁰ To that extent, this contribution should be understood as a plea for an “in-depth knowledge” that all of us have to acquire.

b) *Croatian civil justice system: the background of delays*

The Croatian judicial system has been in a state of crisis for several decades. This crisis has lasted since the fall of communism in the beginning of the 1990s, through the war in the Balkans that ended in Croatia in 1996, to the present day. One of the causes and symptoms of this crisis was and remains an enormous, persistent backlog of cases. Simply put, the court system, the judges and their staff are overwhelmed by and unable to effectively and appropriately handle or adjudicate the volume of cases that presently exists in the system.

To put some specifics on the backlog, it may be pointed out that, according to the official statistics of the Ministry of Justice, the number of ‘unresolved’ judicial cases that are counted as backlogs since the beginning of the 1990s grew from about 450,000 in 1989 to over 1.3 million in 2004. In the past decade, when the issue of court delays was raised to the level of an important political issue (also in the context of the EU accession, see below), the government has tried to demonstrate statistical improvements, but even with changes in the methods of statistical monitoring and the transfer of many cases to non-judicial bodies, the backlogs in the last reported statistical period (until 2012) were declared as about

10. In one of my earlier papers on the topic of delays, I systematized the elements of horizontal and vertical analysis of delays that have to be studied in order to acquire a full picture on the duration of proceedings. None of these elements has been the subject of serious comparative research. See the table below, taken from: Uzelac, *Accelerating Civil Proceedings in Croatia – A History of Attempts to Improve the Efficiency of Civil Litigation*, in: C.H. van Rhee (ed.), *History of Delays in Civil Procedure*, Maastricht, 2004, p. 286 (an excerpt):

Duration	Horizontal analysis	Majority/all proceedings	Type of proceedings
		Single incidents ('cases')	Territorial jurisdiction
	Vertical analysis	Lengthiness of all stages of the proceedings	
		Delays in proceedings ('bottlenecks')	

800,000, with a trend that is either stagnating or increasing. The court backlogs and delays have caused a high level of user dissatisfaction with the courts and judges. In surveys of public trust, the courts have been among the least trusted social institutions.

In their public statements, government officials do recognize this problem, and try to relativize it by pointing to numerous changes in procedural rules and to a series of ongoing organizational reforms. But in spite of these efforts that so far have produced a very limited result it is far from certain that the outcome will be positive. According to the statements of the Minister of Justice Orsat Miljenić, while the number of backlogs in some areas is decreasing, in some areas, such as commercial and general civil litigation cases, the situation is getting worse, and this is why ‘structural reforms are needed’.¹¹ However, many attempted reforms so far have not achieved the desired results – on the contrary, they have produced more damage by introducing uncertainty and by poor planning and implementation. The last announced reform that should address the backlogs by more even distribution of cases is also likely to experience great difficulties. It foresees the reduction of the number of courts by merging courts, including a possible merger of commercial and general civil courts, and reducing their number from about 130 to 33. If the government succeeds in overcoming opposition from local municipalities, many years will be needed to stabilize the system and produce real improvements.

In the meantime, the courts most burdened remain the courts in the urban centres, in particular the courts in Zagreb. While 72 per cent of the courts and state prosecutors’ offices have up to 10 judges or prosecutors, and in some of the smaller courts judges adjudicate 50 or fewer cases per year, the large civil and commercial courts in Zagreb have over 100 judges and have to decide thousands of cases per judge.¹² Therefore, the backlogs are larger and cause more problems in the most important courts. As an example, the Commercial Court in Zagreb had an annual influx of 12,785 cases in 2013. In the same year, this court had a backlog of 18,440 cases, which is over 140 per cent of the annual caseload. In other words, without receiving a single new case, this court would have to work for 16 months just to clear the currently existing backlog.

c) *Delays and backlogs in the context of Croatian Accession to the EU*

The backlog of cases was a significant issue when Croatia was being considered for membership in the European Union. After many years of waiting, the formal

11. Statement in the leading daily paper *Večernji list*, 03.05.2013.

12. Confirmed by the recent statements of the Minister of Justice in the speech given to the Lawyers’ Club at the Faculty of Law on 24 February 2014, Reorganisation of the Court Network, Bulletin 103 – to be published.

accession process started in 2004 when the EU finally issued the document that formally marks the start of negotiations, the *Avis*.¹³ One of the main stumbling blocks was from the very beginning the issue of backlogs. The *Avis* diagnosed serious deficiencies in the functioning of the Croatian judiciary. It stated that “in the second half of the 1990s, Croatia’s judicial system lacked independence and efficiency” and pointed to “widespread inefficiency of the judicial system”, the “weaknesses related to the selection and training of judges”, and to “a very large backlog of cases” (quoting the figure of 1.38 million backlogged cases, which “indicate serious constraints in the judiciary’s ability to handle the work load”).¹⁴ Despite the fact that the *Avis* is a political document which is often drafted in a careful, diplomatic fashion, the conclusion was very clear: “Citizens rights are therefore not yet fully protected by the judiciary in accordance with the provisions of the Constitution”.¹⁵

The EU accession process resulted in a number of government activities that tried to convince the EU that Croatia had adopted European standards in various fields, but the negotiations with Croatia lasted longer than in any previous round of EU enlargement. One of the reasons for this was the negotiations regarding the chapter on the judiciary and human rights, known in Croatian public opinion as the notorious Chapter 23. This chapter was, in spite of the limited EU authorities in this area, described in the media as “the most difficult one”. It was also the last negotiation chapter to be closed, more than seven years after the start of the accession process, on 30 June 2011. All progress reports that monitored negotiations issued by the EU in the meantime found persistent deficiencies in the judiciary. In the Progress Report 2005 it was stated that inefficiency of the courts, the excessive length of court proceedings and other structural difficulties “contributed to an increase in the already very large backlog of cases before the Croatian courts, thus further weakening judicial capacity”.¹⁶ In the Progress Report 2006 the conclusion was that “the judicial system continues to suffer from severe shortcomings”.¹⁷ In the Progress Report 2007 some progress in reducing case backlog was noted, but with the remark that “the case backlogs remains large” and that “a number of cases have thrown light on the weaknesses in the system, most frequently concerning equality before the law”.¹⁸ In the Progress Report 2008 it was stated that “adequate

13. Opinion on Croatia’s Application for Membership of the EU, Brussels, COM (2004) 257 final, generally referred to as “*Avis*” – after its French title.

14. *Ibid.*, p. 16.

15. *Ibid.*

16. Croatia 2005 Progress Report, SEC (2005) 1424, p. 15.

17. Croatia 2006 Progress Report SEC (2006) 1385, p. 8.

18. Croatia 2007 Progress Report, COM (2007) 663 final, p. 9.

monitoring of [judicial reforms] has not been possible due to weak administrative capacity”, and that “the case backlog remains large and the length of judicial procedures excessive” (also noting that “court rationalization has not yet begun in earnest and the current plans lack ambition”).¹⁹

The Progress Report 2009 noted some progress in the reduction of court backlogs, but it criticized the lack of “ambition”, “clear budgeting” and “only limited assessment of the impact of new [reform] measures”. It also stated that “the overall case backlog and the number of unresolved cases older than three years remain high and the length of judicial procedures excessive”.²⁰ In 2010, the EU observers stated that “implementation of judicial reform has continued, although the main expected results of the reform process are yet to be seen”, finding that “the backlog of cases has been reduced unevenly across the various courts and overall remains high”.²¹ Even the final progress report in 2011 that gave the “green light” for closing the accession process praised more the “large volume of legislation adopted” than the improved functioning of the judiciary, which was mainly placed in the uncertain future. The conclusion was that “Croatia needs to improve human resources planning, including for the long term needs of the judiciary, taking into account the impact of many on-going and planned reforms”. As to the backlogs, the report found further reduction of the court backlog had been achieved.

It seems, however, that a significant part of the apparent reduction in court backlogs found by the EU observers (who had a limited mandate and no independent controlling mechanisms) can be attributed to the government actions that did not strive to genuinely improve the functioning of the judiciary. In order to secure membership in the EU, the Croatian government determined to reduce the backlog, but it did so not by making major improvements in the administration of justice, but largely by manipulating the statistics. In the period after 2005, the government reduced the backlog by approximately 20 per cent simply by making a change to the way in which it counted cases. Instead of counting all active cases within the judicial system, as it had always done, the Minister of Justice decided that all cases dealing with enforcement of judgments would be deemed ‘closed’ when the enforcement order was issued, notwithstanding that many, if not most, of such cases would continue within the judicial system. This change, as well as a transfer of jurisdiction in some debt-collection cases from courts to notaries public, artificially reduced the backlog by eliminating approximately 400,000 of the 1.3 million backlogged cases simply by changing the standards and without making substantive improvements in or changes to the system of justice. This

19. See Croatia 2008 Progress Report, SEC (2008) 2694, p. 8.

20. Croatia 2009 Progress Report, COM (2009) 533, p. 9.

21. Croatia 2010 Progress Report, COM (2010) 660, p. 8.

can be demonstrated by, among other sources, the otherwise unexplainable surge in the official statistics of the Ministry of Justice that show over 200,000 more “resolved” cases in the years 2004 to 2006 than the “normal” level of resolved cases after 2007.²²

According to some unofficial statements, in its informal dealings with the EU the Croatian government has conceded that it had fixed the calculations, and also admitted that the new calculation of closed cases creates problems due to the fact that many judges and judicial staff work on formally ‘non-existent’ cases. An official confirmation may be derived from the fact that now, after the entry into the EU, the government has restarted the efforts to reform the court network, arguing that the current way of functioning of the court system is inefficient. Recently, in February 2014, the UK Deputy Minister of Justice on his visit to Croatia repeated that “entry of Croatia into the EU should not mean the end, but the beginning of the process of judicial reforms”, and also emphasized how judicial proceedings in Croatia “should last shorter”.

In the newly established EU Justice Scoreboard,²³ the European Union addressed the need for systematic overview of the functioning of the justice systems in the EU Member States. Based on the methodology developed by Cepej, the European Commission has so far issued two annual editions, for the years 2013 and 2014. Due to the limited powers of the EU in respect of the civil justice systems of the Member States, which is limited to eliminating obstacles in national judicial procedures that have an impact on the common EU market and resolution of cross-border cases, the EU Justice Scoreboard was intended only to “assist the EU and its Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of the Member States”. The conclusion of the EU Justice Scoreboard was that “there are Member States which continue to face particular challenges with regard to the efficiency of their justice systems” (p. 15). While the EU document was diplomatically soft, putting Croatia in the circle of several countries for which justice should be “a priority area”, offering funding for future reforms, the Croatian press was less diplomatic in its interpretation of the report and concluded that the “Croatian judiciary is the worst in the EU”.²⁴ The main findings were that Croatia is at the bottom of the scoreboard both in the category of efficiency and in the category of the perception of judicial independence.

22. cf. *Statistički pregled* – Statistical surveys of the MoJ for the years 2004 to 2012.

23. See: [http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm], publication of 17.03.2014.

24. Hrvatsko pravosuđe je najgore u EU. Odgađanje pravde isto je kao i njezino uskraćivanje, article in the national daily paper *Jutarnji list*, 17.03.2014.

Even if in some areas of judicial practice backlogs may be somewhat reduced, it seems that they re-appear and surge dramatically in other places. Recently, the backlogs started to multiply in the higher levels of adjudication and, in particular, in the Supreme Court. According to the recently presented information of the President of the Supreme Court, Judge Branko Hrvatin, since 2004 the annual number of cases received per judge in the Court rose from about 150 to almost 500. Consequently, the backlogs in the Court increased in the past decade tenfold, from about one thousand to the present 10,000 backlogged cases.²⁵ Traditionally, in Croatia the appeal to the Supreme Court is a part of the standard means of recourse, and in a large number of cases it is allowed as of right to all applicants. Though technically it does not stay enforcement automatically, in practice it still causes many court rulings to be ineffective prior to the decision of the Supreme Court.

d) *Length of proceedings before civil courts: the current state of affairs*

One of the causes of the backlog in the Croatian court system is the length of time that it takes for civil cases to be fully and finally resolved. This goes for all types of cases in spite of the fact that the vast majority of cases are rather routine, present relatively straightforward legal issues and typically do not involve matters of great monetary significance. Yet such cases still take years, and often decades, for the Croatian court system to resolve.

Due to the lack of statistical information and the non-transparent monitoring of court proceedings it is difficult to assess the length of an “average” case in the Croatian legal system. According to practitioners experience, even in cases of average complexity the proceedings regularly last two to three years just to obtain a ruling from the trial-level court, which can be conceived more as an “initial decree” than as an effective judgment. However, in Croatia (just as in the other successor states of the former Yugoslavia) under the Constitution everyone has a full-fledged right to appeal against all judicial decisions (and also a right to appeal against most interlocutory procedural orders).²⁶ Such an appeal goes to an intermediate appellate court and, in most cases, a further right to appeal to

25. From a presentation of Judge Hrvatin (*Pregled rada VSRH-a u periodu 2005-2012*), available from the author.

26. See more in Uzelac, *Ustavno pravo na žalbu u građanskim stvarima: jamstvo ispravnog pravosuđenja ili relikv prošlosti?* [Constitutional Right to Appeal in Civil Matters: A Guarantee of Correct Adjudication or a Relic of the Past?], in: *Djelotvorna pravna zaštita u pravičnom postupku. Izazovi pravosudnih transformacija na jugu Europe. Liber amicorum Mihajlo Dika*, Uzelac/Garašić/Maganić (eds.), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013, str. 219-243.

the Supreme Court of Croatia is available as well (currently, all civil cases above \$35,000 and commercial cases above \$90,000 are automatically granted leave to appeal to the Supreme Court, but in all other cases such leave can be requested as well). Appeals are taken from first instance judgments in the overwhelming majority of properly contested cases. Available statistics demonstrate that in some types of cases the rate of appeal goes as high as approximately 70 per cent (information, for example, regarding trespassing cases). How frequent appeals are in practice can be derived from the fact that in 2012 there were 154,446 new civil litigation cases in courts of first instance, and 63,095 new appeals in the appeals courts. With commercial courts the appeal rate is even higher, exactly 50 per cent – 28,277 new cases in the commercial courts of first instance versus 14,110 new appeals in the High Commercial Court.²⁷

Critically, there is no enforcement of the initial judgment during the pendency of the appeal – it is automatically suspended. In practical terms, the first instance judgment is therefore essentially without any effect, and the appeal against first instance decision is an expected part of the litigation process in Croatia. It is often used with the intentional purpose to delay the proceedings, as the first appeal from an initial decree typically takes between two and four years to resolve.

Resolution of the first appeal may, unfortunately, often be only the starting point for litigation. In what has been described as ‘the endless cycles of remittals’, the intermediate appellate courts frequently overturn the first instance judgments and remand the case to the lower court with directions to start the entire process all over again. Thus a case lasting ten years is easily imaginable, and a persistent, systemic reality in Croatia even today.

The reasons the intermediate appellate courts frequently give for such remittances include, typically, incomplete factual findings and, to a lesser extent, procedural errors. The policy of the higher courts to remit the case to the lower instances with the “try harder” instruction is connected to the basically inquisitorial nature of the civil litigation process in Croatia, which forces the courts to actively participate in tracking and finding evidence that could assist in clarification of the factual background (some foreign observers conclude that the main policy of the Croatian appeals courts is the “no stone should be left unturned” policy). These same issues and process could occur again and again following the second and sometimes third and fourth judicial decisions (“first instance judgments”) from the lower court, and sometimes include additional appeals to the Supreme Court (and remittals,

27. For a survey of appeals practice in Croatia, see Uzelac, Features and shortcomings of appellate review in civil and administrative cases in Croatia, in: Uzelac/van Rhee (eds.), *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*, Cambridge: Intersentia, 2014, p. 227-255.

as the Supreme Court also frequently resorts to quashing and remitting to the first instance). This cycle is even further exacerbated when the case has political or economic significance, as there is a perception that no judge or court wants to be seen as “owning” or taking responsibility for a significant decision.

Indeed, the failure of the Croatian legal system to dispense justice to its citizens in a timely fashion has been the subject of numerous cases brought by Croatian citizens against the government in the European Court of Human Rights (ECtHR), under Article 6, Section 1 of the European Convention on Human Rights, which guarantees citizens the right to a fair trial within a reasonable time. In 2013 alone there were decisions in three cases filed against the Croatian government by citizens under Article 6, Section 1; between 1998 and 2013 there were 91 such decisions. The failure to provide citizens with the right to a trial within a reasonable time pursuant to Article 6, Section 1 has been the single most prevalent human rights issue brought by Croatian citizens before the ECtHR, followed by the violation of the right to fair proceedings (73 violations). The ECtHR has also found that “allowing for repeated remittals mandated by incomplete findings of fact” is a “systemic deficiency in the Croatian procedural system”.²⁸ The very first case in which the ECtHR found a human rights violation in Croatia was a length of proceedings case, which lasted about 25 years before it was brought to the Court in Strasbourg.²⁹

In recent years, the smaller number of length of proceedings cases against Croatia is due above all to the establishment of the internal complaint system for the length of proceedings in Croatia that allows litigants to seek monetary compensation as “just satisfaction” for excessive length of court proceedings.³⁰ So far this system has caused the government to pay into the account for excessive length of proceedings a sum of about 247 million kuna compensation to litigants (2013 data). The availability of domestic remedies has, however, not sped up the proceedings significantly. This has been visible to the general public as well, as decades-long cases frequently appear in the headlines.³¹

Where official statistics are concerned, the reality again seems to be substantially different. Comparative data provided to Cepej and used in the EU Justice

28. ECtHR, *Božić v. Croatia*, no. 22457/02 at 36.

29. ECtHR, *Rajak v. Croatia*, 49706/99.

30. See more in Uzelac, ‘Legal Remedies for the Violations of the Right to a Trial Within a Reasonable Time in Croatia: In the Quest for the Holy Grail of Effectiveness’, *Revista de Processo (RePro, São Paulo)*, 35:180/2010, p. 159-193.

31. See e.g. the title “Dugotrajni procesi: spor traje 28 godina, a težak je 3 kune!” – Long-lasting court proceedings: litigation lasts for 28 years, and the amount in dispute is 3 kuna! [54 cents] – published in the national daily paper *Večernji list* on 3 May 2013.

Scoreboard³² placed Croatia high among the countries that need a lot of time to resolve civil and litigious cases. Yet the data provided for 2010 and 2012, which showed an “average” length of first instance proceedings of about 460 days, were in fact calculated on the basis of the “disposition time” indicator, which is basically an artificial indicator and not a real empirical value.³³ Essentially, doubts remain as to whether this is truly representative information, and as to what correlation this actually has with the real delays in court proceedings.³⁴ Some other indicators, which are currently not publicly available, may be better in assessing the delays.³⁵ Local statistics tried to put in the foreground the aggregate data on the disposition time for all cases, which was, for example, for the municipal courts only 144 days, and for the commercial courts even lower, only 96 days.³⁶ But as these data combine the litigious and (much more numerous) non-litigious cases, the result is hardly usable.³⁷ The bottom line is that, despite the simmering attempts to polish the reality and declare that the situation has been brought back to “normality”, the situation with court delays in Croatia is far from being satisfactory. The toughest cases are “hard-core” civil litigation cases, where delays in civil procedure are a persistent feature. The reasons for this are to a great part beyond civil procedural rules – but they may be a contributing factor as well. In the following text, I will address the issues that were raised by the authors of the questionnaire, issues which contain several important aspects of civil procedure that may (or may not) contribute to the length of proceedings.

32. See 2014 EU Justice Scoreboard: Towards more effective justice systems in the EU, [http://europa.eu/rapid/press-release_IP-14-273_en.htm, Annex], p. 1.

33. The “disposition time” indicator is more a case-flow indicator based on the aggregate data on resolved and unresolved cases. It is calculated on the basis of the number of unresolved cases divided by the number of resolved cases at the end of a year.

34. The “disposition time” is also very different across the court structures. In the largest and the most important civil court – Zagreb Municipal Court – the disposition time for first instance cases is about 1,500 days (over four years) – see statements of the Minister of Justice, op. cit. (n. 10 above). As this number is calculated on the basis of aggregate figures, which include the cases that were dropped or disposed early in the proceedings, it may not reflect accurately the duration of average cases that were ended by a judgment on the merits issued after the taking of evidence.

35. Croatian Justice Minister Miljenić mentioned e.g. 8,000 cases at a Zagreb court of general jurisdiction in which over a three-year period no action was undertaken by the court (ibid.).

36. Statistički pregled Ministarstva pravosuđa za 2012. godinu, p. 14 and 16.

37. e.g. under the same methodology, the CPJ indicator – cases per judge – was 1,610 for municipal and 1,855 for commercial court judges in 2012. Obviously, the vast majority of those cases are either collection of uncontested debt (production of enforcement titles in non-contested cases) or land registry and company register cases, as well as some other routine categories of “cases”.

II. THE RESPONSIBILITY OF PARTIES AND THEIR LAWYERS FOR PROCEDURAL DELAY AND THE CORRESPONDING SANCTIONS

When things go wrong, partners often quarrel over who is responsible for failures and errors. As described above, the situation with delays in Croatian civil procedure is not optimal, and it is no wonder that judges and lawyers have different views regarding the origins of the problem. A usual reply given by the representatives of the Bar was on several occasions expressed by the former president of the Croatian Bar Association Marijan Hanžeković who argued that lawyers cannot be responsible for the undue length of proceedings, because Croatian civil procedure, just like its predecessor, the Austrian ZPO, gives exclusive authority to judges to steer and manage civil proceedings. According to this distinguished attorney-at-law, all the blame for undue delays has to be on the judges, who are not trained or skilful enough to prepare and organize the proceedings in a way that will enable the smooth and timely arrival to a final conclusion of the dispute.

At first glance, the argument about the exclusive powers of the court does have some persuasive force: Croatian civil justice has maintained a relatively high degree of paternalistic inquisitorialism inherited from the Socialist times. But, indeed, putting all the blame for delays in civil proceedings on judges is not justified. The argument that they dispose of sufficient powers and authority to effectively conduct the proceedings is largely demagogical, even if it is true that some judges do not use their authority to conduct the proceedings in a swift and timely manner.

At the same time, the opposing argument, which starts with the assumption that the parties (i.e. their lawyers) are the main cause of delays, may be equally untrue. Nevertheless for at least a decade it seems that civil procedure reform in Croatia generally shared this position. The first amendments to the Code of Civil Procedure (CCP) that clearly demonstrate such an attitude were enacted in 2003.³⁸ The main political slogan of the voluminous amendments was ‘strengthening of procedural discipline’. The starting point of this reform, which was undertaken a decade ago, was that the long duration and inefficiency of trials are adversely influenced by the parties who (ab)use their procedural rights, and obstruct and even block the proceedings and, to make matters worse, remain unsanctioned for such behaviour.³⁹ The underlying assumption was that civil procedure would be faster if the judges vigorously enforced their superior authority and punished the parties and their attorneys for every attempt to protract judicial proceedings.

38. See Off. Gaz. 117/2003 of 23 July 2003 (law effective since 1 December 2003).

39. See more in Uzelac, Accelerating... cit. (n. 9 above).

Let us briefly summarize some changes introduced in 2003 that deal specifically with the dilatory conduct of the parties, and the sanctions for dilatory techniques and strategies.⁴⁰

a) *Sanctions for abuses of procedural rights and the reasons for their practical failure*

In order to emphasize the right and duty of the court to ensure procedural discipline, if needed by stronger means for battling against procedural abuses, the general clause from the CCP stating that parties have a duty to conscientiously use their rights (usually interpreted as the parties' obligation to cooperate in good faith and avoid vexatious behaviour) was reinforced by stronger sanctions. The court was authorized to fine the parties or their representatives for 'significant abuses of their procedural rights'.⁴¹ In case of an imposed sanction, the sanctioned party was given the right to appeal the decision and thereby suspend enforcement of the fine. In 2003, the maximum fines that the court could impose for violation of procedural discipline were set at about €1,500 for natural persons (and almost €7,000 for legal persons), though with a relatively low minimum threshold (less than €100). The same limits are still in place today.

As an indirect sanction, in some specific cases of procedural abuses⁴² the court was authorized to order the abusing party to pay expenses caused by its fault independently of the outcome of the litigation. Such an order was immediately enforceable.

At first sight, these amendments invoke a comparison to the Anglo-Saxon *contempt of court* concept. This was, however, hardly the case. The reforms went only half way – and the resulting effect was that, up to the present day, they have been more or less insignificant in practice. There are a number of reasons for this.

First, the right to appeal the judicial fines for procedural abuse was a powerful barrier against resorting to them. Namely, every judicial order that is subject to appeal has to be accompanied with reasons, so that judges who imposed fines felt this as an additional burden of writing another reasoned decision.

Second, as an order on fines was ineffective until confirmed by the intermediate court, the threat of sanctions was to a certain extent lame. The long time for decision-making on appeals against such orders also reduced their effectiveness.

Third, more importantly, due to this procedural arrangement it seemed that there was a contradiction between the procedure and its basic intention. That is,

40. For this purpose, some parts of the earlier presentation are used (see Uzelac, *Accelerating...* cit., ad 7.3.1.).

41. See new text of arts. 9 and 10 CCP.

42. See sec. II. b on vexatious challenges.

the imposition of fines for vexatious behaviour in practice proved to be in itself a contributing factor to the length of proceedings. In principle, if the sanction was appealed, the case file was transmitted to the superior court, where it could dwell for several months. This period, even if the order was confirmed, would be added to the procedural length. If a fine was relatively low (and often it was), it could even justify a calculation by the party that wished to protract the proceedings to knowingly and intentionally provoke such sanctioning.

Fourth, the precondition for sanctioning for procedural abuses is based on a broad legal standard of 'significant abuses of procedural rights'. In case law and legal theory this standard is not precisely defined and explained.⁴³ For a resolute application of heavier sanctions for procedural abuse (i.e. for higher fines), a judge of impeccable ability, will and discipline is needed. In the present circumstances this condition is not so easily met.

Fifth, the issuing of the directly enforceable order to recover costs and expenses caused by the vexatious behaviour to the other party raised the issue of determining and proving these expenses. In practice, this caused multiple problems: what should be regarded as recoverable costs (e.g. the costs of the adjourned oral hearing or the costs of the subsequent hearing), the scope of compensation (travel expenses, lawyers' fees) and the means of proof that would be regarded as sufficient? All these facts needed to be justified in the reasons of the costs order (which may be attacked in the appeal against the final judicial decision). In short, from the judicial perspective the direct costs orders based on the *culpa* principle were not a bit simpler than the pronouncement of fines.

Sixth, the enforceability of fines in itself did not mean that the sanctioned participant (a party or the party's lawyer) would effectively pay the fine. It seems that a considerable number of fines were never enforced, which led to another series of legislative amendments with even more paradoxical results. Namely, two subsequent amendments, in 2008 and 2013,⁴⁴ added further strain on the judges who imposed sanctions for procedural abuses, basically transferring onto them the obligation to take care about the forcible enforcement of their own decisions.⁴⁵ In fact, the judges who dared to use the authority to fine the parties

43. All the more so because the concept of the 'abuse of rights' is unclear. Some even argue that this term is *contradictio in adiecto*, since 'rights' refer to actions that are generally permissible and available to parties, and therefore they cannot be punished if they make use of them. See *Newsletter of the Forum of the Zagreb Law School*, Abuse of rights in Civil Proceedings, at p. 2 (available at [http://zakon.pravo.hr]).

44. See Off. Gaz. 84/2008 and 25/2013.

45. See art. 10 CCP that was extended (in 2008) beyond the borders of readability by six lengthy clauses of an essentially administrative and disciplinary nature, which were (in 2013) replaced by seven similarly ineffective and even less readable clauses.

or their lawyers were exposed to such challenges that they felt the sanction was effectively a boomerang, that returned to hit them instead of the sanctioned person.

Therefore, it is no wonder that the procedural sanctions of this kind were rare in practice, and when they were pronounced the minimum amounts were preferred. After all, the spouses (mainly husbands) of many judges in Croatia also belong to the legal profession and practise as attorneys, so that a certain level of collegiate tolerance for vexatious behaviour was always a constant in the work of the civil courts.

b) *Avoiding vexatious motions on delegation of court jurisdiction and challenge of judges*

In relation to the battle against abuses of procedural rights, a more practical impact was gained from some other, apparently minor changes aimed at reducing or disabling some of the delaying tactics which were widely used in practice prior to 2003.

One such change effected by the 2003 amendments related to the *petitions to delegate court jurisdiction to another court* (motions to have a case adjudicated by another court, e.g. because of the reasons of convenience and costs).⁴⁶ Before the 2003 amendments, if a party requested that jurisdiction be delegated to another court, the first instance court had to transfer this request to the highest court of the specific branch of jurisdiction (for the courts of general jurisdiction, to the Supreme Court) that was due to decide on the motion. In the meantime, the first instance court, not being in possession of the file (which had to be transferred to the superior court as well), had to suspend the proceedings until a decision on such a motion was made. In practice, this could cause delays of several months due to the caseload of the Supreme Court or the High Commercial Court. In order to prevent the use of this motion, whose only purpose was to gain time, the parties' right to submit such a motion was in principle cancelled, so that now only the first instance court can request delegation of jurisdiction to another territorially competent court, upon its motion or initiative of a party. In any event, the decision whether to address the highest tribunal with the request for delegation is now within the discretion of the trial court, which can disregard the requests if it deems them to be vexatious or manifestly ill-founded.⁴⁷

46. See Art. 68 CCP.

47. On the delegation of jurisdiction, see Čizmić, *Određivanje mjesne nadležnosti od strane višeg suda*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 33:1-2012, p. 295-304 (with ample references to mainly pre-2003 case law).

The second, similar change excluded some kinds of manifestly ill-founded *requests for challenge of judges*.⁴⁸ After 2003, expressly inadmissible are the following types of challenges:

- general requests for exemption of all judges of a certain court;
- repetitious challenge requests (repetition of challenges that were already decided); and
- challenges that do not contain reasons for challenge.⁴⁹

Such inadmissible challenges may be dismissed instantly by the trial court judge, without the need to transfer them to the higher court (no intermediate appeal is allowed against such dismissals).

Although normally the challenged judge is bound to discontinue all actions until the decision on challenge, he can continue to act if he regards the challenge as manifestly ill-founded and aimed at obstructing the proceedings.⁵⁰ In such a case, the law states that the case file will be copied, while the original file will stay with the trial court.⁵¹

If a petition is manifestly ill-founded and vexatious, the court is also authorized to fine the applicant and rule immediately on the costs and expenses incurred by the other party.⁵²

c) *The battle for concentration of proceedings (preclusion of new evidence, limitation of remittals and limitation of the number of hearings)*

The sympathy for procedural fines and strict rules on “procedural discipline” may be traced back to the Socialist procedural approach, which was rooted in general distrust towards the parties, their lawyers and all other “remnants” of bourgeois and capitalist society. Therefore, this “play hard” strategy can be a

48. On challenge provisions under the 2003 Amendments (with some critical remarks), see Garašić, *Institut izuzeća sudaca i Novela Zakona o parničnom postupku 2003*, Zbornik Pravnog fakulteta u Zagrebu, 53:6-2003, p. 1189-1256.

49. See art. 73. CCP.

50. Art. 75 para. 2, CCP.

51. Obviously, these provisions are of a purely administrative nature. The sheer fact that they are inserted in the Code of Civil Procedure indicate how important for speed or procedure some apparently trivial technical details may be. In practice, the costs and time associated with the copying of the case file (that may contain thousands of pages) also played a discouraging role for the use of authority to continue the proceedings while the appeal regarding the challenge was pending. The result is again that even manifestly ill-founded challenges still have a capacity to cause undue delay.

52. For practical difficulties with procedural fines and immediate costs orders based on the *culpa* principle, see sec. II. a.

part of the proof that the spirit of paternalistic inquisitorialism still haunts the corridors of the Croatian civil justice system.⁵³ Such a paternalistic approach with the formal dominance of the powers of the court has never proved to be efficient.⁵⁴ As indicated in the preceding paragraphs, it has not proved to be efficient in the context of imposing procedural discipline by fines and penalties either.

Let us see whether there was more success in another battle in the fight against delays: the battle against procrastinated trials and procedural de-concentration.

From the times of Socialist Yugoslavia until today, the procedural principle of “concentration of trials” has continually been uttered in the procedural textbooks of South East Europe, where the same doctrine resonates in the current mandatory students readings in courses of civil procedure of all the successor countries of Yugoslavia. The “principle of concentration” (*die Konzentrationsmaxime*) was copied into Yugoslav and post-Yugoslav literature of civil procedure from the influential procedural treatises of Austrian and – to a lesser extent – German authors. Yet procedural concentration was from the very beginning treated as an elusive goal (“to complete the proceedings at only one hearing only if it is possible”), which was extended by the principle that was essentially the opposite of it – the principle of the “unity of the main hearing” (*jedinstvo glavne rasprave*). This latter principle argued that no matter how many hearings took place in civil litigation, any of the procedural actions might be undertaken at any of the hearings (in other words: no procedural preclusions are possible during the “stage” of the main hearing).

Indeed, in the 1990s and beginning of the 2000s, just as in the overwhelming majority of South East and Central European jurisdictions, Croatian civil procedure was a good example of de-concentration, a rather representative illustration of the style of proceedings that was described as “piecemeal” or “May rain” trial. The hearings were regularly adjourned (sometimes “until further notice”), and lawyers often used them only as an opportunity to meet the other party, suggest the taking of further evidence, and/or file another written submission. Any new proposal, or any non-appearance of a party, a lawyer, a witness or an expert, caused inevitably the adjournment of the hearing. Reliable statistical information about the number of hearings held in particular first instance proceedings in civil cases

53. I have reported on the lively existence of Socialist law (the “third” legal tradition) in Uzelac, *Survival of the Third Legal Tradition?*, *Supreme Court Law Review* (2010), 49 S.C.L.R. (2nd), p. 377-396. This is not peculiar to Croatia, but also to other post-socialist states – see e.g. R. Manko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, (September 27, 2013). *Comparative Law Review* 4.2 (2013). Available at SSRN: [http://ssrn.com/abstract=2332219].

54. See more in Uzelac, *Croatia: Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence*, in: C.H. van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Springer – Ius Gentium: Dordrecht, Heidelberg, New York, London, 2014, p. 197-221.

is generally lacking, but anecdotal evidence speaks about the trials where hearings were adjourned over 20 or even 30 times. As the court calendar seldom allowed the next hearing to be held before two or three months had passed, the time between the hearings was substantial, sometimes over a year. According to one neutral expert study undertaken in 2000, in Zagreb Municipal Court the average time lapse between hearings in damages and labour cases was 173 days (about two hearings per year), and the maximum number of hearings in one damage case was 17, which were held over a period of 2,750 days.⁵⁵

A large number of civil procedure reforms from the 1990s up to today tried to address the issue of concentration, both in the first instance proceedings and in the subsequent proceedings regarding the means of recourse. The strategy (if a number of poorly prepared legislative changes deserve this word) consisted in imposing ever-stricter rules on the submission of new procedural material. At first only appeals were affected: in 1990, a rule was introduced that evidence may not be introduced on appeal if the evidence was proposed in first instance proceedings but not produced because of the failure of the party to advance the costs. Otherwise the introduction of new evidence was admissible on appeal. The 2003 amendments went one step further and generally excluded new facts and evidence altogether from appellate proceedings. The main reason for these changes was, as stated in the explanatory materials to Amendments 2003, to battle against the practice that “fraudulent parties, by concealing some facts or evidence during first instance proceedings and stating them only in the appeal, succeeded in reaching annulment of the contested judgment and returning the case to retrial”.⁵⁶

Another change introduced in 2003 dealt with the general obligation of the defendants to submit a written statement in reply to the claimant’s allegations. If no such statement was filed within the time due, a default judgment may be entered against the defendant (*presuda zbog ogluhe*).⁵⁷ The new rules strengthened the obligation of the parties to state all facts and propose all evidence already in their written statements of claim and defence, either at the preliminary hearing or, at the latest, if the preliminary hearing was not held, at the first oral hearing on the merits.

55. Results of the Case Review Study Report based on the sample of 1,400 cases undertaken by the USAID sponsored project executed by the National Center for State Courts (NCSC, *Functional Specifications Report for Computerization in Zagreb Municipal Court*, September 2001, p. 14 – unpublished).

56. Explanatory Material to Amendments 2003, at 45 (commentary to Art. 195 of the Amendments).

57. This general rule is subject to several exceptions, such as urgent cases (where the hearing can be scheduled before the statement in reply is received), and the cases in which public interests or the interests of third parties are present (some labour and family law cases, cases in which the parties’ right to dispose with the claim is limited, etc.).

In 2003, sanctions for delayed presentation of facts and evidence did not, however, include preclusion of the parties' rights to present them altogether, but instead the obligation to compensate all of the costs caused that would arise from such delayed statements. The court was supposed to rule on such costs immediately, irrespective of the outcome of the case.⁵⁸

As we predicted ten years ago,⁵⁹ these reforms were not sufficient to accelerate civil proceedings. Further steps in the direction of concentration were made in 2008, when a special regime of preclusions was introduced for small claims. For them, it was provided that new facts and evidence may be introduced, at the latest, at the end of the preliminary hearing (which became a mandatory part of the proceedings).⁶⁰ In addition, it was provided that in small claims cases the preliminary hearing "may be adjourned only once".⁶¹

Again the effects caused by the introduction of stricter rules proved to be modest, so that the government decided to make them even stricter in another comprehensive set of CCP amendments enacted in 2013.⁶² The latest amendments used as a model the special rules on preclusions in small claims, and rolled them over to general civil procedural rules, while at the same time raising the level of preclusions in small claims one step further.

Accordingly, under current law the parties are supposed to bring forward their factual allegations and evidentiary proposals already in their statements of claim and defence, and, at the latest, until the end of the preliminary hearing. Later submission of facts and evidence is admissible only if the parties could not have submitted them earlier due to no fault of their own. Facts and evidence submitted in violation of this rule should be disregarded.⁶³ In small claims disputes, the parties may present their factual submissions and evidence only in the statements of claim and defence, and further statements and evidence can be introduced only on a no-fault basis until the end of the preliminary hearing. After that point, the parties are absolutely precluded from new factual allegations and evidentiary proposals.⁶⁴

In an attempt to reduce the number of adjournments, the present rule universally allows for only one adjournment of the preliminary hearing,⁶⁵

58. See art. 299 CCP, as amended in 2003 (but also the comments on the difficulties with immediate costs orders in sec. II. a).

59. Uzelac, *Accelerating...* cit., ad 7.2.2.

60. Art. 461.a CCP (effective from 1 October 2008 to 31 March 2013).

61. Art. 461.j para, 3, CCP (effective from 1 October 2008 to 31 March 2013).

62. Off. Gaz. 25/2013.

63. See Art. 299 CCP (effective from 1 April 2013).

64. See Art. 461.a CCP (effective from 1 April 2013).

65. Art. 291 para 3 CCP.

but the rule on only one "main" hearing for the taking of evidence is further retained only "in principle".⁶⁶ The law has also kept a number of provisions on adjournment, including a very open formula that the "hearing can be adjourned when this is necessary for taking of evidence, or in case of other justified reasons".⁶⁷

As the new rules have been in force only since last year, their practical effects cannot be assessed. But we may safely foresee some difficulties in their application. Again these rules mainly address the powers and obligations of the courts and judges, and fail to specify the consequences of their non-observance. A judgment that is grounded on late factual submissions and evidence that is taken in spite of the rules on preclusions is in principle not appealable – at least not due to violation of rules on preclusions. The same goes for violations of rules on the maximum number of (preliminary) hearings, and also for some other similar limitations in the CCP. As a certain latitude towards new submissions has been a constant in Croatian courts, supported by the intermediate and supreme levels, new procedural directions may at their best be taken as recommendations, which partly conflict with the requirements of thoroughness in factual inquiries and the imperative to find, to the extent possible, the 'real' state of facts in the case.

In addition, the Croatian reforms of civil procedure – unlike the Slovenian ones – failed to address the issue of uninvited or late filing of preparatory briefs. The practice of bringing written submissions to the hearings, or delivering them immediately before the hearings, was and remains a widespread technique used by lawyers – as a dilatory technique, but also as a matter of routine, normal practice. Due to such a procedural style, almost none of the professional actors in civil procedure expected much from the oral debate at the hearing, and consequently the hearings were attended less and less by "serious" lawyers, who mainly sent their junior interns or associates as "envoys" to exchange briefs (and charge double fees – see below). Even today there is no legal ground for rejection or dismissal of such last-minute written submissions. In principle, the trial judge may state that no new evidence is allowed any more. But if the party argues that the submission contains reasons why introducing it is legitimate, there will be no other option but to allow it – and to adjourn the hearing in order to allow both the court and the other party the opportunity to study it more carefully.

Therefore, after a quarter of century, it seems that the battle for concentration has still not been won. Gains, if any, have only been incremental.

66. Art. 293 para 2 CCP.

67. Art. 116 CCP.

III. LAWYERS' FEES AND INTERESTS AS A DELAYING FACTOR

I will skip some other procedural reforms from the past decades that aimed to reduce delays but that showed less-than-impressive results when transferred into litigation reality. Among them are, for example, stricter rules on pleadings, changes in the rules on service of documents, amendments to the rules on deliberations and production of judgments, various tweaks to procedural deadlines, prohibition of multiple remittals and other topics that would otherwise require closer examination. Let me only limit my observations to the general statement that none of them proved to be crucial in the context of acceleration of civil procedure. Their aggregate effect may turn out to be positive in the long run, but so far we lack conclusive evidence that the situation has dramatically improved (not to speak of proof of causality for positive changes, if any).

On the other hand, the slow and incremental gains despite frequent and massive changes of civil procedural rules may be an indication that the core of the problem lies elsewhere. Indeed, few changes of rules would make people alter their entire way of living if this is not compatible with their vital motives and interests. In this context, the study of the forces that drive the main procedural actors – lawyers and judges – is essential for an understanding of the situation with procedural delays. The approach to remuneration of lawyers may be one of the key elements that contribute to the speed (or slowness) of judicial proceedings. A doctoral dissertation recently defended at Zagreb University confirmed that assumption.⁶⁸

For a full understanding of the role of lawyers' fees in the context of delays, one needs to go back a bit into the past. The legal profession in the Socialist Federal Republic of Yugoslavia (SFRY) was, unlike other communist countries, private and, to a considerable extent, independent. Some state control was practised in the area of legal fees, which were regulated by tariffs (schedules of fees) that were issued by the Bar associations of the Yugoslav republics and provinces, but in agreement with and after confirmation by the government. Effectively, these tariffs were based on the number of actions and submissions in individual legal proceedings, while taking into consideration the type of case and the amount in dispute. This model was in principle not very far from similar tariffs inherited from the pre-1941 period during which Yugoslav procedural law was under the influence of Austrian law, but with some important differences. In the SFRY, the tariffs were generally much less flexible: they were regarded as quasi-legislative documents, and were applied

68. See Z. Jelinić, *Modeli ugovaranja i naplate pravnih usluga i njihov utjecaj na brzinu, cijenu i kvalitetu pravne zaštite* [The Models of Contracting and Payment of Legal Services and Their Impact on Speed, Costs and Quality of Legal Protection], dissertation, Zagreb, Pravni fakultet, 2010.

by the courts as a mandatory source of law. In addition, in the spirit of Socialist egalitarianism the tariffs were relatively low, allowing the lawyers to charge only small amounts for their services. Therefore, the way to earn a living was to collect as many actions as possible for each case. This judicial practice was permissible and, generally, every adjourned hearing and every preparatory memorandum was approved by the courts as a 'necessary' expense in the proceedings.

So, as an example, under the 1990 Tariff (the first one that was issued without state patronage)⁶⁹ a lawyer was entitled to charge for one action (statement of claim, or representation in one hearing) the minimum amount of 256 Yugoslav dinars (ca. €18) if the amount in dispute was under YUD 1,000 (ca. €75). On the high side of the tariff, for amounts in dispute over YUD 2 million (ca. €150,000), the per-action fee was YUD 3,200 (ca. €220). Under such conditions, it was quite natural that legal practice tended to "milk the cow" by collecting one fee unit after another. Until the 2010s there were no limitations to the number of actions per case or procedural stage, except that the judge had the right to disregard actions that were not considered to be "necessary" – and that type of filtering rarely happened. As, at least in theory, the judges had exclusive case-management powers, it was also hard to justify the disregarding of fee units for some of the hearings or submissions.

Later, during the times of hyper-inflation, the fee units were often adjusted⁷⁰ and, especially since 1993, they became much higher, in particular for disputes of higher amounts.⁷¹ Currently, the ceiling of the per-action fee is set at 100,000 kuna (VAT excluded), i.e. about €13,000. However, until the late 2000s there was little change in the approach to legal costs, except that judgments became more detailed in the reasoning of cost decisions (but more on account of cost distribution than on account of their total amount). As the amounts that could be charged per action for some types of legal cases (e.g. divorce or trespassing) remained low, the protraction of cases remained the recognized method to recover fair compensation. On the other hand, in cases with high values the successful delaying of proceedings could become a quite profitable and lucrative activity for a narrow cast of economically

69. In March 1990, the need to request approval from the Croatian "Executive Council" (the equivalent to the government in the communist era) was abolished – see art. 13 para 2 before the 1990 amendments (Off. Gaz. 8/1990).

70. It seems that the inflation was used as a pretext for the relativization of values and prices, so that in a period of three years, while the economy was going down and the war was creating great damage to the national wealth, the price of lawyers' services multiplied.

71. So, for instance, under the 1993 Tariff, in a dispute with a value of 20 million Croatian dinars (about €50,000) the fee per action was HRD 160,000 (about €400), for €150,000 it was about €1,000 (five times more than in 1990). Currently, for the same amount the fee-per-action is about €1,500 plus VAT (about €1,900).

successful and socially and politically influential lawyers (provided that the amounts claimed could eventually be collected).⁷²

The contribution of such regulation of lawyers' fees to the length and overall costs of litigation finally led to attempts to control them from the state level. In spite of the vigorous opposition of the Bar Association, which argued that its right to be the exclusive and self-controlling body for issuing the tariff is the guarantee of the independence of lawyers, in 2008 the Law on Attorneys was changed⁷³ and the need to request approval from the Ministry of Justice for the tariff was (re)introduced. Several Croatian ministers of justice publicly announced that they would use their authority to persuade the Bar Association to introduce limitations on the number of actions-per-case. After a period of silent protest, the Bar Association reluctantly introduced and further developed several such limitations.⁷⁴

Currently, under the regime that has been in force since 2009, for a series of judicial proceedings (trespassing, housing, divorce and marriage annulment, disputes regarding parenthood, labour disputes and maintenance) a lump sum of about €270 has to be charged irrespective of the number of actions (hearings, submissions) for the entire first instance proceedings. In other types of proceedings, the previous way of calculation of fees is retained, but the number of preparatory memoranda that may be charged in first instance proceedings is limited to four.⁷⁵ The results of this pragmatic compromise between the Bar Association and the Ministry of Justice are so far unclear, but it seems that it has generally led to additional diversification: the diversification between expensive, high-profile lawyers and their cases for which very little is done in the sense of discouraging

72. As "big" disputes (those worth several hundred thousand or a million euros) awarded the lawyers the right to ask for exceptionally high per-action fees, the economically rational parties regularly insisted on other types of arrangements that were also permissible under the Tariff (flat fee or hourly calculation). Therefore, it seems that the only way to collect the excessively high fees in rare "juicy" litigations – other than by winning the litigation against economically solvent companies – has been through some fee-splitting arrangements or other ethically suspect under-the-table agreements (often in dealings with state enterprises and other politically controlled entities).

73. See amendments published in Off. Gaz. 117/2008 regarding Art. 18 of the Law on Attorneys.

74. cf. Tariffs published in Off. Gaz. 148/2009 and 142/2012.

75. Tbr. 8, para 1 (2012 edition). These four submissions are in addition to the initial pleadings. However, this rule does not prevent lawyers from charging additionally for an unlimited number of hearings. Obviously, charging five fee-units for five written submissions (and five or more for the same number of hearings) is in crass contrast with the ideal of concentrated trial with the maximum of two hearings. Therefore, it seems that the declared "maximum" of fee units is more of a symbolic move, which will not change anything for the categories to which it applies.

dilatory tactics or reducing the overall expenses, and the simple but for individual destinies essential legal cases where rather modest lump-sum fees are provided.

IV. LEGAL CULTURE AS THE GENERATOR OF DELAYS?

"Our legal proceedings last long because it is a part of our culture." This statement is often pronounced when acceleration efforts threaten to change the accustomed practices of the legal professionals. The next sentence is most likely: "Our people are very litigious; we have one of the highest rates of litigation in the world." If this is not convincing enough, the last, conclusive assertion would most likely be something like: "The people in our country very much like to settle their affairs by resorting to the courts. This is a part of our tradition."

In my firm opinion, these statements are fundamentally untrue – they are basically a hoax, just as are the often stated lies about "millions of disputes" that flood the dockets of the civil courts.⁷⁶ Essentially, for everyone but a very tiny minority of people, going to court is a necessary evil, and not social entertainment. Just as people have to eat, communicate and travel, they have to resort to the courts, whether they like it or not, for the satisfaction of a number of their fundamental economic, social and legal needs.

Therefore, a functional and effective dispute resolution mechanism should be a part of civilization, not a part of culture. Its construction should be a part of a natural process of social development. The nations of Southern Europe seldom had fast postal services or good roads, and in the past it seemed that slow communications and travel were among the hallmarks of the Mediterranean. Yet the same nations were in the second half of the 20th century among those that embraced mobile phones and fast highways more than better organized and traditionally efficient nations of the North. There is no reason why the introduction of effective justice would be contrary to the national spirit or culture, including the legal culture. Just as "Justice delayed is justice denied" has become universal, and not merely a

76. The figure of "millions of litigations" was repeated from various sources, originating sometimes from the highest judicial bodies. However, statistics demonstrate that the caseload of Croatian courts consists of over one million cases, but only about 150,000 of them are litigious in nature; the rest consist of various clerical matters, such as the issuing of excerpts from the land registry, establishment and statutory changes in commercial companies, collection of uncontested debt, etc. The very categorization of a "litigious" case may be doubtful. According to an analysis by the World Bank (JustPal) based on Cepej data for 2010, while the European average is 2,230 litigious cases per 100,000 inhabitants, Bosnia and Herzegovina have 3,847; Croatia 3,163; Serbia 2,610; and Slovenia 1,541. As a matter of contrast, the Russian Federation has declared 7,157 litigious cases per 100,000 inhabitants. ECA PREM Public Sector, World Bank, document of 5 September 2012.

British proverb, it can be argued that slow justice is not a feature of legal culture, but a symptom of the lack of legal culture, the negation thereof.

Admittedly, if the notion of “legal culture” is confounded with the notion of ideological and cultural (mis)perceptions of the small circle of legal professionals that consider themselves the “legal elites”, one can say that “legal culture” does have a decisive impact on the speed of proceedings. The inability to undertake changes that would improve the situation with delays in judicial proceedings is more often encountered in the justice systems with a large number of influential legal professionals than in the systems with a weak and underdeveloped legal landscape. The judicial system of Croatia may be a good example for this equation, just as are the judicial systems of its two neighbours, Slovenia and Italy. All three countries were in the past and mainly still are notorious for their judicial delays. Yet Croatia and Slovenia are the countries with the highest number of judges,⁷⁷ while Italy has the highest number of lawyers per capita in Europe.⁷⁸ How can one justify such oversized professional structures? There is no better argument than inefficiency: if the courts are clogged and the proceedings last excessively long, the intuitive answer is – Let’s employ more judges and recruit more lawyers! Conversely, if reforms are effective, the urge to downsize the oversized structures might become too powerful to resist. Therefore, the fight against delays may be put at risk by another – for some, existentially important – fight: the fight to maintain the *status quo*. The inevitable conclusion might be: not everything that is good for the citizenry is good for the legal profession. Still, sometimes the latter is the stronger.

PESQUISAS DO EDITORIAL

Veja também Doutrina

- As causas da morosidade processual, de Carlos Henrique Borlido Haddad – *RePro* 229/455 (DTR\2014\701);
- O princípio da duração razoável do processo sob a perspectiva axiológica, de Francisco Rosito – *RePro* 161/21 (DTR\2008\471); e
- Questões novas e velhas sobre a morosidade processual, de Lucas Rister de Sousa Lima – *RePro* 150/308 (DTR\2007\895).

77. Croatia has 43 and Slovenia 50 judges per 100,000 inhabitants. The European average is 21.3. EJS – Cepej Report (2010 data), p. 147-148.

78. Italy has 349.6 lawyers per 100,000 inhabitants, surpassed only by Greece with 369.5. The European average is 127.1 and the median is 98.5. EJS – Cepej Report (2010 data), p. 310.

IDENTIFICAÇÃO DA CONEXÃO E A CORRETA APLICAÇÃO DE SEUS EFEITOS

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RESUMO: A proposta deste trabalho é a análise da conexão entre ações com o objetivo de responder às questões principais que circundam o instituto: as suas hipóteses de verificação e a correta aplicação de seus efeitos. Embora predominantemente descritivo, o artigo propõe críticas às teorias sobre o conceito de conexão e à definição adotada pelo Código de Processo Civil brasileiro.

PALAVRAS-CHAVE: Conexão de ações – Continência – Reunião de processos – Prejudicialidade – Suspensão de processos.

ABSTRACT: The purpose of this paper is to examine the connection of lawsuits in order to answer the key questions surrounding the institute: the cases where connection is found and the correct application of its effects. Although predominantly descriptive, this article criticizes theories on the concept of connection of lawsuits and the definition adopted by the Brazilian Code of Civil Procedure.

KEYWORDS: Connection of lawsuits – Reunion of lawsuits – Consolidation – Preliminary demand – Suspension of lawsuits.

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1. INTRODUÇÃO

O estudo da relação entre demandas vem a cada dia se tornando mais relevante, tendo em vista que as relações substanciais verificam-se gradativamente mais complexas, fator que reflete diretamente no processo. Não só no âmbito do processo civil, mas também na arbitragem, constata-se a proliferação de demandas distintas e relacionadas entre si, tanto advindas de relações jurídicas que cotidianamente dão origem a conflitos e processos judiciais, como de negócios e redes contratuais a cada dia mais sofisticados dos quais decorrem ações judiciais e arbitrais diversas.

A pendência de processos correlatos, sejam quais forem a identificação e a intensidade da relação entre eles, é tema para o qual o legislador, os estudiosos e, principalmente, o aplicador do direito devem se atentar. A atividade jurisdic-