The sin of evidence-taking in Croatian courts of appeal
Why no fact-finding at second level of adjudication?

- Summary of presentation -

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I. The 2013 Amendments to Croatian Civil Procedure Act highlighted the duty of appellate courts to hold oral hearings and conduct fact-finding procedures. This option at the second level of adjudication is not new, but, just as before, has almost never been used in practice.

Under 1956 law on civil procedure of the Federal People Republic of Yugoslavia it was possible to hold oral hearings and take evidence at the second level of adjudication. The same provision continued to apply in the 1976 Civil Procedure Act of the Socialist Federal Republic of Yugoslavia. After independence, the CPA 76 was adopted as a piece of Croatian legislation, subject to numerous amendments. Some of them dealt with the appellate proceedings. In 2003, the law abandoned the option of public oral hearings for taking of evidence at the second level, which was explained by the fact that "this option was not confirmed in practice".

Although it may be true that second instance judges were reluctant to conduct the oral hearings prior to 2003, in the context of an attempt at reducing the number of judgments that are remitted to the first instance court upon appeal, the 2008 amendments re-introduced a facultative possibility of holding oral hearings before the appellate court. This option is even more pronounced in the 2011 Amendments to the Civil Procedure Act which introduced the prohibition of double remittals of first instance judgments. Namely, if a case was already remitted to the first instance upon appeal, if the court of appeals holds that some facts need to be clarified, it has the duty to conduct itself evidentiary hearing procedure in accordance to the rules applicable to first instance procedure in order to eliminate the defects. This may, for the first time, mean an obligation of the appeals court to retry the case and hold oral hearings at the second level. From 2011 to 2013, the prohibition of double remittals, however, applied only to some special procedures (procedures in family disputes, procedures before commercial courts, procedures in labor disputes).

In 2013, the prohibition of double remittals was extended to all types of litigation cases. Thus, under new law, after the first remittal it would be absolutely necessary that courts of appeal conduct the procedure in a way that would avoid sending the case to the first instance court for retrial (obligatory oral hearings at the second level).

II. Despite such reintroduction and recodification of oral hearings at the appellate level, the Croatian reality is still the same: the appellate courts still do not hold any oral hearings, and thus avoid any autonomous fact-finding. This trend is also present in the neighboring, post-Yugoslav countries (Slovenia).

III. Why no fact-finding at second level of adjudication?

The author will analyze the Croatian system of obligatory and facultative oral hearings and evidence-taking in the court of second instance, taking into account the historical context. The purpose of this exercise is to find reasons of the reluctance of appellate courts to hold oral hearings and conduct fact-finding procedures, even when it is mandatory under the current laws and regulations.