

Original scientific paper

ALTERNATIVE DISPUTE RESOLUTION IN LIGHT OF THE CIVIL PROCEDURE ACT*

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Abstract. *In this paper, the author analyzes the provisions of the new 2011 Civil Procedure Act on peaceful dispute resolution. In addition to the principle of peaceful dispute resolution which was proclaimed in the former legislative act, the new Act contains a brand new article which explicitly lays down this principle and introduces a compulsory attempt at peaceful dispute resolution between a claimant (a natural person or a legal entity) and a respondent (the Republic of Serbia, an autonomous province or a local self-government unit). The author analyzes the provisions of this Act in light of the applicable principles governing peaceful dispute resolution, with specific reference to the position of potential litigants and their mutual relations. Finally, the author explores the possibilities of enacting alternative legal solutions on this issue.*

Key words: *alternative dispute resolution, state as a respondent, mediation, peaceful dispute resolution.*

1. INTRODUCTION

The latest modifications in the Civil Procedure Act (CPA) are aimed at promoting the efficiency and effectiveness of the litigation procedure, ensuring an additional harmonization of the national legislation in compliance with the recommendations of the Council of Europe and building certain EU directives into the national legal system. However, these modifications have not introduced substantial changes in the basic principles of litigation procedure, nor have they had a significant impact on the systemics of the civil pro-

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cedure legislation. A number of institutes have been slightly modified, some legal solutions have been repealed and a small number of new provisions have been introduced into the new Civil Procedure Act (CPA).

One of the proclaimed objectives for adopting this new Act was to increase the efficiency of the litigation procedure, which has been a long-term drawback of the national judiciary. This objective should be accomplished, *inter alia*, by introducing time limits on the litigation proceedings, new provisions on the delivery of documents and the rules on the compulsory legal representation by a counsel.

The promotion and a more extensive application of different alternative dispute resolution methods is certainly one of the possible ways of promoting the court efficiency and reducing the workload of the judiciary; indirectly, it would provide for exercising the right to be tried within a reasonable time, which is guaranteed in numerous international documents.

The author's primary goal in this paper is to provide a critical analysis of the CPA provisions on peaceful dispute resolution, to consider the possibilities for improving the current legal provisions and to explore the opportunities for resolving disputes between an individual and the Republic of Serbia by using a range of diverse peaceful dispute resolution methods.

2. ALTERNATIVE DISPUTE RESOLUTION – INTRODUCTION

Apart from the dispute resolution from the position of force, peaceful dispute resolution may be twofold: a) by litigation (adjudication) as a primary and predominant form of dispute resolution, and b) by using different Alternative Dispute Resolution (ADR) methods.

Both forms of dispute resolution have their advantages and disadvantages. The court (litigation) proceeding is primarily aimed at establishing the truth (fact-finding) on the basis of the litigants' contradictory allegations and establishing the admissibility of the presented evidence; thus, as a rule, the case will be adjudicated in favour of the party whose claim is clearly supported by the law. In case of a condemnatory claim, the final judicial decision leads to a forced execution. On the other hand, the litigation proceedings are often inefficient, cost-ineffective, and unsatisfactory for either party due to the win-lose outcome. In comparison, the alternative dispute resolution methods are cheaper, less formal and contribute to a better communication between the disputing parties. The disputants have control over the process of drafting an agreement, without being subject to public scrutiny; the public is as a rule excluded from these proceedings for the purpose of maintaining the parties' privacy and avoiding publicity (Durham J, Wax R, 2006). The disputants may choose a third neutral party who has a lot of experience in resolving similar disputes and whose impartiality both parties may rely upon (McDowell W, Sussman L, 1996). Yet, the alternative dispute resolution methods also have some drawbacks. Thus, mediation may be abused by a party wishing to conceal the liability and disregard the law. In some situations, it is used as a form of "affordable justice", particularly when one of the parties is an indignant person of insufficient means (Petrušić N, 2004).

A number of studies show that there has been an expansion of alternative dispute resolution methods; hence, almost every single European country has chosen to institute at least one of these methods. The alternative dispute resolution models are numerous and almost infinite; given the circumstances of each case, these models may be combined

(which includes merging various features of different dispute resolution methods). A wider application of alternative dispute resolution methods is in line with the recommendations adopted by the Committee of Ministers of the Council of Europe: the Recommendation (98)1 concerning mediation in family matters, the Recommendation (99)19 concerning mediation in criminal (penal) matters, the Recommendation (2001)9 on the alternatives to litigation between administrative authorities and private parties, and the Recommendation (2002)10 on mediation in civil matters. Considering that the Republic of Serbia has acquired the candidacy status for the EU membership, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters is also relevant for Serbia.

3. THE ADR NORMATIVE FRAMEWORK

The 2004 Mediation Act is a basic legislative act in the field of Alternative Dispute Resolution. This Act defines the general concepts which are significant for alternative dispute resolution, establishes the basic principles governing the dispute resolution procedure and prescribes the minimum rules in the mediation proceedings. The Serbian Mediation Act is certainly the most significant act in this area, particularly given the fact it was the first legislative act in Serbia which regulated the area of extrajudicial dispute resolution. Considering the scope of its applicability, it is a general act. The mediability zone has been laid down in broad terms which provides for applying the mediation procedure rules in a wide range of disputes concerning property relations between the natural and legal persons, commercial, labour, family and other civil law relations, administrative and criminal matters where the parties may freely dispose of their claims, unless the dispute falls into the exclusive jurisdiction of a competent court or another administrative authority as prescribed by the law. Thus, in the Serbian legislation, the scope of mediability is determined on the basis of the subject matter of mediation (mediability *ratione causae*) but there is an additional constraint because the legislation does not envisage the exclusive jurisdiction of the competent court or another competent authority (mediability *ratione jurisdictionis*); (Petrušić N, 2006). There are no limitations concerning personal jurisdiction (mediability *ratione personae*) because the dispute may be subject to mediation irrespective of the status of its participant.

Apart from the Mediation Act, the extrajudicial dispute resolution is also regulated in the Act on the Peaceful Resolution of Labour Disputes, which regulates the substantive and procedural matters concerning the peaceful resolution of collective and individual labour disputes, the rights and duties of conciliators and arbitrators, and other related issues. The Labour Act also contains a provision on the peaceful dispute resolution of collective and individual labour disputes.

The 2005 Family Act regulates mediation in marital and family relations, the reconciliation proceeding for resolving marital conflicts and the settlement proceeding for resolving conflicts related to the division of marital property.

The Consumer Protection Act, which significantly reformed the consumer law and provided a better legal protection of consumers, also prescribes the procedure for the extrajudicial dispute resolution in disputes between a consumer and a trader by applying arbitration, mediation or some other dispute resolution method in compliance with the Ar-

bitration Act, the Mediation Act and other legal provisions regulating extrajudicial dispute resolution.

4. EXTRAJUDICIAL DISPUTE RESOLUTION UNDER THE CIVIL PROCEDURE ACT

The Civil Procedure Act contains a minimum corpus of rules pertaining to peaceful dispute resolution. The introductory part of this Act contains one of the basic principles of the litigation procedure: the principle of peaceful resolution of disputes. As prescribed by the law, the competent court will refer the disputants to mediation or to an informative hearing for mediation; it means that the court will inform the parties about the possibility of resolving their dispute in out-of-court proceedings by means of mediation or some other consensual method. The wording of this Article generates a conclusion that the competent court is obliged to refer the parties to a peaceful dispute resolution in every single case. Therefore, the court may exercise its duty in two ways. First, the court may inform the parties on the mediation, its key principles, basic standards and fundamental rules of the mediation procedure. Otherwise, it is obliged to refer the parties to a (preliminary) mediation hearing, where the parties will get all the necessary information about mediation. However, this Act does not envisage any sanctions for judges who fail to exercise this duty. The existing legal provision differs from the legal solution contained in the former Civil Procedure Act which envisaged that the parties and the court should endeavour (before and in the course of the proceeding) to resolve civil disputes by mediation or by using some other peaceful dispute resolution method. In the former Act, the parties' referral to mediation was optional and it is assumed to have rested on the judicial assessment whether the dispute could be subject to mediation.

The Civil Procedure Act contains a brand new provision which obliges the parties to try to resolve their dispute by peaceful dispute resolution if the intended defendant is the Republic of Serbia, an autonomous province or a local self-government unit. Before filing a complaint against the Republic of Serbia, the person who intends to file a complaint is obliged to submit a proposal for peaceful dispute resolution to the competent Public Attorney's Office (PAO) of the Republic of Serbia unless there is a special legislative act prescribing the statutory time limit for filing a complaint. A proposal for peaceful dispute resolution must contain the same information as a complaint. The rule that the parties must try to resolve their dispute peacefully also applies when the complaint has been filed against an autonomous province or local self-government unit, in which case the proposal for peaceful dispute resolution is filed with the competent PAO office, i.e. to the authorized representative of an autonomous province and local self-government unit. By its nature, the obligation to submit a proposal for peaceful dispute resolution is a procedural presumption; if this presumption is not satisfied, the complaint is dismissed.

The PAO has a statutory time limit of 60 days to respond to the proposal; in case it does not provide a timely response, the proposal is considered to have been rejected, in which case the party who has submitted the proposal is entitled to file a complaint. In case the competent PAO and the intending claimant reach an agreement, this agreement has the power of an enforcement order. These rules shall not apply if there is a separate legislative act prescribing the procedure for a peaceful dispute resolution or mediation pertaining to disputes with the Republic of Serbia. This Article further defines the effect of sub-

mitting a proposal on the course of the statute of limitation. Once the party has submitted a proposal for peaceful dispute resolution, the limitation period is stayed for 60 days.

Given the fact that this CPA Article is one of the novelties in the procedural law, it will be analyzed in detail and compared with the rules contained in other legislative acts.

First of all, it is worth noting that the aforementioned provisions of the Civil Procedure Act are in collision with the provisions of the Public Attorney's Office Act. The Public Attorney's Office Act prescribes that a legal or natural person who intends to initiate a proceeding against the Republic of Serbia, or a legal person whose property rights and interests are represented by the PAO, may submit a proposal to the competent PAO for a consensual resolution of the given dispute. The PAO is obliged to inform the person who submitted the proposal on the undertaken measures and their results within a period of 30 days from the date of receiving the request. Therefore, the intending claimant may (but does not have to) submit a proposal for a consensual dispute resolution. The PAO is obliged to respond within the time limit of 30 days (not 60 days) from the reception date, which eventually brings about some certainty in the claimant-defendant relations. Taking into consideration the specific nature of the respective dispute, this Article envisages that the PAO shall take the necessary measures to ensure the consensual dispute resolution even before a lawsuit or some other proceeding has been initiated. Therefore, this Act prescribes a mutual obligation of both the PAO and the claimant to try to resolve the dispute peacefully.

Although the legislator's endeavour to promote and regulate the area of extrajudicial dispute resolution is highly commendable, there is a general impression that (for the above reasons) the model which has been accepted in the CPA may not be the best option.

The first objection is related to the content (wording) of this Article, which prescribes that a person who intends to file a complaint against the Republic of Serbia is obliged to submit a proposal for a peaceful dispute resolution, whereby the proposal shall include all the elements which are contained in the complaint. In effect, it means that the claimant has to specify the legal grounds governing the primary claim on a particular legal matter and put forward additional claims, to present the facts which the claim is based on (it remains unclear if it is a request for adjudicating the issue of a potential complaint), to provide relevant evidence to support these facts, to indicate the value of the subject matter of dispute (whose relevance for peaceful dispute resolution remains indistinct), and to provide other data which must be contained in any other pleading. The requirement that the proposal shall include all the elements which are contained in the complaint yields the following dilemma: whether the "proposal" is actually an offer clearly defining the terms for dispute resolution or whether it is intended as an initial pleading aimed at instituting a proceeding which would give impetus to the peaceful dispute resolution, whereas the mechanisms of dispute resolution still remain unknown at this stage in the proceedings.

There are further implications concerning the requirement that the proposal shall include all elements contained in the complaint. Namely, as soon as the proposal for a peaceful dispute resolution has been submitted to the competent PAO, this institution obtains information about all the elements contained in the complaint. Under the CPA provisions concerning the answer to complaint, the PAO has a 30-day statutory time limit to file an answer to complaint. Thus, in case the PAO fails to respond to the proposal within the prescribed time limit of 60 days and the claimant files a complaint after the expiry of this term, the PAO actually has a period of 90 days to prepare its answer to complaint. Ultimately, the PAO may take advantage of such a solution by making calculations and

deliberately failing to respond to a proposal in order to gain more time to prepare an answer to complaint.

Yet, there is a question what happens in case a person files a formally incomplete proposal. Considering the fact that the proposal is submitted to the other disputing party, there is no official body of authority to establish whether the proposal includes all the elements which should be included in a complaint. What happens in case a person has filed a formally incomplete proposal, the prescribed 60 days' statutory time limit has expired and the person has filed a complaint, and the PAO notifies the court that the proposal is incomplete? Can the court dismiss the complaint because the party has failed to observe this procedural presumption?

The legislator has departed from the general regime envisaged for a dismissal of complaint; namely, the Act clearly enumerates the legal grounds governing the dismissal of complaint but the requirement on instituting a preliminary proceeding for a peaceful dispute resolution is not included in the provision.

Once the proposal for a peaceful dispute resolution has been submitted, the statute of limitations is stayed for a period of 60 days. It is commendable that the legislator has envisaged the provision which protects the claimant from the consequences which may arise while he is waiting for the RDP office to respond to his proposal. Yet, in the referential literature, there are some other time limits which the legislator failed to include but which are effective while the prospective claimant is waiting for the response of the prospective defendant. Some authors draw attention to the time limit for positive prescription (*usu-capio*); in case of death, bodily injury or harm to health, there is a question whether the monetary compensation (damages) are to be determined from the moment of submitting a proposal or from the moment of filing a complaint; moreover, there is a question what the court and the claimant should do if the requirements for imposing a provisional measure have been satisfied (*Rakić-Vodinelić V*, 2011).

Another novelty is that the agreement achieved between the RDP and the person who has initiated the proceeding for a peaceful dispute resolution has the power of an enforcement order. The parties' agreement in mediation proceedings shall have the force of an out-of court settlement, providing that the settlement agreement is made in writing and that it is not contrary to the public order. On the other hand, the parties' agreement reached in the course of mediation proceedings shall have the force of a judicial settlement providing that it has been entered by the judge into the official court record (minutes) after the judge has established that the agreement is in compliance with the public order. By introducing this legal provision, the legislator has departed from the general regime governing the power of the negotiation agreement. On the other hand, this provision is in line with the EU Directive on Mediation in Civil and Commercial Matters, which specifies that mediation should not be perceived as a less valuable alternative to litigation because the application of the mediation agreement exclusively depends on the good faith of both parties. The EU Member States should ensure that the agreement becomes effective but they may also refuse to do so if it is considered to be in contravention of the national legislation and the provisions of Private International Law, or if the Member State legislation does not envisage the possibility of execution or implementation of such an agreement.

In practice, there has been a dilemma whether this Article should accordingly apply to the (extrajudicial) non-litigious proceedings. In the proceedings for determining the compensation for an expropriated real property, the competent court determines the compen-

sation amount in case the expropriation user and the former owner have failed to reach a mutual agreement before the competent municipal administrative authority on the compensation for the expropriated real property. Under the Expropriation Act, expropriation may be performed for the needs of the Republic of Serbia, an autonomous province, a City, the City of Belgrade, a municipality, public funds, public companies, joint-stock companies founded by public companies and joint-stock companies founded with the majority state capital by the Republic of Serbia, an autonomous province, a City, the City of Belgrade or a municipality, unless otherwise prescribed by the law. Therefore, the adversaries in this legal relation are the same legal entities as those specified in Article 193 of the CPA. Hence, there is a question whether the attempt to institute a peaceful dispute resolution is a prerequisite for initiating a non-litigious proceeding? What are the contents of such a proposal? Are the implications the same as in the litigation procedure?

4.1. Analysis of Peaceful Dispute Resolution Methods envisaged in Article 193 of the CPA

The legislator has neither prescribed nor proposed an appropriate method for resolving disputes contained in Article 193 of CPA. For this reason, further on in this paper, the author will consider some extrajudicial dispute resolution methods which are regulated in the Serbian positive legislation and explore their adequacy for resolving disputes between individuals and the Republic of Serbia.

Mediation is a voluntary process which involves one or a number of mediators whose primary goal is to resolve a dispute by reaching an amicable and consensual agreement which would be suitable for both parties and their (well-conceived) interests.

In the Mediation Act, mediation is defined as any procedure, notwithstanding its designation, whereby the disputing parties wish to settle their dispute peacefully by the assistance of one or more mediators who help the parties reach a mutually satisfactory agreement on the disputed issue. The mediator is not entitled to impose a binding agreement on the parties.

The mediation procedure includes the principles of voluntary participation, party equality, as well as privacy, confidentiality and urgency of the proceedings.

The principle of voluntary participation implies that the negotiation process is conducted on the basis of the parties' explicit consent. It is evident from the CPA provisions that this principle has been fully observed in terms of the involvement of the Public Defender of the Republic of Serbia in these proceedings, given the fact that the Public Defender's explicit consent is required for peaceful dispute resolution and in line with the maxim "qui tacet, consentire non videtur". Such a mediation procedure would be compulsory for a natural or legal person who intends to initiate a peaceful dispute resolution proceeding.

The obligatory attempt at peaceful dispute resolution is not a completely unknown concept in our law given that the conciliation proceeding is a presumption for instituting a divorce lawsuit, as prescribed under the Family Act. In introducing the provision on the obligatory attempt at conciliation, the legislator was primarily driven by the specific nature of spousal relations and the underlying intent to preserve the family unit as a desirable form of social community.

However, unlike the proceedings envisaged in the new CPA, the conciliation proceeding is obligatory for the spouses. In addition, the Family Act provides a list of excep-

tional circumstances when conciliation is not applied in resolving marital disputes. Under the Civil Procedure Act (CPA), the decision to make the conciliation proceedings obligatory is not related to the nature of the legal dispute but rather to the specific nature of the respective litigants. It endangers the constitutionally guaranteed right to equal protection before the law and the legal instrument for ensuring an equal protection of rights before the courts and other state authorities to the holders of public authorities, bodies of autonomous provinces and local self-government units. The CPA proclaims that the parties are entitled to an equal, impartial and equitable protection of their rights. As opposed to the parties' obligation to try to resolve their dispute peacefully, the legislation does not oblige the PAO to attempt to resolve a dispute with another party peacefully before initiating the proceedings. This fact confirms the opinion that the state is the most privileged litigant, whose privileges exceed those provided in the legislation enacted in "the omnipotent state of administrative socialism, at the time when the first CPA was devised" (Rakić – Vodinelić V, 2011).

The next important mediation principle is the principle of equality, which implies that the parties in the mediation proceeding shall enjoy equal rights and that the mediators shall act independently and impartially. The mediator is obliged to be neutral, without any bias or prejudice towards either party or the subject matter of dispute. However, can the mediator really manage to remain neutral in the circumstances when one of the disputants is an individual quite ignorant about the law while the other party is the PAO acting as a state representative highly skilled in the law? In particular, can the mediator remain fully neutral considering the assumption that the PAO is bound to protect the public interest, which is (broadly speaking) also the interest of the mediator? The referential literature points out to a number of cases which are inappropriate for mediation, particularly the cases where there is an abuse of power or a substantial imbalance of power between the adversaries.

The privacy of the mediation process implies that the public is excluded from the proceedings. Thus, the mediation process includes the disputing parties, their legal representatives and proxies and (possibly) a third party, subject to permission obtained from the disputants. In contrast to mediation, the public may also be excluded from the litigation procedure only in circumstances which are explicitly prescribed by the law. It means that all persons interested in the outcome of the litigation proceeding may be present in the main hearings; in that way, the legislator wants to promote and strengthen the citizens' trust in the public institutions, public officials and their work, to exercise control over the work of the state authorities and to sanction their inadequate conduct in compliance with the mechanisms envisaged in a democratic society (Dika M, 2008). All information, proposals and statements pertaining to the mediation procedure shall be confidential (unless otherwise agreed by the parties), except for the cases where the disclosure thereof is required under the law or for the purpose of implementing or enforcing a settlement agreement, or when it is required in the public interest. The information, proposals and statements given for the purpose of settlement may not be used in the litigation, arbitration or some other proceedings, nor may they be disclosed in any other way. Inter alia, mediation proceedings have to remain confidential in order to enable the parties to develop mutual trust. In order to provide for the confidentiality of information, mediators frequently take note on the course of the mediation proceedings. The relevant literature provides an exception to the confidentiality principle in cases involving the public health and security, safety, public officials, public authorities, and "the issues of public importance" (Menkel -

Meadow C, Porter Love L, 2006). Under the Public Attorney's Office Act, the scope of the mediator's authority may include some legal actions and using some legal instruments in court proceedings and before other competent authorities for the purpose of exercising the property rights and interests of the Republic of Serbia, its institutions and bodies of authority, and other legal entities funded from the budget or other funds of the Republic of Serbia. Considering the scope of rights the PAO is obliged to protect, the PAO operations have to be transparent. However, it may jeopardize the application of the confidentiality principle as one of the underlying principles of mediation which enables the parties to approach the mediation process openly and without any fear or concern.

The mediation procedure is urgent and it shall not exceed a period of 30 days. The competent court of another relevant authority may extend the course of a mediation proceeding for a valid reason, upon the request of the mediator or the disputants. The expedient (urgent) procedure is certainly one of the most valuable features of mediation because it saves time and expenses. Long legal proceedings have an adverse psychological effect on the disputants. Yet, to some extent, this valuable feature has been undermined by the provision prescribing a lengthy time limit which enables the PAO to respond to the proposal for a peaceful dispute resolution after prolonging the entire proceeding for 90 days.

The provided analysis of the underlying mediation principles raises another issue: whether mediation is an appropriate method for resolving disputes envisaged in Article 193 of the CPA; namely, the imbalance of powers between the disputing parties aggravates the application of these basic principles and the implementation of the mediation procedure.

Apart from mediation, the disputing parties may also try to reconcile their differences by means of an out-of-court settlement, which is regulated in the Obligation Relations Act. The parties who have a dispute or encounter legal uncertainty may enter into a settlement agreement in order to end the dispute and remove the uncertainty in their legal relation by agreeing to mutual concessions, as well as in order to secure their mutual rights and obligations. In case the concessions are made only by one of the disputing parties (for example, by recognizing a right to the other party), such an arrangement does not constitute a settlement but rather a unilateral act (such as a discharge of debt); (Petrušić N, Simonović D, 2011).

The out-of-court settlement has substantive effects only. If the parties enter a settlement agreement while the litigation proceeding is underway, the claimant is usually obliged to withdraw the complaint. In case the claimant fails to do so, the defendant may file an objection *ex transacto* (Poznić B, 2009). Yet, under the CPA provision on dispute resolution between the intending claimant and the Republic of Serbia, a settlement agreement will have the power of an enforcement order.

The Civil Procedure Act does not envisage the possibility to enter into a judicial settlement before initiating the litigation proceeding; consequently, the parties are given no option to recourse to this dispute resolution method before a complaint has been filed.

In light of the Civil Procedure Act provisions, the parties may decide to make an attempt to resolve the dispute themselves by entering into an out-of-court settlement. The provision on the enforceability of the out-of-court settlement is certainly a stimulating factor: first, because it enables the disputing parties to subsequently initiate a legal action on the same legal matter and, second, because it introduces some legal certainty into the parties' relations.

4.2. The Draft Act amending and modifying the Civil Procedure Act

Given the fact that the legislator is currently drafting amendments and modifications to the existing Civil Procedure Act, the new legal solution is most likely to address some of the above issues. The amended CPA Act currently includes two alternatives to the existing legal solution contained in Article 193 of this Act. The first version of the amended Article 193 prescribes that, in cases where the Republic of Serbia appears as a disputing party, a complaint may be filed only after the parties have attempted to resolve the dispute by peaceful means. The attempt at peaceful dispute resolution shall be compulsory for both disputing parties, which means that the legislator has acknowledged the criticism on the privileged position of the State which has been unjustifiably favoured as a litigant under the current CPA. The second version of this Article prescribes that the person who intends to file a complaint against the Republic of Serbia shall first (before filing a complaint) submit a proposal for a peaceful dispute resolution to the Republic Public Defendant's Office, unless the time limit for filing a complaint is prescribed in a special legislative act. This legal solution still does not impose the same obligation on the Public Attorney's Office but this obligation is not imposed on the intending claimant either, who is rather offered a possibility to submit a proposal for a peaceful dispute resolution. Considering that the experience has shown that the draft version, the proposed version and the final (adopted) version of a legislative act may comprise significantly different legal solutions, the author of this article will not get into any further elaboration on the proposed solutions. Yet, it is highly commendable that the legislator has re-examined the existing legal solution, reconsidered some of the drawbacks and decided to regulate this issue again.

5. CONCLUSION

In the Civil Procedure Act of 2011, the legislator endeavoured to promote peaceful dispute resolution methods by introducing an obligation of the party intending to initiate a proceeding against the Republic of Serbia to submit a prior proposal for a peaceful dispute resolution to the Public Attorney's Office. Although the legislator's endeavour to encourage the parties to attempt to resolve their dispute peacefully is highly commendable, there is a general impression that the legislator has not reached out for the best solution.

By providing that only one disputing party is obliged to attempt to resolve the dispute peacefully, the legislator has jeopardized the principle of litigants' equal procedural standing which is proclaimed both in the Constitution and in the statutory law. The legislator has not taken into consideration the provisions contained in the Public Attorneys' Office Act, which generates a collision between these two legislative acts.

Although the elements of the proposal for peaceful dispute resolution have been regulated in detail, the legislator has failed to clarify how the court will sanction the claimant for submitting an incomplete proposal, in case the PAO points out in the course of the litigation proceeding that the proposal has been incomplete. Also, the legislator has regulated the effect of the proposal on the stay of some time limits only.

A significant novelty is a possibility to enforce a settlement agreement signed by the parties, which is a departure from the general regime that is applied to these agreements.

The question concerning peaceful dispute resolution methods has remained open to discussion. The mediation results may also be highly disputable. Taking into considera-

tion the author's analysis on the application of the mediation principles to the disputes involving the State and the individual, mediation is not the most appropriate method for resolving disputes in cases involving an imbalance of powers. On the other hand, the value of the out-of-court settlement is reinforced by the provision under which the settlement agreement entered by the interested parties shall have the power of an enforcement order.

In the latest draft aimed at amending and modifying the Civil Procedure Act, there are two alternatives to the existing legal solution contained in Article 193. Although there is certain progress in regulating this matter, it remains to be seen which of the proposed solutions will be adopted in the new Act. The author strongly believes that the legislator will consider all the inconsistencies of the existing legislative act and exert an additional effort to improve the provision governing this significant area of civil procedure.

REFERENCES

1. A Strategic Framework to Access to Justice in the Federal Civil Justice System, Access to Justice Taskforce Attorney-General's Department, 2009.
2. Cvetković M, *Online rešavanje sporova kao oblik medijacije u građanskim stvarima*, u: Pravo na pristup pravosuđu – instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije, (Online Dispute Resolution as a form of Mediation in Civil Matters, in: Access to Justice – Instruments for the Implementation of the European Standards in the Legal System of the Republic of Serbia), Niš, 2010, p. 205.
3. Dika M, Načelo javnosti u parničnom postupku – prilog pokušajima opravdanja i reafirmaciji instituta, Zbornik Pravnog fakulteta Sveučilišta Rijeka (1991) v. 29, br. 1, 2008, str. 1. (The Principle of Publicity in the Civil Procedure, Collection of Paper, Faculty of Law, University of Rijeka).
4. Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
5. Durham W, Wax R, *Staying out of court*, Electric Perspectives (periodical), May/June 2006.
6. European Judicial System, Edition 2012 (2010 Data), Efficiency and Quality of Justice, p. 131.
7. Gligorić Č, Vremenski okvir u Zakonu o parničnom postupku Republike Srbije iz 2011, Anali Pravnog fakulteta u Beogradu, LIX, 2/2011, str. 347 (Time Limits in the Serbian Civil Procedure Act of 2011, Annals of the Law Faculty, University of Belgrade).
8. <http://mediationchannel.com>.
9. <http://www.ni.os.sud.rs>
10. <http://www.srbija.gov.rs/vesti>.
11. Karamarković L, *Poravnaje i medijacija* (Settlement and Mediation), Beograd, 2004, p. 235.
12. Kerbershian L, *ADR: To be or...?*, 70 N.D.L. Rev. 1994, p. 381, 400.
13. *Ljudska prava u Srbiji*, Beogradski centar za ljudska prava (Human Rights in Serbia, Belgrade Center for Human Rights), 2011, p. 299.
14. Marjanović S, *Med – arb kao model alternativnog rešavanja sporova*, u: Pravo na pristup pravosuđu – instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije, (Med-Arb as an Alternative Dispute Resolution Model; in: Access to Justice – Instruments for the Implementation of the European Standards in the Legal System of the Republic of Serbia), vo. 5, Niš, 2010, pp. 191 – 199.
15. Marković A. et al, *Medijacija iz ugla građana, privrednika i mediajtora* (Mediation from the Perspective of Citizens, Businessmen and Mediators), Beograd, 2011.
16. McDowell W, Sussman L, *Overcoming the Patology of Litigation: An ADR Primer for Executives*, Business Horizons, May/June 1996.
17. Menkel – Meadow C, Porter Love L, Kupfer Schneider A, *Mediation: Practice, Policy and Ethics*, Aspen Publishers, 2006.
18. Petrušić N, *Alternativni metodi rešavanja pravnih sporova u pravu Republike Srbije*, Funkcionisanje pravnog sistema Republike Srbije, (Alternative Dispute Resolution Methods in the Serbian Legislation, in: The Operation of the Legal System of the Republic of Serbia), Pravni fakultet Niš, 2006, str. 588.

19. Petrušić N, *Medijacija kao metod rešavanja pravnih sporova* (Mediation as a Method for Resolving Legal Disputes); in: *Temida*, no. 2, 2004
20. Petrušić N, *Sporovi u pravnim odnosima i medijacija*, u: *Zbornik radova Pravnog fakulteta u Nišu*, (Legal Disputes and Mediation, in: Collection of Paper, Faculty of Law in Nis), no. 38 – 39, 1999, p. 121.
21. Petrušić N, Simonović D, *Komentar Zakona o parničnom postupku* (A Commentary on the Civil Procedure Act), Beograd, 2011, p. 609.
22. Petrušić N, *Vansudsko rešavanje potrošačkih sporova u pravu Srbije*, (Extrajudicial Resolution of Consumer Disputes in the Serbian Legislation), u: *Pravni život*, no. 11, 2011.
23. *Porodični zakon*, "Sl. glasnik RS" (the Family Act, Official Gazette RS), 18/2005.
24. *Poznić B, Komentar Zakona o parničnom postupku* (A Commentary on the Civil Procedure Act), Beograd, 2009, p. 733.
25. *Predlog izmena i dopuna Zakona o parničnom postupku*. (A Proposal for amending and modifying the Civil Procedure Act).
26. *Priručnik za obuku medijatora – posrednika*, Centar za posredovanje Crne Gore, Podgorica, 2009, pp. 41 – 42. (The Handbook for the Training of Mediators, Mediation Center of Montenegro).
27. *Radovanov A, Zakon o parničnom postupku: kritički prikaz, objašnjenja i tumačenja*, (the Civil Procedure Act: critical overview, explanation and interpretation), Novi Sad, 2012, p. 15.
28. *Rakić – Vodinelić V, Zakon o parničnom postupku Srbije 2011* (the Serbian Civil Procedure Act of 2011), *Pravni zapisi*, year 2, no. II, 2011, pp. 537 – 540.
29. Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties.
30. Recommendation Rec (2002)10 concerning mediation in civil matters.
31. Recommendation Rec (98) 1 concerning mediation in family matters, particularly in the area of divorce (and custody cases of children).
32. Recommendation Rec (99)19 concerning mediation in criminal matters aims to enhance the active participation of the victim and the offender in criminal proceedings.
33. *Smith G, Unwilling Actors: why voluntary mediation works, why mandatory mediation might not*, *Osgoode Hall Law Journey*, Vol. 36, No. 4, 1998.
34. *Stanković G, Građansko procesno pravo – parnično procesno pravo* (Civil Procedure Law – Litigation Procedure Law), Niš, 2010, p. 137.
35. *Ustav Republike Srbije*, „Sl. glasnik RS“, no. 83/2006 (The Constitution of the Republic of Serbia, Official Gazette of RS).
36. *Uzelac A, Mirenje kao alternative suđenju*, u: *Mirenje u građanskim, trgovačkim i radnim sporovima*, p. 15 – 32. (Conciliation as an alternative to Adjudication, in: Conciliation in civil, commercial and labour disputes).
37. www.mpravde.gov.rs.
38. *Zakon o mirnom rešavanju radnih sporova*, „Sl. glasnik RS“ (the Act on the Peaceful Resolution of Labour Disputes, Official Gazette RS), no. 125/2004 and 104/2009.
39. *Zakon o obligacionim odnosima*, „Sl. glasnik Sl. list SFRJ“, br. 29/78, 39/85, 45/89 i 57/89 i "Sl. list SRJ", br. 31/93. (the Obligation Relations Act, Official Gazettes of SFRY and SRJ).
40. *Zakon o parničnom postupku*, „Narodne novine“, br. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11 (the Civil Procedure Act, Republic of Croatia).
41. *Zakon o parničnom postupku*, „Sl. glasnik RS“, no. 72/2011 (the Civil Procedure Act, Official Gazette RS).
42. *Zakon o posredovanju – medijaciji*, „Sl. glasnik RS“, no. 18/2005 (the Mediation Act, Official Gazette RS).
43. *Zakon o radu*, „Sl.glasnik RS“, no. 24/2005, 61/2005 and 54/2009 (the Labour Act, Official Gazette RS).
44. *Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda*, izmenjene u skladu sa Protokolom broj 11, Protokola uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 4 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda kojim se obezbeđuju izvesna prava i slobode koji nisu uključeni u Konvenciju i Prvi protokol uz nju, Protokola broj 6 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne, Protokola broj 7 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 12 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda i Protokola broj 13 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne u svim okolnostima, „Sl. list SCG – međunarodni ugovori“, br. 9/2003, 5/2005 i 7/2005 – ispr. i „Sl. glasnik RS – Međunarodni ugovori“, br. 12/2010). The Act on the ratification of the European Convention on the Protection of Human Right and Fundamental Freedoms (ECHR) amended in line with Protocol 11; Protocol 4 to the ECHR securing certain rights and freedoms other than those included in Convention and Protocol 1; Protocol 6 concerning the abolition of death penalty; Protocol 7 and Protocol 12 concerning the protection of human rights and fundamental freedoms;

Protocol 13 concerning the abolition of death penalty in all circumstances (the Official Gazette of Serbia and Montenegro – International Treaties, no. 9/2003, 5/2005 and 2005–corr.; the Official Gazette of the Republic of Serbia – International Treaties no. 12/2010).

45. Zakon o vanparničnom postupku, "Sl. glasnik SRS", br. 25/82 i 48/88 i "Sl. glasnik RS", br. 46/95 – dr. zakon, 18/2005 - dr. zakon i 85/2012. (the Civil Procedure Act, Official Gazettes of SRS and RS).
46. Zakon o zaštiti potrošača, "Sl. glasnik RS", br. 73/2010 (the Consumer Protection Act, Official Gazette RS).
47. Zakona o eksproprijaciji, "Sl. glasnik RS", br. 53/95, "Sl. list SRJ", br. 16/2001 - odluka SUS i "Sl. glasnik RS", br. 20/2009 (the Expropriation Act, Official Gazettes of RS, SRY and RS).

VANSUDSKO REŠAVANJE SPOROVA U SVETLU ZAKONA O PARNIČNOM POSTUPKU

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U ovom radu autorka analizira odredbe Zakona o parničnom postupku u vezi mirnog rešavanja sporova. Pored, i ranijim zakonom proklamovanog, načela o mirnom rešavanju sporova, novi zakon sadrži sasvim nov član kojim se konkretizuje ovo načelo i uvodi obavezan pokušaj mirnog rešavanja sporova između potencijalnog tužioca, fizičkog ili pravnog lica i potencijalnog tuženog, Republike Srbije, jedinice teritorijalne autonomije ili lokalne samouprave. Odredbe ovog zakona biće sagledane u svetlu principa koji o mirnom rešavanju sporova važe, a posebna pažnja biće posvećena položaju potencijalnih parničnih stranaka i njihovom međusobnom odnosu. Konačno, razmotriće se da li postoje, i koje bi bile, alternative novog zakonskog rešenja.

Ključne reči: *vansudsko rešavanje sporova, država, medijacija, rešavanje spora mirnim putem*