

# IZVANSUDSKI OBLICI RJEŠAVANJA UPRAVNIH STVARI: HRVATSKA I POLJSKA ISKUSTVA

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## NON-JURISDICTIONAL FORMS OF DISPOSING AN ADMINISTRATIVE MATTER: CROATIAN AND POLISH EXPERIENCES

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### Summary:

*The aim of this paper is to research applicability of the existing alternative dispute resolution methods' in the administrative law and give some suggestion for their improvement. Firstly, in this paper, the concept of alternative and consensual dispute resolution in administrative law is analysed. After that, the advantages and disadvantages of the non-jurisdictional forms of disposing an administrative matter are pointed out. Then, the contemporary regulations devoted to such methods in Croatia are presented. The experiences of alternative dispute resolution methods in Poland are also discussed, because Poland tried to establish this system in the very similar environment like in Croatia, but several years ago. Finally, in conclusion authors give their attitude on applicability of non-jurisdictional forms of dispute resolution in Croatian administrative law and suggest some steps for their improvements.*

**Keywords:** *alternative dispute resolution; mediation; settlement; administrative law; Croatia; Poland.*

### 1. INTRODUCTION

The use of traditional mechanisms appropriate for jurisdictional procedure in dealing with diverse and complicated tasks entrusted to contemporary public administration has for years become ineffective and insufficient. Formed in the mid-nineteenth century and based on judicial procedures, administrative process that worked well in implementing the tasks of then administration does not always suit the fast growing world and the needs of immediate and efficient management by law.

Croatia, like Poland, belongs to the successors of the *acquis* of the Austro-Hungarian Monarchy. Those countries took over – in 1931 (former Yugoslavia) and 1928 (Poland) – by the acts on administrative proceedings – the Austrian ideas,

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enshrined in the Law on Administrative Procedure of 1925.<sup>1</sup> These examples were not accidental, since after the collapse of the Austro-Hungarian Empire in 1918, due to the practice of the administrative authorities and the administrative structure that have been established for years, it was easy to use the already known legal constructions. They might have been seen as modern at that time, and adapted to the needs of the state of the early twentieth century. Austrian model was adopted by most of the states – the successors of the Monarchy, for example former Czechoslovakia or Hungary. These solutions also determined the texts of the laws in the Soviet sphere of influence of the socialist countries after the Second World War. It was exemplified by the Yugoslavian Law on the General Administrative Procedure of 1957 and the Polish Code of Administrative Procedure of 1960.

Some of the key administrative process institutions characteristic of the Austrian law have survived until today, such as the concept of a party to proceedings, based on the construction of legal interest. Obviously, such procedural canons include the idea of the administrative process itself, based on the court's procedure and the decision-making form of settling the matter, in respect of which the Austrian Law and its interwar copies hardly bore any exceptions.

However, a lot has changed, since 1925: civilization transformations, crowds and diversification of tasks implemented today by the administration, including the obligations imposed by the European Union legislator caused that the existing tools, characteristic of jurisdictional proceedings, have not become fully useful anymore.<sup>2</sup> These circumstances forced the systematic inclusion constructions that did not fit in the canon of traditionally understood jurisdictional proceedings in the administrative law system of, both in terms of its conduct and the form of settling the case. It includes procedures classified in science as so-called third generation, dedicated primarily to the distribution of European Union funds, opening proceedings for participation of entities without legal interest, as well as various forms of alternative and consensual dispute resolution and related forms of amicable termination of proceedings.<sup>3</sup>

These last two issues attract attention of not only legal practitioners and scholars, but legislators in the plenty of European countries also. One of the European Union's political priorities is directed to the encouraging alternative dispute resolution.<sup>4</sup> Council of Europe also recommends to all its States Parties to make out-of-court settlement procedures in administrative matters more attractive wherever it

1 Ivo Borković, *Upravno pravo* (Zagreb: Narodne novine, 2002.), 400-401.

2 It is worth emphasizing that this observation applies not only to systems developed on the basis of the Austrian order, but also to those that owe their pedigree to another great codification - the Spanish Act of 1889.

3 Javier Barnes, "Introduction. Reform and Innovation in Administrative Procedure", *Transforming Administrative Procedure*, ed. Javier Barnes (Seville: Global Law Press, 2008.), 35-37.

4 In 2002, European Commission adopted a Green Paper on alternative dispute resolution in civil and commercial law, approached November 2<sup>nd</sup>, 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&from=EN>. In this document, Commission highlights the importance of the non-judicial models of resolving disputes at the Union level, but also at the level of member states.

is possible.<sup>5</sup> Therefore, importance of using alternative dispute resolution methods is trend not only at the national, but at the supranational level also.<sup>6</sup>

The regulations devoted to non-jurisdictional forms of disposing an administrative matter are being included in the systems of Austrian succession. However, as the analysis of the Croatian and Polish orders proves, this is not an easy task, and the regulations introduced, which break the well-established patterns of conduct, are not always popular in practice.

Non-jurisdictional forms of disposing administrative matter include all kinds of assisted, amicable, appropriate or consensual dispute resolution, that attract more and more interest in contemporary legal doctrine and practice. Refusing the alternative or consensual dispute resolution methods in administrative law, as well as pure copying of those models from the civil law will not get sufficient results. Therefore, it is very important to research applicability of the existing non-jurisdictional forms of resolution methods' in the administrative law. Firstly, in this paper, the concept of alternative and consensual dispute resolution in administrative law is analysed. After that, the advantages and disadvantages of the non-jurisdictional forms of disposing an administrative matter are pointed out. Then, the contemporary regulations devoted to such methods in Croatia are presented. The experiences of alternative dispute resolution methods in Poland are also discussed, because Poland tried to establish this system in the very similar environment like in Croatia, but several years ago. Finally, in conclusion authors give their attitude on applicability of non-jurisdictional forms of dispute resolution in Croatian administrative law and suggest some steps for their improvements.

## **2. THE CONCEPT OF ALTERNATIVE AND CONSENSUAL DISPUTE RESOLUTION IN ADMINISTRATIVE LAW**

The term "alternative dispute resolution" refers to non-jurisdictional procedures for settling disputes by means other than litigation.<sup>7</sup> It includes all out-of-court forms of dispute resolution in which an independent person assists parties to resolve disputable issue, regardless of their particularities in the methods of dispute settlement. Alternative dispute resolution has to be assigned to the third neutral party, whose role could be to issue a binding decision, or just to act intermediary or advisory. Today, in European countries it can be found many different forms of alternative dispute

5 Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, approached November 2<sup>nd</sup>, 2019, <https://rm.coe.int/16805e2b59>.

6 See also Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowoadministracyjnym* (Warszawa: Lex, 2013.), 103 etc., Zbigniew Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym* (Kraków: Kantor Wydaw. Zakamycze, 2004.), 129 etc., Ewa Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie i w Polsce* (Warszawa: C. H. Beck, 2007.), 9, Adam Zienkiewicz, *Studium mediacji. Od teorii ku praktyce* (Warszawa: Centrum Doradztwa i Informacji Difin, 2007.), 227.

7 Henry C. Black, *Black's Law Dictionary* (St. Paul: West Publishing, 1991), 51.

resolution, such as early neutral evaluation, mediation, conciliation, arbitration, etc. Some of them are typical for some special administrative areas, such co-operative compliance in the tax law matters.<sup>8</sup>

Model of the alternative dispute resolution presents the consensual way of dispute resolution. This model, as any of alternative dispute resolution, should meet two basic assumptions to be used: admissible disposition of the subject of the relation and willingness of the participants to collaborate. Important characteristic of this model is the possibility, and not obligation for the parties, to be assisted in dispute resolution. In consensual dispute resolution parties can also solve the problem without third neutral party, so called mediator. Therefore, in these cases, final decision can be issued by the help of the mediator or by the parties themselves. It is essential to emphasize that outside of the administrative, judicial, or other procedure, the mediator cannot adopt an enforceable decision, neither may do so, unless alternative dispute resolution model is specifically recognised by the law. Therefore, regulators often seek combinations between traditional procedures and alternative dispute resolution.<sup>9</sup>

It is well known that alternative and consensual dispute resolution methods work very well in the private law system. In the world, such procedures, which are usually less costly and more expeditious, are increasingly being used in commercial and labour disputes, divorce actions, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would likely otherwise involve court litigation.<sup>10</sup> However, their application is rather new in the administrative law.

The complexity of administrative matters, the length of administrative dispute proceedings, and the transformation of the traditional position of superiority of the administrative authority in relation to the private person into various forms of cooperation between the administration and the citizens, straightened the idea that certain disputes in the administrative law could be resolved out of the jurisdictional forms of disposing an administrative matter.<sup>11</sup> First concepts of alternative and consensual dispute resolution appeared in the tax law in the late 1980s, from where they were widening to the other administrative areas.<sup>12</sup> The main reason for hard using of alternative and consensual dispute resolution in administrative law can be found in avoiding to meet all the necessary requirements developed in the private law system. The limits, in which administrative authority should find the area for mediation is pretty narrow in the administrative law. Powers granted to the administrative authority by the

8 Tereza Rogić Lugarić and Alma Yasin, "O alternativnom rješavanju sporova u poreznom pravu", *Porezni vjesnik* 25, no. 3 (2016): 28, 33.

9 See Polonca Kovač, "The potentials and limitations of tax dispute prevention and alternative resolution mechanisms", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 39, no. 4 (2018): 1510.

10 Black, *Black's Law Dictionary*, 51.

11 Aleksandra Maganić and Mihajlo Dika, "Mogućnost rješavanja upravnih stvari arbitražom", *Novosti u upravnom pravu i upravnosudskoj praksi*, ed. Ante Galić (Zagreb: Organizator, 2018.), 1.

12 In 1980s, tax authorities become more aware that expensive appeal procedures in tax matters are not often in the best interests of the government, especially if they are avoidable. Therefore, the new ideas about settling disputes between tax authorities and taxpayers in a peaceful way were born. Rogić Lugarić and Yasin, *O alternativnom rješavanju sporova u poreznom pravu*, 28.

public law enable administration to adjudicate on rights and obligations of the parties. In the adjudication process administrative authority uses and exercises public-law powers, as they are prescribed in the laws and regulations. While using these powers, administrative authority is superior to the private party. In adjudication procedure it, also, has a task to protect the public interest, i.e. the interest of the community in whole. Principle of lawfulness in administrative decisions and other measures, bind administrative authority and force it to act in accordance with the law. Contrary to the private-law system, administrative authority should also imply an absolute respect for substantive truth on which legal provision should be applied. Authority is also bound by several specific restrictions, for example on the disposition of the subject matter of the procedure since, generally, public-law relations are not dispositive.<sup>13</sup> Unlike the private-law debt relationship in which the creditor may waive its claim against the debtor, in the administrative law administrative authority has a duty to set and to accomplish its claim to the debtor. Therefore, relationship of the administrative authority and the party in the administrative law matter cannot be compared with the position of the parties in the private-law relationship.<sup>14</sup> Administrative authority as a holder of the public-law powers, in the dispute resolution process does not have such a freedom in disposing with its rights as a private person. That presents an obstacle in pure application of the alternative or consensual dispute resolution in administrative law.

The need to unburden administrative courts of the high number of the cases and make administrative justice faster, calls upon including some methods non-jurisdictional forms of dispute resolution in the administrative law.<sup>15</sup> In 2001, Council of Europe by the recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, suggested introducing alternative dispute resolution in the process of administrative matters solving. Aware of specific nature of administrative law, some systemic limitations compared to civil relations were recommended. To encourage

13 Kovač, *The potentials and limitations of tax dispute prevention and alternative resolution mechanisms*, 1506. The public-law relationship between public authority and party can be differentiate form the private-law relationship that is established by the two private persons by the few characteristics: nature of parties involved in the relationship and inequality between their hierarchy position, way of establishing relationship, type of the acquired rights and obligations of the parties and the way of dispute solving. Borković, *Upravno pravo*, 62-64.

14 On this see more in Nataša Žunić Kovačević, "Upravnosudska kontrola u poreznim stvarima", *Zbornik radova Pravnog fakulteta u Splitu* 53, no. 1 (2016): 288.

15 First attempts of the unburden administrative courts was directed to the establishment of the new courts, or the whole level of the courts. For example, for that reason, in 1953 France established the first instance administrative courts, and in 1987 administrative courts of appeal. Dario Đerđa, *Upravni spor* (Rijeka: Pravni fakultet, 2017.), 41. The problem of the overloading courts was present in the European Union also. The burden of the European Court of Justice, which in some matters had a role of the administrative court, in 1989 resulted in the establishment of a Court of First Instance, today called General Court. On that way, European Court of Justice was released of resolving cases of no political or constitutional significance, and, consequently could focus primarily on resolving important cases and safeguarding the basic values of the Union law. See more in Trevor C. Hartley, *Temelji prava Europske zajednice: uvod u ustavno i upravno pravo Europske zajednice* (Rijeka: Pravni fakultet, 2004.), 61.

alternative and consensual dispute resolution in practice, Council of Europe also adopted the Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties.<sup>16</sup> In those documents it suggested several approaches, such as prevention (e.g. consultation), special non-judicial procedures (e.g. internal reviews, arbitration, negotiated settlement, mediation or conciliation), and alternative judicial procedures. Altogether, it is an alternative approach, either in the context of classic procedures, such as administrative or judicial procedures, or as a parallel or alternate route. In practice, alternative and consensual dispute resolution most often presents a processual form or set of forms rather than a substantive law institution.<sup>17</sup>

Approach based on the responsibility for performing public tasks in administrative law, did not discourage the states to involve some alternative or consensual dispute resolution process in this law area. The first steps were taken in the tax law, where “tax compliance theory” changed the traditional relationship between tax authorities and taxpayers.<sup>18</sup> This theory completely transformed the approach of tax authorities in tax matters, and resulted in new legal institutes aiming to soften the tension between tax authority and taxpayers and resolving possible disputes at the earliest possible stage. Thus, this area can serve as a template for alternative and consensual way of dispute resolution in the administrative law,<sup>19</sup> in which the relationship between tax authority and taxpayer should be based on fair play concept, reciprocal cooperation and even highlighted voluntarism.<sup>20</sup> The sample in the tax law shows that alternative and consensual dispute resolution can positively effects to the administrative law.

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16 Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties, approached November 2<sup>nd</sup> 2019, <https://rm.coe.int/1680747683>.

17 Kovač, *The potentials and limitations of tax dispute prevention and alternative resolution mechanisms*, 1510.

18 By adopting the Charter on Cooperation between the Tax Administration and the Taxpayers from 2014, Croatia, also, showed the will to achieve the mutual respect of the tax authority and taxpayers. See more in Nives Vrgoč, “Alternativni načini rješavanja sporova u upravnom postupku”, *51 jesensko savjetovanje Računovodstvo, revizija i porezi u praksi*, ed. Željana Aljinović Barač (Split: Udruga računovoda i financijskih djelatnika, 2016.), 191.

19 Tereza Rogić Lugarić and Nevja Čičin-Šain, “Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?”, *Zbornik Pravnog fakulteta u Zagrebu* 64, no. 3 (2014): 348.

20 In 2012, the OECD published a study on the “enhanced relationship” models that should in the future result with different relationship of the tax authority and taxpayer, based on the mutual trust. Žunić Kovačević, *Upravnosudska kontrola u poreznim stvarima*, 289. Good public governance requires a participatory and efficient public administration which assists the parties in the exercise of their rights and obligations, as long as such does not affect the public benefit or third parties. Kovač, *The potentials and limitations of tax dispute prevention and alternative resolution mechanisms*, 1507.

### **3. STRAIGHTS AND WEAKNESSES OF NON-JURISDICTIONAL METHODS OF DISPOSING AN ADMINISTRATIVE MATTER**

There are lot of benefits of the alternative and consensual dispute resolution that courts generally cannot match. Some of them are simpler, more flexible and faster procedures, more effective dispute resolution according to the principle of fairness and not merely following strict legal rules, lower costs, confidentiality of the process, risk diminishing, parties control over the procedure, amicable settlement, higher satisfaction of the parties with the achieved result and, because of that, better acceptability of decisions by the parties. Mediation, for example, can serve to resolve two categories of disputes: firstly, achieving a state in which each party achieves a win (win-win case emphasized in American doctrine), secondly - in the event of a confrontation between the fundamental values of a conflict – reducing the “all or nothing” area of the zero-sum game (germ. *Nullsummen - Spiels*). Seeking a consensus can be effective especially in cases where attempts to resolve the dispute have led to a “dead end” (germ. *Sackgasse*), because then the feeling of urgent settlement needs arises. According to Pünder, the end of the conflict (germ. *Ablauf der Konfliktmittlung*) should result in discussing the legal situation of individual participants in the dispute and then considering their interests in the proceedings.<sup>21</sup>

These processes also help parties to maintain their relationships. The latter seems particularly relevant for administrative relations since the acceptance of a decision, particularly if the decision is a forced one, reflects the respect for the rule of law. Forcible regulation of relations leads to the need for repression, such as – in administrative matters – enforcement, inspection measures, and criminal prosecution, all less democratic and more expensive in the end. Finally, the key advantage of alternative dispute resolution is to prevent disputes before the courts, i.e. to reduce court workload.<sup>22</sup> For example, it is proved that in the tax law alternative dispute resolution methods encourage growth of the voluntary compliance of tax obligations, straighten fairness of the tax system in the taxpayers' eyes and establish a more “friendly” atmosphere in the relations between tax authorities and taxpayers. Thus, this method has not only practical, but also significant psychological influence also.<sup>23</sup>

21 Hermann Pünder, “Mediation in Verwaltungsverfahren”, in: *Allgemeines Verwaltungsrecht*, ed. Dirk Ehlers and Hermann Pünder (Berlin/New York: De Gruyter, 2010.), 570, Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought”, *Minnesota Law Review* 89, (2004): 378 etc.

22 These reasons are stated by Kovač, *The potentials and limitations of tax dispute prevention and alternative resolution mechanisms*, 1512, Rogić Lugarić and Čičin-Šain, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?*, 351, Giorgio F. Colombo, “Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems”, *Ritsumeikan Law Review* 29, (2012): 71 and Giuliana Romualdi, “Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context”, *Utrecht Law Review* 14, no. 3 (2018): 53.

23 Rogić Lugarić and Čičin-Šain, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?*, 351. In the United States alternative dispute resolution in the tax matters is very popular. From the statistic is obvious that respondents would opted in majority of 84% for alternative dispute resolution again, while 70% of them were completely or partially satisfied



It could be highlighted especially in the field of mediation – shaping “rules” of mediation together may be the first point at which conflicting parties reach agreement. This process can therefore itself serve to reach a broader compromise. It is impossible not to refer here to the concept of the communicative function of law according to Habermas. In this context, mediation appears as a structure that creates a platform for discourse, assuming – of course – that the necessary conditions identified by this author are met.<sup>24</sup> Respecting the jointly defined negotiation principles is to build a margin of mutual trust, increasing the chance of reaching an agreement. In this way, the settlement developed in the course of democratic discussion gains the hallmarks of the utilitarian idea, presenting the best possible solution for the largest number or even all participants of mediation. This trust is strengthened by the parties’ control over the resolution of the case, through the active exercise of the right to be heard and stronger acceptance of the negotiated outcome of the proceedings.<sup>25</sup>

However, in administrative law non-jurisdictional methods, especially alternative dispute resolution can also have some negative effects. The main limitations are respect for lawfulness and equality of the parties. The result of procedure cannot be a kind of precedent.<sup>26</sup> Therefore, the principle of equality cannot be treated equally in cases, in which a decision was issued and in those which were concluded alternatively. In such context, the subject matter of substantive and procedural rules is the definition of the public interest, and the administrative authority could jeopardise it if the boundaries of the regulation were considered (too) broadly. This approach can lead to the “privatise and consensual justice”, that is generally unacceptable in the administrative law. In addition, from the point of view of separation of powers and the administration being bound to the legislative branch, it is questionable how much discretion can the legislature allow to the administrative authority.<sup>27</sup> The use of various methods in alternative dispute resolution reflects the intention to move away from rigidly shaped procedures in favour of a flexible procedure formula, increasing an almost unlimited catalogue of deformed activities.<sup>28</sup> Further objections raised from constitutional issues are derived from the fact that the nature of alternative dispute resolution may lead to restrictions on the right to be heard, the principle of procedural justice or the principle of self-government independence.

It is also doubtful to tie the body with a compromise. The nature of public law means that it is subject to restrictions, which may, however, be excluded in certain

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by the fair and impartial treatment of tax officials in the alternative dispute resolution procedure. Rogić Lugarić and Yasin, *O alternativnom rješavanju sporova u poreznom pravu*, 34.

24 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Mein: Suhrkamp, 1994.), 187 etc.

25 Kars J. de Graaf, Albert T. Marseille and Hanna D. Tolsma, *Mediation in administrative proceedings: a comparative perspective* (Berlin: Springer, 2014.), 592.

26 de Graaf, Marseille and Tolsma, *Mediation in administrative proceedings: a comparative perspective*, 598.

27 Kovač, *The potentials and limitations of tax dispute prevention and alternative resolution mechanisms*, 1513. de Graaf, Marseille and Tolsma, *Mediation in administrative proceedings: a comparative perspective*, 597.

28 Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 287 etc.

situations, e.g. in the face of an impending claim for damages by a party against the administration. Therefore, weighing interests turns out to be the key.<sup>29</sup> The high risk of undermining the result of procedure is also noted, which would not have a solid basis in the norms of generally applicable law, on the basis of allegations of abuse of power or violation of the public interest.<sup>30</sup> Another type of problem is related to the transparency of the administrative procedure. The natural for alternative dispute resolution forms: secrecy of activities and statements may conflict with transparency as a basic feature of the proceedings. However, the secret of negotiations should be distinguished from the openness of the result of any alternative dispute resolution procedure. Moreover, the information disclosed in the formalized proceedings is also available to third parties to a limited extent. The democratically conceived rules for access to public information guarantee both confidentiality of negotiations and openness of those elements of the procedure that should remain transparent. Another question may be raised by the issue of excessive length of the procedure. Undertaking negotiations involves the risk of extending, and sometimes significantly, the duration of the case.<sup>31</sup> Finally, the institutionalization of the result of alternative dispute resolution, in particular through a settlement, cannot limit the scope or premises of judicial control of administration.<sup>32</sup>

Although the non-jurisdictional dispute resolution methods shows some weaknesses, they have more advantages that can contribute to the faster dispute resolution between administrative authorities and private parties and make the final decision easier to implement in the practice. Therefore, alternative and consensual dispute resolution models present a trend that should be more used not only in the private law, but in the administrative law also.

#### **4. NON-JURISDICTIONAL METHODS OF DISPUTE RESOLUTION IN THE CROATIAN ADMINISTRATIVE LAW**

The Republic of Croatia highlighted the importance of including contemporary models of alternative dispute resolution in its legal system, asserting development of the system of non-jurisdictional methods of dispute resolution as particular state interest. Alternative dispute resolution can contribute much to the national justice, to

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29 Pünder, *Mediation in Verwaltungsverfahren*, 577 etc.

30 Philip Langbroek, Milan Remac, Paulien Willemsen, "The Dutch System of Dispute Resolution in Administrative Law", in: *Alternative Dispute Resolution in European Administrative Law*, eds. Dacian C. Dragos and Bogdana Neamtu (Heidelberg: Springer, 2014.), 118, 137. Inger M. Conradsen, Michael Götze, *Administrative Appeals and ADR in Danish Administrative Law*, in: *Alternative Dispute Resolution in European Administrative Law*, eds. Dacian C. Dragos and Bogdana Neamtu (Heidelberg: Springer, 2014.), 173.

31 de Graaf, Marseille and Tolsma, *Mediation in administrative proceedings: a comparative perspective*, 599–600.

32 Pünder, *Mediation in Verwaltungsverfahren*, 581–583. Ludo M. Veny, *The Complexity of Administrative Appeals in Belgium: Not Seeing the Woods for the Trees*, in: *Alternative Dispute Resolution in European Administrative Law*, eds. Dacian C. Dragos and Bogdana Neamtu (Heidelberg: Springer, 2014.), 201.

the economic and social development and to the international judicial cooperation. By development of the alternative dispute resolution methods, citizens and other entities may choose some other dispute resolution model, which may be more appropriate for solving their dispute due to the speed, simplicity and costs than the ordinary court procedure.<sup>33</sup>

Most of such methods are designed and included in the legal system with the purpose to serve to the private, not public law.<sup>34</sup> One of the most important points of the usage of alternative dispute resolution is the parties' freedom to dispose with their own rights. This could be doubtful in administrative matters, because, administrative authority enters the public-law relations *ex officio* and has to take care about the public interest. In addition, administrative authority in the public law should apply the legal provision to the factual situation, which have to be substantially true established. Because of here mentioned limitations, alternative dispute resolution is not easy to incorporate in administrative-law system.

Any negotiable situation in administrative law, which does not include relation between administrative authority in performing public tasks, and private person, is not a subject of alternative dispute resolution process. For example, using a settlement in the administrative procedure is not a kind of alternative dispute resolution, although the settlement arranges concrete administrative matter. Such a settlement is allowed to be concluded only in an administrative procedure in which two or more parties take a role, and in which parties has mutually opposite interests. In such cases, they can agree on certain substantive issues about which they have right to dispose, generally because these rights are a kind of property rights. By the settlement in the administrative procedure, administrative body does not adjudicate on the rights of the party, but parties regulate their own relations between themselves. In this way, the settlement in the administrative procedure contains a contract whereby the parties regulate their legal relations, which they are free to discuss in that procedure.<sup>35</sup> Parties cannot conclude a settlement on procedural issue, such as whether or not an expert is to be engaged, because this is always decided by an administrative authority. Thus, the settlement cannot regulate issues within the jurisdiction of the administrative authority, but only relations between the parties themselves on which the parties are free to dispose.<sup>36</sup> In the legal doctrine, it is emphasized that legal nature of settlement

33 See Ministarstvo pravosuđa, Strategija: Razvoj alternativnih načina rješavanja sporova, approached November 2<sup>nd</sup>, 2019, [http://www.centar-za-mir.hr/uploads/Medijacija/Razvoj\\_ANRS\\_%20Ministarstvo.pdf](http://www.centar-za-mir.hr/uploads/Medijacija/Razvoj_ANRS_%20Ministarstvo.pdf).

34 See more about alternative dispute resolution in private law in Alan Uzelac *et al.*, "Aktualni trendovi mirnog rješavanja sporova u Hrvatskoj: dosezi i ograničenja", *Zbornik Pravnog fakulteta u Zagrebu* 60, no. 3 (2010): 1265-1308.

35 In the administrative procedure, concluding a settlement is allowed only if three conditions are cumulatively fulfilled: solving administrative matter includes two or more than two parties, parties have the opposite interests, and their interests are directed to the rights with which they can dispose. Art. 57 of the Law on General Administrative Procedure, Official Journal, no. 47/09.

36 For example, the Law on Expropriation and Determining Compensation, Official Journal, no. 74/14, 69/17, art. 39, stipulates that the expropriation beneficiary and the property owner may conclude a settlement before issuing the decision on expropriation. Such a settlement mainly

is a special type of contract between parties in the process, since it represents dispositive action of the parties, which is the reflection of the autonomy of their will.<sup>37</sup> Therefore, settlement between parties in the administrative procedure is not authoritative way of adjudicating administrative matter, but a legal matter of a private-law nature. Concluding a settlement between administrative authority and a party in administrative procedure is not allowed, but it is allowed between parties.

In Croatia, few types of non-jurisdictional forms of dispute resolution between administrative authority and a private party can be differentiated. For example, some laws that regulate special administrative areas stipulate possibility of using arbitration or conciliation in order to solve arose disputes. Those laws do not regulate arbitration and mediation procedure in detail because special laws regulate these procedures. Some administrative areas show strong interest for involving non-jurisdictional dispute resolution methods, such is the case in the tax law in Croatia. In this area, some new alternative and consensual models of dispute resolution are tested. Finally, Croatian legislator introduced the settlement between claimant and respondent as a way of administrative dispute resolution, but this institute unfortunately since today has not produced expected results in practice.

#### ***4.1. Arbitration and conciliation as a non-jurisdictional methods of dispute resolution***

One of the most efficient methods of alternative dispute resolution by assistance of a third party is arbitration. In Croatia, arbitration process – as a trial before a chosen arbitral tribunal – is governed by the Law on Arbitration, enacted in 2001.<sup>38</sup> This Law governs arbitral contract, arbitral tribunal, arbitral process and execution of the arbitral decision. It defines the limits of arbitrability of cases in Croatia, prescribing that arbitration is allowed only in disputes over the rights that the parties are free to dispose. Of course, it does not prescribe, in which administrative cases arbitration can be used, while the laws that regulate specific administrative areas define this.<sup>39</sup>

One of such laws is the Law on Concessions, prescribing that the parties are free to settle dispute arising from concession contract by arbitration, unless otherwise is provided by the law regulates special administrative area.<sup>40</sup> There are no doubts that disputes arose from concession contract, as a kind of administrative contract, include the rights by which parties may freely dispose, because those rights are their contractual rights.<sup>41</sup> Furthermore, the arbitration in the concession disputes is still subject to numerous restrictions, in order to provide appropriate level of public interest

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contains the form and amount of compensation and the period by which the expropriation beneficiary is obliged to pay the obligation in respect of compensation.

37 Pero Krijan, “Nagodba stranaka u upravnom postupku”, *Informator*, no. 5219 (2004): 5.

38 Law on Arbitration, Official Journal, no. 88/01.

39 Art. 3 of the Law on Arbitration.

40 Art. 97(2) of the Law on Concessions, Official Journal, no. 69/17.

41 Otherwise, the rights arise from the concession decision presents the rights that are not disposable. See Dario Đerđa, “Ugovor o koncesiji”, *Hrvatska javna uprava* 6, no. 3 (2006): 88-89.

protection. This is the case about the place of arbitration, applicable law, language, rules governing arbitration and compulsory implementation of the arbitral decision.<sup>42</sup> Another law providing dispute resolution by arbitration is the Law on public-private partnership. This Law prescribes that parties may contract arbitration for the disputes arising out of a contract on the public-private partnership.<sup>43</sup> It, also, prescribes Croatian law as a relevant in the arbitration process, but parties are empowered to decide on the place of arbitration. Furthermore, there is an open question of the arbitrability of other administrative matters, in which arbitration is not prescribed by a law regulating specific administrative area. For example, the Law on Public Procurement does not contain provisions on the resolution of the disputes by arbitration.<sup>44</sup> Nevertheless, in practice, a large number of public procurement contracts include arbitration clauses. If the framework agreement and the subsequent agreement on public procurement contains an arbitration clause, obviously it is an arbitral matter, which is not expressly prescribed by the law, as it is the case with the Law on Concessions and Law on Public-Private Partnership.<sup>45</sup>

As a method of alternative dispute resolution in Croatia, it is inevitable to mention conciliation. The first Law on Conciliation is adopted in 2003, and now it is in force the Law on Conciliation from 2011.<sup>46</sup> Conciliation should be understood as any procedure, whether conducted in a court, in a conciliation institution or outside, in which the parties try to settle the dispute by agreement and with the assistance of one or more conciliators which help them to reach a settlement instead imposing them binding solution. Conciliation is institutionally and procedurally informal procedure.<sup>47</sup> It is voluntary process, proposed by one interested party and another party may accept it or reject it. If the other party accepts conciliation and settlement is reached, the procedure ends and settlement has the effect of an enforceable judgment. Conciliation is also provided in the Law on the Concessions and the Law on Public-Private Partnership but it is not regulated in detail.<sup>48</sup> Moreover, in the concession disputes the conciliation process is obligate before arbitration process is instituted.<sup>49</sup>

#### ***4.2. Non-jurisdictional methods of dispute resolution in the tax law***

Alternative dispute resolution methods are more often in the tax law. The General Tax Law introduces two institutes that can serve in avoiding disputes from

42 Aleksandra Maganić, "Granice arbitrabilnosti u rješavanju upravnih stvari", *Zakonitost* 1, no. 1 (2019): 11.

43 Art. 31(1) of the Law on Public-Private Partnership, Official Journal, no. 78/12, 152/14, 114/18.

44 Law on Public Procurement, Official Journal, no. 120/16.

45 Maganić, *Granice arbitrabilnosti u rješavanju upravnih stvari*, 14-15.

46 Law on Conciliation, Official Journal, no. 18/11.

47 Rogić Lugarić and Čičin-Šain, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?*, 365.

48 Art. 97(4) of the Law on Concessions and art. 31(1) of the Law on Public-Private Partnership.

49 Maganić pointed out that it is not clear why arbitrarily resolution of the concession disputes in Croatia is conditioned by the previously conducted conciliation process, if we take into account generally poor results of the conciliation. Maganić, *Granice arbitrabilnosti u rješavanju upravnih stvari*, str. 12.

the tax authority and taxpayer relations.<sup>50</sup> These are administrative contract and tax settlement. Those institutes are adopted in the Croatian tax law in 2012, by the amendments of then valid General Tax Law.<sup>51</sup>

The General Tax Law prescribes that the tax authority and the taxpayer may conclude administrative contract with the tax debt due.<sup>52</sup> The taxpayer submits the proposal for the conclusion of the administrative contract. The administrative contract is closed by the free will of the taxpayer, and has not to be against the compulsory regulations, against the public interest, against the legal interests of third parties, nor may it be contrary to the decision establishing the taxpayer liability. An administrative contract has an effect of the enforceable decision issued in the tax procedure, and, on that way, it contributes mostly to the tax payments. The tax authority will unilaterally terminate this contract due to non-compliance with the payment models and deadlines, by an enforceable decision. Any dispute that may arise from the administrative contract is settled by administrative court.<sup>53</sup> Maganić emphasised that willing element in administrative contract is crucial, i.e. disposition of the parties in relation to the disposition of the taxpayer's debt and ways of fulfilling this obligation, as well as in arrangement of the resolving their disputes. She emphasizes that administrative contract in the tax law matter should be arbitrary, because it regulates the matter of a dispute over the rights that a party is free to dispose of, within limits established by compulsory regulations. However, she also emphasizes certain restrictions, strange to the private-law relations. For example, tax authority could not relinquish its request, because it has a duty to set it and to realize it. However, the limitations that characterize a tax-debt relationship in terms of the tax administration's obligation to collect tax, are not of that nature to prevent disputes that may arise between tax authority and taxpayer, by arbitration. Therefore, she thinks that cases about administrative contracts have to be arbitral.<sup>54</sup>

On the newly established obligations in the process of tax supervision, the tax authority and the taxpayer may conclude a tax settlement about performed tax

50 General Tax Law, Official Journal, no. 115/16, 106/18.

51 Art. 7 of the Law on the Amendments of the General Tax Law, Official Journal, no. 78/12. In 2012, closing of an administrative contract in tax law was the only admissible solution for taxpayer to postpone tax debt paying, and to postpone foreclosure as well as the debit of the account. See *Upravni ugovor sukladno Općem poreznom zakonu*, eds. Darija Bogović Ćorković and Danijela Rudić (Zagreb: Institut za javne financije, 2017.), 5. In this paper the Law on Tax Dispute Settlement Mechanisms in the European Union, Official Journal, no. 98/19., is not taken as a relevant for analyses, because its goal is to improve the mechanisms of dispute resolution related to the dual taxation in the European Union to ensure effective and efficient dispute resolution in cases of double taxation with the final aim of eliminating double taxation.

52 Administrative contracts are involved in Croatian law by the Law on General Administrative Procedure in 2010. Adherence of the administrative contracts for the administrative decision and laws that regulate specific administrative areas, proves cautious and more conservative approach taken by the Croatian legislator, makes administrative contract closer to the French model than the German one. Alen Rajko, "Upravni ugovori i postupanja – novi instituti", *Pravo i porezi* 10, no. 5 (2010): 29.

53 Art. 101(1, 5, 6, 13, 14) and art. 102(1) of the General Tax Law.

54 Maganić, *Granice arbitrabilnosti u rješavanju upravnih stvari*, 17.

supervision. The subject of a tax settlement may be defining the newly established tax obligation in procedure in which the tax base is estimated, defining the deadline for taxpayer payment and reduction of the tax obligation on the basis of the reduction of interests. On that way, tax settlement contributes to the efficiency of the procedure. The prerequisites for settling the tax settlement are acceptance of newly established obligations in the process of tax supervision by taxpayer, as well as his waiver of the right to use legal remedies. A tax settlement has the force of an enforceable administrative decision and it is executed according to tax enforcement rules.<sup>55</sup> Many reasons in favour of using tax settlement give Rogić Lugarić and Čičin-Šain. They emphasize that tax authority is legally obliged to take care about the rights and obligations of taxpayers in the tax process. It is also legally obliged to make implementation of the taxpayers' obligations simpler. On the other hand, the taxpayer is obliged to tell to the tax authority true and complete information about all the facts that the tax authority needs to calculate and collect the taxes. These provisions create an obligation for the two participants in tax relation to cooperate in order to find a unique solution that is in accordance with the law. Therefore, they find alternative dispute resolution as a mean of resolving the tax dispute concerning a factual situation in which the tax authority and taxpayer cannot reach an agreement. The taxpayer gives his, necessarily voluntary, consent by taking part in alternative dispute resolution process to actively participate in clarifying circumstances, and to settle the dispute in amicable and cooperative manner. The tax authority also expresses its readiness for determination of facts according to their true economic substance and legal obligation. If a dispute over a factual issue is resolved at early stage of the tax procedure, the dispute of the whole case can be resolved more quickly and promptly.<sup>56</sup> Also, Rogić Lugarić and Yasin emphasised that alternative dispute resolution in the tax law should be used only for solving factual disputes, and should be avoided if the application of the law is "clear". Finally, to insure this, tax laws often specify the types of disputes that can be resolved by the alternative dispute resolution method, as well as those which cannot.<sup>57</sup>

Beside here mentioned models of the non-jurisdictional forms of the dispute resolving, in the Croatian tax law also exist several institutes which contributes to avoiding dispute arise. This is, for example, the case with tax treatment binding opinion on the future and intended transactions or business activities of the taxpayer. Tax authority issues the tax treatment binding opinion in the process initiated by written request of the taxpayer and it is bound by such an opinion.<sup>58</sup> Similar purpose have, also, the previous agreement on transfer prices and contractual relations closed among taxpayer, Croatian tax authority and the tax authority of the country in which party is resident or do business through the business unit. This agreement establishes an appropriate set of criteria, such as methods, comparisons, appropriate adjustments or key assumptions regarding future events, and, on that way determines transfer prices

55 Art. 104(1-3, 10, 12) of the General Tax Law.

56 Rogić Lugarić and Čičin-Šain, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?*, 371.

57 Rogić Lugarić and Yasin, *O alternativnom rješavanju sporova u poreznom pravu*, str. 33.

58 Art. 10. of the General Tax Law.

for these transactions over a period of its validity.<sup>59</sup> Finally, the same aim has approval and termination of the special status of the taxpayer in the program of promoting voluntary compliance of tax obligations and reducing administrative burdens of the tax supervision. On that way, tax authority reduces the tax risks managed by taxpayers and encourages taxpayers to comply with their tax obligations voluntarily.<sup>60</sup> These institutes make legal certainty in the Croatian tax law system much stronger and avoid the potential disputes between tax authority and taxpayers.

### ***4.3. Alternative dispute resolution in the administrative dispute***

Some methods of alternative dispute resolution are present in Croatian administrative disputes also. Although they are prescribed by the Law on Administrative Disputes, this methods in practice avoid court adjudication and end the court procedure by the will of the parties.<sup>61</sup> For example, this Law enables the respondent in the administrative dispute, which is always administrative authority, to acknowledge the statement of the claim in full. Respondent can do that in the response to the claim, or during the first instance court process. In that case, the court shall issue a judgement resolving the dispute in accordance with the will of the parties.<sup>62</sup> In practice, more frequent way of acknowledging the claim is respondent's comply with the claim in full, by taking actions which claimant suggests in the claim. In that case, respondent usually uses the extraordinary legal remedy, annuls the administrative decision, issues the new one as claimant suggests in the claim, and court discontinues the procedure.<sup>63</sup> Rajko emphasises that this consensual models of solving administrative dispute in Croatia makes court settlement rarely used in the practice.<sup>64</sup>

Aware of the importance of the mediation in the administrative law, Croatian Parliament introduced in the Law on Administrative Disputes 2010, the model of consensual dispute resolution by closing the settlement between parties. The purpose of the settlement is to contribute to the process efficiency. This institute is poorly regulated, with only six provisions in the Law. It prescribes that during the dispute, parties may reach a settlement before the court, about the merits of the dispute. It is precisely defined that settlement may be reached only about the claims that the parties may dispose of. In the course of the dispute, the court is obliged to advise the parties about the possibility of reaching a settlement and to assist them in closing it. Court settlement shall be recorded in the minute that shall also be signed by the parties. If the settlement relates to the statement of the claim in full, the court shall discontinue the dispute by its decision. If it relates to the statement of claim in part, the court shall

59 Art. 14a(1) of the Income Tax Law, Official Journal, no. 177/04, 90/05, 57/06, 80/10, 22/12, 146/08, 148/13, 143/14, 50/16, 115/16, 106/18.

60 Regulation on the method of approval and termination of the special status of the taxpayer in purpose to promote voluntary compliance of tax obligations, Official Journal, no. 67/15.

61 Law on Administrative Disputes, Official Journal, no. 20/10, 143/12, 152/14, 94/16, 29/17.

62 Art. 42. of the Law on Administrative Disputes.

63 Art. 43. of the Law on Administrative Disputes.

64 Alen Rajko, Varijante konsenzualnog okončanja upravnog spora, approached November 14<sup>th</sup>, 2019, <http://www.iusinfo.hr/Article/Content.aspx?SOPI=CLN20V01D2012B491>, 2.



include the content of the settlement in the judgment. Finally, it is prescribed that legal provisions on the execution of the judgement also apply to the execution of the settlement.<sup>65</sup>

It is worth to mention that although the court settlement is introduced in the administrative dispute with the purpose of consensual dispute resolution, it can be settled only about the claims that the parties may dispose of. It is clear that private person, as a claimant, and administrative authority, as a responded, in the administrative dispute are in the equal process position, as well as in the private law. However, administrative authority cannot deny its *ius imperii* powers and dispose about the situations already regulated by the law. This basic postulate makes this institute hard to use.<sup>66</sup> Rajko emphasised that the settlement presents the civil-law instrument, while administrative dispute has a highlighted public-law character. Because of the specific nature of the administrative dispute, court settlement is less applicable than in the other court procedures. He, also, points out that administrative dispute is not the subject of the private-law interests, but has the purpose to evaluate the legality of the concrete administrative decision issued in administrative procedure by administrative authority. Thus, administrative authority does not have the same intense of the autonomy as it has the private-law person.<sup>67</sup>

By strict interpretation of the provision that settlement may be reached only on claims the parties may dispose of, it could be concluded that parties can make a settlement about the legality of the administrative decision. By such interpretation, the purpose of the judicial review protection would be completely denied, as well as the principle of legality as a fundamental principle of the administrative adjudication. No one can dispose by the rights and obligations not entitled to him, and the same applies to administrative authorities. This interpretation leads to the conclusion that settlement can be reached only about the subject in which the parties do not dispose by the rights established by the law. That means that they can conclude the settlement about the subject in which they adjust the rights and obligations in the concrete situation to the legal regulation.<sup>68</sup> However, by using so narrow interpretation, administrative dispute could be resolved by a settlement only about the deadlines, conditions or some added obligation contained in the administrative decision, which falls into discretionary powers of the respondent or about the enforcement method that is not strictly prescribed by the law. Rajko favours wider interpretation, by which administrative dispute can be resolved by the settlement whenever administrative authority decides by discretionary power, if the law permits to resolve administrative procedure by settlement, if administrative authority can annul the contested administrative decision using extraordinary legal remedies or if administrative authority more precisely defines the right or obligation included in the administrative decision without widening the right or obligation. He also considers that concluding settlement has to be allowed if

65 Article 89. of the Law on Administrative Dispute.

66 Dario Đerđa and Marko Šikić, *Komentar Zakona o upravnim sporovima* (Zagreb: Novi informator, 2012.), 315.

67 Alen Rajko, *Sudska nagodba po Zakonu o upravnim sporovima*, approached November 14<sup>th</sup>, 2019, <http://www.iusinfo.hr/Article/Content.aspx?SOPI=CLN20V01D2018B1178>, str. 2.

68 Đerđa and Šikić, *Komentar Zakona o upravnim sporovima*, 315.

the public interest and claimant interest in dispute are in the balance, because of the uncertain result of the administrative dispute and the readiness of the both parties to give in part of their requests.<sup>69</sup>

About the reaching the settlement, in practice it could be expected two problems. Firstly, does the settlement is closed on the claims that the parties may dispose of, administrative court takes care *ex officio*. That means the parties could not dispose with the rights that court finds strictly regulated by the law. On the other side, settlement directly interferes to the administrative decision, in full or partly. Thus, settlement requires annulment of the part of the administrative decision that is included in the settlement. Otherwise, in the same case two different enforceable acts would exist parallel, i.e. administrative decision and court settlement. It is very hard to imagine in practice that the administrative decision would be annulled completely by the settlement. Thus, about the statement of the claim that is not included in the settlement the court has to continue disputing. Unfortunately, there is no information on none one successful settlement by which administrative dispute is resolved in Croatia.<sup>70</sup>

#### **4.4. Efficiency of the non-jurisdictional methods of dispute resolution in Croatia**

Non-jurisdictional methods of dispute resolution become more and more popular method of solving disputes in the modern states. After the year of successful practicing in the private law, some trends appear to introduce non-jurisdictional forms of dispute resolution in the administrative law, also. Because term “alternative” suggests reliance on the out-of-court procedures, it is better to use the term “appropriate” dispute resolution. This term could include also closing the settlement by administrative court as a method of dispute resolution already present in Croatian legislation.

As it could be concluded from the above mentioned, Croatia created sufficient legal framework for alternative and consensual dispute resolution and expressed political and legal will to develop these systems. Some authors, as Maganić, find idea of arbitration and conciliation in the administrative matters more than theoretical question, because it can produce very useful practical outcomes. This way of dealing with certain administrative matters would enable relief of administrative courts and straighten their capacities.<sup>71</sup>

Although the alternative dispute resolution leads solving disputes on the cheaper and more efficient way for the parties, in Croatia, out of the tax law area, it does not

69 For example, in the long last civil servant dispute because of the cancellation of the service in which administrative decision was annulled more than ones, the both parties may be interested in settlement dispute resolution. The interest of the administrative authority is that servant do not insist to be returned to the working place and to avoid an obligation to pay unpaid wages. On the other side, servant is not interested any more to be returned to the working place and asked for a several wages that could might belong to him. Rajko, *Sudska nagodba po Zakonu o upravnim sporovima*, 2-3.

70 Rajko, *Sudska nagodba po Zakonu o upravnim sporovima*, 1-3.

71 Maganić, *Granice arbitrabilnosti u rješavanju upravnih stvari*, 16.

apply in practice or applies very rarely. Unfortunately, citizens are generally used to resolve disputes before a court, instead some other bodies. Kontrec thinks that alternative dispute resolution has a very poor share in the total number of disputes in Croatia. He emphasized that the parties do not use alternative means of disputes resolution. The reasons for this he finds, first and foremost, in the mentality, in the habit of having to resolve the dispute before a court and not before any other alternative body.<sup>72</sup> The reason for that it is possible to find in lack of systematic government policy towards non-jurisdictional dispute resolution in Croatia. Unfortunately, there are no investments in the alternative dispute resolution system. All legislative activities were only related to setting up a framework for these procedures, but without elaborating incentive measures.<sup>73</sup>

With the purpose to make the methods of alternative dispute resolution more frequent and more useful, Croatia should take a look to the foreign legal systems and the practice, and try to find some samples of the good experience that could improve this practice. Poland tried to establish alternative dispute system in the very similar environment like Croatia, but several years ago. Therefore, it is interesting to analyse in which way non-jurisdictional methods of dispute resolution is regulated in Poland, and to find would it be useful for Croatia to take some Polish models of alternative and consensual dispute resolution.

### **5. ALTERNATIVE DISPUTE RESOLUTION IN POLISH ADMINISTRATIVE PROCEDURE AND PROCEDURE BEFORE ADMINISTRATIVE COURTS**

As it was already mentioned, Polish Code of Administrative Procedure, adopted in 1960, like similar acts of the Habsburg Monarchy's successors, regulated only one way of settling the matter, that is conducting by the administrative authority the proceedings aimed at issuing an imperious and unilateral decision.<sup>74</sup> The original text of the Code did not anticipate any possibility of negotiating with the party, agreeing the content of the decision or taking actions in other forms than the decision. As a result of the amendment to the Code of 1980,<sup>75</sup> it was admitted to close settlements in administrative proceedings, but like it is the case in Croatia, they were limited to the relations between the parties to the proceedings. This act did not regulate forms of settling the case alternative to administrative decisions.<sup>76</sup> It was understandable if we consider the socio-political background of adopting this Code. The idea of seeking agreement between the administrative authority and the party was not understood by

72 Damir Kontrec, *Provedba Ocjene okružja uređenja zemljišta (LGAF) u Republici Hrvatskoj, Izvješće o stanju – Modul 8: Rješavanje sporova*, 2015, approached November 16<sup>th</sup>, 2019, [https://demlas.geof.unizg.hr/pluginfile.php/221/mod\\_book/chapter/44/Izvjesce\\_o\\_stanju\\_panel\\_8.pdf](https://demlas.geof.unizg.hr/pluginfile.php/221/mod_book/chapter/44/Izvjesce_o_stanju_panel_8.pdf), 6-7.

73 *Strategija Ministarstva pravosuđa*, 3.

74 Code of Administrative Procedure, Official Journal, no. 30, 1960, it. 168.

75 Code of Administrative Procedure, Official Journal, no. 9, 1980, it. 26.

76 Joanna Wegner-Kowalska, "Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego", *Przegląd Prawa Publicznego*, no. 11 (2016): 54 etc.

the legislator at the time. Despite the democratic changes that took place in Poland after 1989, unlike many other countries, for many years it was not decided to include any of the institution of alternative dispute resolution in the Code.

The model of administrative matters settlement adopted many years ago seemed to be not effective due to the currently observed heterogeneity of public tasks, their privatization, the constantly expanding catalogue of matters in the field of so-called providing administration. In addition, there is a need to take into account various reasons, reconcile many intersecting interests in administrative proceedings. Responsibility for the outcome of proceedings is increasingly taken over by parties to the process.<sup>77</sup>

As part of the nearly 4-year work of the Team for the reform of administrative proceedings appointed by Decision no. 8 of the President of the Supreme Administrative Court of October 10<sup>th</sup>, 2012, there were developed solutions regarding inclusion of provisions on mediation in administrative proceedings and new concept of mediation in the Law on Proceedings before Administrative Courts, providing this procedure with.<sup>78</sup> It should be mentioned that Polish concept of mediation is close to conciliation, as the mediator is not only to encourage the parties to mediate, but also to find out the best solution for the case and submit it to the parties. Apart from mediation, there are no other types of alternative dispute resolution admissible in administrative or administrative court's procedure. It is also necessary to mention, that only administrative decision, administrative settlement and tacit consent are mentioned in the Code of Administrative Procedure as admissible forms the administrative proceedings may result in. There was an attempt to include administrative contract in the Code in 2017, but the government rejected that part of the draft. However, separate provisions regulate that form, so it is not dead in practice of law. Claims derived from such contracts may be raised before the courts of the general jurisdiction.

The possibility of an alternative resolution of the dispute with the administration, appeared in the administrative court reform act of 30 August 2002 – Law on Proceedings before Administrative Courts.<sup>79</sup> The legislator decided on the formula of mediation, which - as it should be emphasized – compared to other domestic procedural laws was then an innovative solution. In civil proceedings, mediation has only been admissible since December 10<sup>th</sup>, 2005.<sup>80</sup> Mediation may be carried out at the request of the complainant or an authority or even if the parties have not requested so. There provisions do not precise the type of cases in which mediation is admissible. There are no legal mediation boundaries as its purpose is to clarify and consider the factual and legal circumstances of the case and to agree by the parties on how to deal with it within the limits of applicable law. Its aim is therefore not only to reach a

77 Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 333, 341.

78 Wegner-Kowalska, *Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego*, 54-68.

79 Law on Proceedings before Administrative Courts, Official Journal, no. 153, 2002, it. 1271.

80 Incorporated into the Polish Civil Procedure Code by art 1(1, 2, 4, 5) of the Law of 28 July 2005 amending the Law - Code of Civil Procedure and some other acts, Official Journal, no. 172, 2005, it. 1438.

settlement, but also to settle facts or understand the legal basis of the case. It depends on the parties and the court whether mediation would be carried out. It is emphasized in the doctrine, that mediation is particularly suitable in cases, in which administrative decision was issued basing on discretion or in which administration had to interpret the vague concept.<sup>81</sup>

As a result of these actions, the authority may repeal or amend the contested decision or perform or take other action in accordance with the circumstances of the case within its jurisdiction and competence. Satisfying for the applicant, the change in the position of the authority, made in accordance with mediation results in discontinuation of the proceedings before administrative court. This occurs as a result of either failure to appeal to the court against a newly issued act, action or dismissal of this complaint. If the parties do not agree on how to settle the case, it is to be examined by the court.<sup>82</sup>

Initially mediation was to be carried out by a designated judge or court referendary.<sup>83</sup> Statistical data prepared by the Jurisprudence Office of the Supreme Administrative Court shows that the mediation initially used to be popular but it is not any more. After the reform of the administrative judiciary, in 2004, 679 mediations were carried out, in which as many as 170 cases were settled. In 2005, 204 mediations were initiated, and 117 cases were dealt with in this way, 36 mediations were initiated in 2008, while only 16 cases were settled in this mode, in 2010 11 mediations were launched, and thus only 2 cases were settled, and in 2015 numbers were 8 and 1.<sup>84</sup>

Numerous barriers were noticed at the stage of starting mediation. It was noticed

- 81 Barbara Adamiak, Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz* (Warszawa: C. H. Beck, 2017, 496. According to art. 115 of the Law on Proceedings before Administrative Courts “§ 1. At the request of the complainant or an authority, lodged before the trial has been designated, mediation proceedings may be carried out in order to clarify and consider the factual and legal circumstances of the case and to determine by the parties the manner of its settlement within the limits of the existing law. § 2. Mediation proceedings may be carried out even if the parties have not requested that such proceedings be instituted.”
- 82 According to art. 117 Law on Proceedings before Administrative Courts: “§ 1. On the basis of arrangement made during the mediation proceedings, the authority shall set aside or modify the challenged act or shall made or take other action in accordance with the circumstances of the case within the limits of its own jurisdiction and competence. § 2. If the parties have made no arrangement as to the manner of settlement of the case, it shall be subject to a hearing by the court.” According to art. 118 of the same Law: “§ 1. A complaint may be lodged against an act issued on the basis of arrangements referred to in Article 117 § 1, to a voivodship administrative court within 30 days from the day of delivery of the act or from the conclusion or taking 90 of an action. The complaint shall be heard by the court jointly with a complaint lodged in the case against the act or action on which mediation proceedings have been conducted. § 2. If no complaint has been lodged against an act or action issued or taken on the basis of arrangements referred to in Article 117 § 1, or the complaint lodged has been dismissed, the court shall discontinue the proceedings in the case on which mediation proceedings have been conducted.”
- 83 Originally art. 116(1) of the Law on Proceedings before Administrative Courts stipulated so.
- 84 *Information on the activities of administrative courts in 2004*, 16, *Information on the activities of administrative courts in 2005*, 16, *Information on the activities of administrative courts in 2008*, 17, *Information on the activities of administrative courts in 2010*, 14, *Information on the activities of administrative courts in 2015*, 20, approached October 30<sup>th</sup>, 2019, <http://www.nsa.gov.pl/sprawozdania-roczne.php>.

that difficulties in reaching a compromise between the authority and the party arose, appearing mainly in the phase of agreeing how to settle the matter. At the same time, it was emphasized that reaching a compromise did not depend solely on the court, but the will of both conflicting parties was necessary. Mediation seemed to show particular potential in cases with a large number of parties or participants, e.g. in construction processes. On the other hand, it was argued that a significant number of actors generate barriers to reach an agreement. From the beginning, mediation was conducted mostly in customs and tax matters and also in other categories of cases, for example construction or in the field of higher education.<sup>85</sup> The cause of low effectiveness of mediation was also joined with the lack of negotiating competence of judges or court referendaries that were not trained enough to carry such procedure.<sup>86</sup>

The amended in 2017 art. 116(2 and 3) of the Law on Proceedings before Administrative Courts stipulate that the mediator in administrative court proceedings may no longer be a judge or court referendary, but an entity with appropriate knowledge and experience in conducting mediation in a given type of cases. In formal terms, as in administrative proceedings, it can be “a natural person who has full legal capacity and enjoys full public rights, in particular a mediator entered on the list of permanent mediators or on the list of institutions and persons authorized to conduct mediation proceedings, kept by the president of the regional court”. The parties to the proceedings should indicate the mediator, and if they do not make such a choice, the court will do it for them.<sup>87</sup> The mediator is to be bound by secrets of conduct and be characterized by impartiality. The regulation, guarantees the parties safety of information submitted in good faith and protection of mutual trust shown in the course of mediation.<sup>88</sup> Pursuant to this provision, it is not possible in the course of proceedings to rely on statements made in mediation proceedings, unless it concerns the findings contained in the mediation protocol. The protocol shall in particular contain the arrangements for settling the case.<sup>89</sup> The costs of mediation will be covered by the parties. After the amendment came into force, there were six mediations conducted in the administrative courts.<sup>90</sup> There is not enough data to judge whether the abovementioned amendment would increase the number of mediation in the proceedings before administrative courts.

The Polish concept of mediation could be compared to the Croatian idea of conciliation because of the role of the mediator who is to help parties reach the settlement. This idea is foreseen not only in the administrative procedure but also in the procedure before administrative courts. This kind of mediation is the one chosen by the Polish legislative to be most suitable in the court’s proceeding. Unlike Croatian

85 *Information on the activities of administrative courts in 2006*, 18, approached October 30<sup>th</sup>, 2019, <http://www.nsa.gov.pl/sprawozdania-roczne.php>.

86 *Information on the activities of administrative courts in 2004*, 19, approached October 30<sup>th</sup>, 2019, <http://www.nsa.gov.pl/sprawozdania-roczne.php>.

87 Amended art. 116(2) of the Law on Proceedings before Administrative Courts.

88 Art. 116e(1) of the Law on Proceedings before Administrative Courts.

89 Art. 116e(2/4) of the Law on Proceedings before Administrative Courts.

90 *Information on the activities of administrative courts in 2018*, 17, approached October 30<sup>th</sup>, 2019, <http://www.nsa.gov.pl/sprawozdania-roczne.php>.

law, mediation in the Polish procedure before administrative courts is regulated in details. Perhaps it could be also a pattern for the Croatian court's procedure, especially that it used to work in practice.

## 6. CONCLUSION

The analyses of the two of the successors of the Austrian model of administrative law proved that the tradition of the jurisdictional concept of procedure is still very strong. Although Croatia introduced few models of non-jurisdictional form of dispute resolution in administrative law, following streams of the European Union and the Council of Europe, the most of them are just "dead letter on the paper" and do not show expected results in the practice. It is especially the case with the conciliation in the concession and public-private partnership areas. Court settlement in the administrative dispute disappointed also, because this institute is unrecognized by the claimant and respondent. Promising influence could be found only in the tax law area, in which traditional relationship between tax authorities and taxpayers is changing, strengthening alternative and consensual dispute resolution methods in administrative law.

It is also obvious that Croatia cannot simply relay to the Polish experiences, although Poland in similar administrative environment had to have more experience with the alternative dispute resolution. Polish law included only one model of the non-jurisdictional forms of dispute resolution in its legal system, i.e. mediation. This institute is regulated in detail in Polish law, and could be a target value for Croatian way of regulation also. However, its practical weakens effect in this moment is persuasiveness. Recent reform does not give still sufficient data for concluding should it have to be taken over on such way in the Croatian legal system.

Introducing new methods of dealing with an administrative case requires not only legislative efforts. In legal doctrine it is pointed out that it could be useful to make radical shift in judicial culture and in use of some soft techniques of convincing administration and administrative judges to switch into alternative and consensual dispute resolution. Perhaps a professional training should be considered here, in order to teach the lawyers how and when to use arbitration, mediation, conciliation or other methods of alternative dispute resolution.<sup>91</sup>

The judge still remains an authority figure in the parties' perception, and they go to the courthouse expecting an embodiment of wisdom. For this reason, judicial mediation is a good framework wherein principles of problem-solving justice should be implemented. The mediation conducted in a courthouse combines some of the legal and moral gravitas of adjudication with the flexibility and adaptability of alternative dispute resolution. Parties require a judge's authority to gain respect for each other or to find a more constructive manner to interact with each other, but the judge does not lose his or her authority during the conciliation phase. In legal doctrine is emphasized

<sup>91</sup> See Romualdi, *Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context*, 61 and Colombo, *Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems*, 71.

that request or proposal made from a judge has a much greater impact on parties than a similar request from a private mediator. However, judicial mediation requires a reconceptualisation of the role of the judges in dispensing justice and he or she must be trained in interest-based negotiation. Consequently, education in the school of law has to be reconsidered in order to have judges with communication abilities, empathy and an understanding of psychological dynamics to focus parties on their needs and interests underlying their positions.<sup>92</sup>

At the end, it could be concluded that legislative efforts – as it is proved in Croatia and Poland – cannot reach the desired effect without putting strong attention to the social environment, legal culture and the state of mind of the citizens. Therefore, implementation of the law, and the alternative dispute resolution methods, has not to be based only at the legal rule, but also on the crating prerequisites in the society, the rule to be willingly accepted.

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Sažetak

## **IZVANSUDSKI OBLICI RJEŠAVANJA UPRAVNIH STVARI: HRVATSKA I POLJSKA ISKUSTVA**

Cilj je ovoga rada ocijeniti primjenjivost postojećih mehanizama alternativnog rješavanja sporova u upravnom pravu i dati neke prijedloge za njihovo unaprjeđenje. U radu se analizira koncept alternativnog i konsensualnog rješavanja sporova. Zatim se izlažu prednosti i nedostaci izvansudskih oblika rješavanja upravnih stvari. Analiziraju se pozitivni propisi u Hrvatskoj, koji uređuju primjenu izvansudskih oblika rješavanja sporova. Razmatraju se metode izvansudskog rješavanja sporova u Poljskoj, koja je u vrlo sličnom pravnom okruženju, nekoliko godina ranije nastojala uvesti ove oblike rješavanja sporova u upravnom pravu. Konačno, u zaključku autori izlažu stav o primjenjivosti izvansudskih oblika rješavanja sporova u hrvatskom upravnom pravu i predlažu neke korake kako bi ih unaprijedili.

***Ključne riječi:** alternativno rješavanje sporova; mirenje; nagodba; upravno pravo; Hrvatska; Poljska.*

Zusammenfassung

## **AUSSERGERICHTLICHE FORMEN DER BEILEGUNG VON VERWALTUNGSSACHEN: KROATISCHE UND POLNISCHE ERFAHRUNGEN**

Ziel dieses Beitrags ist es, die vorhandenen alternativen Streitbeilegungsmethoden im Verwaltungsrecht zu untersuchen und Vorschläge für ihre Verbesserung zu geben. Zuerst analysiert man im Beitrag den Begriff der alternativen und einvernehmlichen Streitbeilegung. Danach erörtert man die Vor- und Nachteile von außergerichtlichen Formen der Beilegung von Verwaltungssachen. Demnach stellt man die aktuelle Regelung, die sich auf diese Methoden in Kroatien bezieht, dar. Ebenfalls bespricht man die Erfahrungen über alternative Streitbeilegungsmethoden in Polen, weil dort vor einigen Jahren ein ähnliches System wie in Kroatien geschaffen wurde. Abschließend stellen die Autoren ihre Stellungen über die Anwendbarkeit von

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außergerichtlichen Formen der Streitbeilegung im kroatischen Verwaltungsrecht dar und geben Vorschläge für deren Verbesserung.

**Schlüsselwörter:** *alternative Streitbeilegung; Mediation; Vergleich; Verwaltungsrecht; Kroatien; Polen.*

Riassunto

## **FORME NON GIUDIZIALI DI RISOLUZIONE NELLA MATERIA AMMINISTRATIVA: ESPERIENZA CROATA E POLACCA**

L'obiettivo di questo lavoro è di ricercare l'applicabilità dei metodi esistenti della risoluzione alternativa delle controversie nel diritto amministrativo e di fornire alcune proposte per il miglioramento di esse. *In primis*, in questo lavoro è stato analizzato il concetto della risoluzione alternativa e consensuale delle controversie nel diritto amministrativo. Dopodiché, sono stati sottolineati i vantaggi e gli svantaggi delle forme non giudiziali di disposizioni nella materia amministrativa. Poi, è stata presentata la regolazione contemporanea dedicata a questi metodi in Croazia. L'esperienza dei metodi di risoluzione alternativa delle controversie in Polonia è anche stata discussa, perché la Polonia ha tentato di stabilire questo sistema in un ambiente molto simile a quello croato, ma parecchi anni fa. Infine, nella conclusione gli autori presentano la loro propensione all'applicabilità delle forme non giudiziali della risoluzione delle controversie nel diritto amministrativo croato e propongono alcuni passi per il miglioramento di esse.

**Parole chiave:** *risoluzione alternativa delle controversie; mediazione; accordo; diritto amministrativo; Croazia; Polonia.*

