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Preliminary negotiation of the dispute as a vision of effective judicial proceedings

Veronika Václavová

Abstract

The presented article discusses the new institution of the recoded civil process, namely the institution of preliminary discussion of the dispute, the purpose of which is to conclude a settlement and its regulation in Act no. 160/2015 Coll. Slovak Republic, The Civil Procedure Code, as amended. The aim of the contribution is to point out the potential of the given institute and its validity in the Slovak legal order, while the author emphasizes the need for its greater use in judicial practice, while based on her own experience, theoretical starting points and codes, she will evaluate the importance of introducing the given institute into the Slovak legal order. The author is also of the opinion that through the preliminary discussion of the dispute, the court proceedings can be made more efficient since even though the purpose of the given institute is primarily to conclude a settlement, its goal is also to speed up the dispute proceedings and ensure its procedural economy.

Keywords: civil process, preliminary discussion of the dispute, optionality, adversary, economy, efficiency, default judgment, settlement, res judicata

1. Introduction

The article discusses the institution of preliminary discussion of the dispute, the legal regulation of which is found in the second part of the Civil Procedure Code. Its entire wording is comprehensively defined in the provisions of § 168 to § 172. The Slovak legal system in question before the introduction of Act no. 160/2015 Coll. He did not know the civil dispute procedure. It is thus one of the new institutes of the recoded civil process.

From the provisions of § 168 par. 1 of Act no. 160/2015 Coll. The Civil Dispute Procedure as amended (hereinafter referred to as the "Civil Dispute Procedure") indicates that the preliminary hearing of the dispute precedes (according to the law only optional) the hearing itself in a specific civil disSuppose it is possible and at the same time expedient. In that case, time expedient, it should prevent the prolongation of the civil process and make the resolution of the dispute between the parties more efficient already within the preliminary discussion of the dispute. The contribution provides a view of the analyzed institute, and the reason for its inclusion in the Slovak legal order, while at the same time pointing out the need for its use in practice and the related justification, respectively, the unfoundedness of the optionality of the given institute. It also compares the institution of preliminary discussion of the dispute with the former institution of conciliation proceedings. Subsequently, it approximates the economy of proceedings and adversariality; in the sense of adversariality, it defines a default judgment.

Finally, he talks about the ideal of preliminary discussion of the dispute, which is the settlement of the dispute by reconciliation.

2. The reason for the incorporation of the institute of preliminary discussion of the dispute into the Slovak legal order

Even though Act No. 460/1992 Coll. The Constitution of the Slovak Republic (hereinafter referred to as the " Constitution of the Slovak Republic ") in Art. 48 par. 2 guarantees everyone, among other things, the right to have their case heard without unnecessary delays, as stated by L öwy A . and Mitterpachová J., the civil process is constantly troubled by the length of the court proceedings, especially with reference to outstanding cases and the burden on the appeal courts **[1]**, which cannot be disagreed with. Also, in terms of Art. 17 of the Code of Civil Procedure, the court proceeds in such a way that the matter is discussed and decided as quickly as possible, while preventing unnecessary delays in the proceedings, at the same time acting economically and without unnecessary and disproportionate burden on the parties to the dispute and other persons.

Not only national legal regulations oblige courts to act without unnecessary delays, but also transnational ones, which results from Constitutional Act no. 23/1991 Coll. which states the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a constitutional law of the Federal Assembly of the Czech and Slovak Federative Republic, according to which: *"everyone has the right to have his case heard publicly, without unnecessary delays and in his presence, and to be able to comment on all evidence presented ."* **[2]**. Notification no. 209/1992 Coll. of the Federal Ministry of Foreign Affairs on the negotiation of the Convention on the Protection of Human Rights and Fundamental Freedoms and the Protocols following this Convention, according to which: "*everyone has the right to have his case heard fairly, publicly and within a reasonable time by an independent and impartial court established by law, which decide on his civil rights or obligations."* **[3]**. The right to discuss the matter within a reasonable period, or without delays is thus considerably relevant, and it is necessary to pay attention to this fact.

In many proceedings, however, it happens that the court does not act on the matter for a long time, and this inactivity is most often justified by an excessive number of cases or a lack of judges, which we understandably do not dispute. However, the Constitutional Court of the Slovak Republic stated in its decision that the deficiencies in the organization of the procedural actions of the court cannot be justified by the insufficient staffing of the necessary number of judges **[4]**. In another finding, the Constitutional Court of the Slovak Republic stated that when deciding whether there really were unnecessary delays in court proceedings, it considers three basic criteria, which are the complexity of the case, the behavior of the party to the proceedings and the court's procedure **[5]**.

In view of the above, it was necessary to resolve the situation in question within the framework of the civil process recodification. Thus, the introduction of the institution of preliminary discussion of the dispute began to be negotiated, and finally, this institution was also implemented from the Slovak legal order. It should be added that the inspiration for its establishment was also foreign legal systems and foreign practice. Baricová J., and Števček M. state that the foreign experience with the legal regulation of the preliminary discussion of the dispute with the specific application of the given institute significantly helped to ensure the procedural economy of the dispute proceedings **[6]**. It should be added that by the principle of process economy, we understand the principle of speed and economy of action.

3. Institute for preliminary discussion of the dispute and institute for conciliation

It might seem that before the introduction of the Civil Procedure Code, the legal system of the Slovak Republic did not know a similar institute and preliminary discussion of the dispute, or its purpose, which is mainly the pursuit of reconciliation, is a complete novelty in Slovak law.

The predecessor of today's Civil Dispute Procedure was Act No. 99/1963 Coll. Civil Procedure Code, as amended (hereinafter referred to as " Civil Procedure Code "). Even if the wording of the institution of preliminary hearing of the dispute is not found in the Code of Civil Procedure, we would draw attention to its provisions § 67 to § 69, which contain the regulation of conciliation proceedings.

The institution of the conciliation procedure consisted in the contentious relationship, the nature of which allows for it, to be resolved in a timely manner through a court-enforceable conciliation, thereby avoiding a proper proceeding on the matter. Provision § 69 of the Code of Civil Procedure exhaustively states: *"the purpose of conciliation proceedings is to conclude peace."* **[7]**. Similarly, the purpose of the preliminary discussion of the dispute is to conclude a settlement (if possible and expedient), in such a way that the court is offered the possibility to speed up the proceedings.

It should be added that the institution of conciliation proceedings in its original version was not incorporated into the Civil Procedure Code, but was significantly recoded and subsequently transformed into the provision of § 148 of the Civil Procedure Code governing conciliation. As follows from the provisions of § 170 par. 2 of the Code of Civil Disputes, the court will try to resolve the dispute by amicable settlement, while based on the provision of § 148, the settlement will not be approved in a situation where it would be in conflict with generally binding legal regulations. However, we believe that the institution of preliminary discussion of the dispute can also be considered as a kind of extension and, of course, a related modification of the institution of conciliation, despite some differences between the individual institutions. The institution of preliminary discussion of the dispute is much more complex, as, in the case of preliminary discussion of the dispute in a situation where the dispute is not resolved by reconciliation or mediation, the court will order a classic hearing. The difference between the preliminary hearing of the dispute and the conciliation procedure is also noticeable in the fact that the purpose of the conciliation procedure was not to determine the fulfilment of procedural conditions. In contrast, in the preliminary hearing of the dispute, the court examines the fulfilment of these conditions. At the same time, during the conciliation procedure, the possibility of forcing the presence of the participants and their cooperation was excluded, which is the opposite of today's institute of preliminary discussion of the dispute.

4 The validity of the optional preliminary discussion of the dispute

The institution of preliminary discussion of the dispute is characterized by its optional nature, which follows from the wording of § 168 par. 1 of the Code of Civil Procedure, according to which the court orders a preliminary hearing of the dispute before the first hearing unless it decides otherwise. On the one hand, the purpose of the institute is to clarify the subject of the dispute. Still, on the other hand, it is not a mandatory institute, so it is up to the court to decide whether to order a preliminary discussion of the dispute before the first hearing. Despite the fact that the optionality of the preliminary discussion of the dispute is presumed by law, the legislator assumed before its legislative definition that its use would be the rule rather than the exception.

As stated by Judiak P., the manifestation of optionality is that the judge is entitled to order a straight hearing in accordance with Section 177 of the Code of Civil Procedure, which in some cases does not lead to the speed and efficiency of the proceedings **[8]**. To this end, we refer to the decision of the Regional Court in Trnava, which stated that this is always an optional act of the court, and in the case of any type of procedure according to the Civil Procedure Code, there is no obligation imposed by law to preliminarily discuss the dispute. However, according to him, it is a relatively practical institute, which can be used to make the procedural procedure leading to the decision that ends the proceedings in a fundamental way more efficient and simpler. He adds that its purpose is aimed both at eliminating possible deficiencies in relation to the procedural conditions and amicable resolution of the dispute and at basic procedural actions that are directly related to the discussion of the case and decisions on the merits **[9]**.

According to Baricová and Števček, if the court comes to the opinion that a preliminary discussion of the dispute can bring about a faster and more efficient resolution of the dispute in the process, it will order it on the spot **[10]**. It should be added that due to the great impact that the preliminary hearing of the dispute can have on the overall course and decision of the court, the approach of judges to this institution is crucial, even from the point of view of the further development of judicial practice. At the same time, the legislator expressed his will for the courts to apply this institution as often as possible. So far, however, the institute of preliminary discussion of the dispute has not been used in practice to the expected extent. As part of the lege considerations ferenda, we would therefore recommend to the

legislator the introduction of a mandatory regulation of the preliminary discussion of the dispute in cases established by law, i.e., especially in cases where a settlement can be expected between the parties to the dispute. It is not, for example, a property settlement, when often neither party is interested in waiving their demands. In other cases, the optional nature of the given institute would be maintained. More significant use of the preliminary discussion of the dispute in application practice would be beneficial for possible proposals for legislative changes that could eliminate its shortcomings.

5 Contradiction vs. economy of action

Preliminary discussion of the dispute is to reflect the principle of the speed of proceedings and has the prerequisites for at least partial elimination of future potential reasons leading to delays in the proceedings. Actions that can be used to prevent delays in the proceedings include, for example, the examination of the fulfilment of procedural conditions, an attempt at reconciliation, or a preliminary legal assessment of the matter. In connection with the principle of the speed of proceedings, we point to the statistical data published by the Ministry of Justice of the Slovak Republic, which shows that the average length of proceedings in civil law cases in the Slovak Republic in 2017 was approximately 21 months **[11]**.

As can be seen from the Explanatory Report to the government's draft Civil Procedure Law, the legal regulation of the preliminary hearing of the dispute is based on the consistent application of the principle of procedural due diligence of the parties, which, as A. Podivinská **[12]** claims, causes a natural limitation of the court's evidentiary initiative and also its transfer almost without exception to the parties to the dispute **[13]**. Since the task of the court is not to take evidence, and this obligation is on the part of the plaintiff and the defendant, the adversarial nature of the proceedings is applied. According to the resolution of the Supreme Court of the Slovak Republic, in an adversarial process, the party to the dispute should be the bearer of the procedural initiative. He further adds that the plaintiff is particularly endowed with procedural due diligence, and thus responsible for the course of the dispute **[14]**. It follows from the ruling of the Constitutional Court of the Slovak Republic that the essence of adversarial justice and the related equality of arms is that all participants in the proceedings have a real opportunity to use their procedural rights to present arguments and also the opportunity to respond to the opposing party's counterarguments, which is especially true in litigation in which the plaintiff and the defendant face each other and where the adversarial nature of the proceedings is applied in its entirety **[15]**.

However, within the framework of the preliminary discussion of the dispute, the economy of the proceedings is also applied (and the related speed of the proceedings, as these are significantly related to each other, both of which involve preserving the procedural economy of the proceedings, whether from a time or financial point of view), which, as Ficová S. claims, expresses the requirement that the provision of protection of rights and legitimate interests in civil proceedings is not associated with disproportionate material expenses of the court as a state body, but especially of the participants" **[16]**. Mazák J. also states that the obligation to act and make decisions economically is implicit, as it is impossible to imagine the proceedings well enough, which would be governed by a principle other than the principle of economy, for example, the principle of non-economics **[17]**. As it follows from the above that the economy of the proceedings is intended to protect mainly the participants in the proceedings, the question arises as to whether the adversarial nature of the proceedings does not hinder its economy, as it burdens the parties to the dispute to present evidence (for example, an expert opinion).

On the other hand, however, we believe that the use of both principles is justified at the preliminary hearing of the dispute, as long as the party informs the court at the preliminary hearing of the dispute that it can prepare an expert opinion. Still, already at that time the court has enough presented relevant evidence, which it will mark as undisputed, the party to the dispute can thereby avoid additional costs, the expenditure of which would be unnecessary in the course of the proceedings.

5.1 Default judgment as a means of speeding up proceedings

"In adversarial proceedings, the procedural responsibility for conducting the dispute rests with the disputing parties. Therefore, if the plaintiff does not respect the obligation imposed by the court (in this case, it is the obligation to participate in the ordered hearing), the form of the decision corresponds to

this," **[18]** the decision of the Supreme Court of the Slovak Republic states. In such a case, the court is authorized to decide in the form of a default judgment, which, according to another resolution of the Supreme Court of the Slovak Republic, represents a sanction for the party to the dispute who does not show interest in the dispute in the proceedings and causes unnecessary delays **[19]**.

A default judgment is a form of abbreviated decision, which can be considered as one of the means to streamline and speed up court proceedings. According to the decision of the Constitutional Court of the Czech Republic, default judgments are based on the fact that the party in the proceedings does not defend its rights, despite the fact that it had the opportunity to do so and despite the fact that it is an adversarial dispute governed by the principle of negotiation, in which the party has in one's own interest to contribute to the clarification of the facts in the event that the claims of the other party are false, incomplete or otherwise deviate from reality **[20]**. However, in order for the court to be authorized to make a decision in this form, all conditions established by law must be met. Among them is compliance with the procedure in accordance with the provisions of § 167 of the Code of Civil Procedure, i.e. hand-delivering the summons, which, as follows from the decision of the Supreme Court of the Slovak Republic, means that the summons is delivered in such a way that the addressee confirms with his signature on the document delivery confirmation acceptance of default **[21]**, and timely summoning of the disputing party and at the same time the fact that the disputing party does not appear without a serious reason. According to the decision of the Constitutional Court of the Slovak Republic, the law does not specify the term "serious reason" and leaves this question to the discretion of the court in terms of assessing the specific situation. It is necessary to add that the prerequisite for a decision in the form of a default judgment is also the failure to fulfil the conditions for stopping the proceedings, rejecting the claim or rejecting the claim.

The possibility of making a decision in the form of a default judgment can really speed up the proceedings and help to eliminate or prevent the occurrence of unnecessary delays (and in practice, this actually happens), however, it is necessary to thoroughly examine the reasons why the party to the dispute does not appear **[22]**. It is so important that the party to the dispute informs the court in advance and apologizes, of course, if it is possible, that he cannot appear for objective reasons, which again helps in the speed and, at the same time, the economy of the proceedings, as it not only relieves the other party of the dispute, so that delivered.

6 An ideal in the form of resolving a dispute amicably

The most ideal way to resolve the matter within the framework of the preliminary discussion of the dispute is to settle the dispute amicably, while the provisions of § 170 of the Code of Civil Procedure indicate that, as far as it is expedient and possible, the court will try to resolve the dispute amicably, or recommend the parties to the dispute to try to settle the dispute through mediation. Also, Art. 7 of the Code of Civil Procedure shows that leading the parties to an amicable settlement of the dispute is one of the basic principles of court proceedings, while Horváth E. and Andrášiová A. add that it should serve to clarify the subject of the dispute and also to discuss procedural options, including the possibility of ending the dispute amicably **[23]**. The result of the preliminary discussion of the dispute should thus be the clarification of the subject of the dispute, issues of evidentiary law, and at the same time, the judge's legal assessment. However, this is a kind of ideal that is not achievable under all circumstances, as it is often not requested by the parties to the dispute (for example, in the case of property disputes), therefore the preliminary discussion of the dispute often does not end in reconciliation. However, suppose no settlement was reached (and the court did not issue a default judgment, or the plaintiff did not use the institution of withdrawal of the claim in accordance with the provisions of § 144 et seq . of the Code of Civil Procedure). In that case, he is obliged to prepare documents for the hearing, and it is not excluded that the hearing follows on from a preliminary hearing dispute.

7 Conclusion

The Institute of temporary dispute resolution is still a relatively new institution of the Slovak civil process, which is currently not receiving the expected attention, which is not in favour of its application in practice.

As part of the preliminary discussion of the dispute, the court is obliged to inform the parties of the dispute with its opinion on the matter under discussion. Even if it is only a preliminary opinion, the court shows the parties the path that its opinions can take. It is, therefore, possible that, based on them, the plaintiff decides to end the dispute even before the hearing. The court is obliged to express its opinion at the beginning. In contrast, the court's legal opinion can significantly help the parties evaluate the procedural risk and possible success or failure. However, this does not rule out that the party against which the court expressed a legal opinion during the preliminary hearing will win the dispute.

We are of the opinion that the institute of preliminary hearing has the potential to speed up court proceedings and, subsequently, limit delays in court proceedings to the greatest possible extent. Despite the fact that Horváth and Andrášiová claim that: *"the legislator expects that its use will be the rule rather than the exception, as it expects it to streamline and speed up concentrated litigation,"***[24]** even though a few years have already passed since the adoption of the Civil Litigation Code, given the institute is still not being used to the extent that was expected and its full potential cannot be manifested.

However, it is necessary to add that the applicability of the obstacle res must be considered in the decision-making process during the preliminary discussion of the dispute indicate, or obstacles to a validly decided case, which excludes the court from discussing again the same case in which it was legally decided. According to the resolution of the Supreme Court of the Slovak Republic, res indicates procedural conditions, and its existence leads to its termination at every stage of the proceedings without further ado **[25]**. Pursuant to the provision of § 230 of the Code of Civil Procedure, the same claim, which has already been legally decided, can be considered the same thing if it is based on the same legal reason arising from the same factual situation.

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Contact Address:

*__Veronika Václavová__, Matej Bel University, Faculty of law, Komenského 20, 974 01 Banská Bystrica.
Tel.: +421 48 446 3111
E-mail: veronika.vaclavova@umb.sk
ORCID: https://orcid.org/0000-0001-6896-4162

Corresponding author: *

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