LEGAL PRINCIPLES OF DISPUTE RESOLUTION WITH THE PARTICIPATION OF A NOTARY AS ONE OF THE DIRECTIONS OF MEDIATION

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УДК 342.9.03:351.95(043.3)

DOI: https://doi.org/10.71404/EP.2025.2.61

The article describes the legal principles of dispute resolution with the participation of a notary as one of the areas of mediation. The procedure for conciliation with the participation of a notary involves a certain sequence. It is proven that conciliation with the participation of a notary should consist of certain stages: First, there is a preparatory stage for the parties to the agreement. Here, the notary analyzes the documents provided to him, if necessary, formulates requests (appeals) to the relevant authorities, officials and other parties involved, assesses the legal validity and completeness of the documents received, determines the circle of participants, provides preliminary explanations regarding the possibilities of reconciliation and receives consent to conduct the conciliation procedure from all participants. According to the current version of Article 42 of the Law of Ukraine "On Notaries", a notary is authorized to request additional data or documents from individuals and legal entities, send documents for examination, and also check the absence of objections from interested parties. The clarification of the true intentions of each participant is carried out by establishing a common understanding by the notary of the parties of the meaning, conditions of future legal relations and their legal consequences for both parties. In this case, the determination of the true intentions of one of the parties can be carried out by the notary in the absence of the other party in order to avoid third-party influence on its expression of will.

We emphasize that it is at this stage that the notary can make a decision on the impossibility of mediation, taking into account, in particular, the lack of intention of the parties or one of them to reach an agreement. In this case, the notary explains the likelihood of refusal to perform a notarial act.

Then, at the second stage, the notary organizes the reconciliation process of the parties. At this stage, the notary presents the positions of the parties, together with the participants determines issues for discussion, development of joint proposals and their coordination.

The final stage (third) is the performance of a notarial act or its refusal. In particular, if the participants have not reached an agreement on key issues or terms of the transaction, as well as if the performance of such an act contradicts the legislation of Ukraine; the information and documents necessary for the performance of a notarial act have not been provided; there are doubts about the understanding by an individual, a participant, of the meaning, content, legal consequences of his actions, or the person acts under the influence of coercion, the notary refuses to notarize the results of the reconciliation process, that is, to perform a notarial act.

Keywords: administrative proceedings, administrative procedures, foreign experience, dispute resolution, mediation, notary, areas of improvement, dispute, legal principles.

It is worth noting that a significant part of the Latin notary countries formalize the notarial powers of the notary in a separate agreement on the conduct of mediation or a settlement agreement concluded within the framework of the mediation. For example, the competence to conduct mediation by notaries of Georgia is regulated by Article 38 of the Law of Georgia

"On Notaries", according to which during mediation with the participation of the notary and in the event of reaching an agreement between the parties, the notary draws up an act of settlement and notarizes it [1].

In the event of failure to perform such an agreement, the notary has the right to make an executive inscription on it, which is an executive document. The notary performs these actions on issues of family disputes (except for issues of adoption, deprivation of parental rights), inheritance, good neighborliness, as well as others, except for those for which the legislation of Georgia provides for a special procedure for conducting mediation. At the same time, the legislation of Georgia does not provide for a unified form or recommendations regarding the content of the act of amicable settlement, therefore the notary draws it up independently, taking into account the explanations of the parties.

Ukrainian legislation does not establish similar requirements for the conduct of reconciliation of the parties with the participation of a notary. At the same time, we believe that the current version of the Law of Ukraine "On Notaries" does not prohibit a notary from conducting such a type of proceedings, and a contract certified by a notary, in the event of nonfulfillment of its conditions relating to property obligations, is the basis for making an executive inscription on it.

The development of a democratic system, the implementation of the idea of legal and economic freedom, undoubtedly, leads to the complication of relations between participants in civil circulation, which, in turn, provokes an increase in the number of disputes and conflicts between them. That is, the procedural and structural complexities of modern society, the expansion of human interests and needs make legal disputes, legal conflicts a natural element of the dynamics of social processes and an important means of regulating relationships.

The universal form of settlement and resolution of disputes is undoubtedly the court, which is currently overburdened, which, in turn, affects the quality and terms of protection of rights and interests and can be perceived as a decrease in the effectiveness of legal settlement and resolution of conflicts in various spheres of social life. This necessitates the creation and development of other forms and technologies of out-of-court settlement of disputes.

The idea of out-of-court settlement of disputes has existed for a long time and is associated with the cultural traditions of common and continental law countries. It is worth noting that it was for the countries of continental law that the formation of a system of dispute prevention was important. In particular, in France, the idea of preventive justice was implemented through the creation of institutions of notary, justice of the peace, which are entrusted with the duty of preventing legal disputes and their peaceful settlement [7].

In Europe, countries of continental law, the need to develop extrajudicial forms of dispute resolution is due to the need to find ways to prevent disputes, develop conciliation procedures, which, in turn, is considered an effective mechanism for implementing the principle of accessibility of justice.

Unlike most countries of continental law, Ukraine is only now beginning the process of forming a system of extrajudicial dispute resolution and has not yet considered the institution of notary as a subject of reconciliation of the parties at the legislative level.

In turn, "mediation" comes from the Latin "teDizh", "teiiiit" and means "in the middle", that is, it involves a certain procedure with the participation of a disinterested person who is between the parties who intend to reach certain agreements.

In our opinion, it would be correct to define mediation as a form of dispute resolution, that is, as a procedure regulated by the norms of law aimed at achieving consensus by the parties.

In addition, questions arise regarding the use of the term "dispute resolution" by the authors of the draft law.

According to Article 1 of the Civil Procedure Code of Ukraine, the task of civil proceedings is a fair, impartial and timely consideration and resolution of civil cases. In this case, the goal is defined as the protection of violated, unrecognized, disputed rights, freedoms or interests of individuals, rights and interests of legal entities and interests of the state [2].

In exercising their constitutional right, enshrined in Article 55 of the Constitution

of Ukraine, everyone has the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law. Therefore, every person has the right to protect their, in particular, civil rights in the event of their violation, non-recognition or challenge. The result of protection should be at least the restoration, recognition of civil rights by others, in particular by the counterparty of the subject of the claim [8].

At the same time, today, given the priority of contractual development of legal relations, one should not exclude partial restoration or recognition of only a certain amount of rights, which satisfies both parties and is a certain compromise between them. Therefore, in the event that the parties are ready to compromise regarding their own claims to each other, one should take into account the possibility of settling this dispute [9].

Dispute resolution involves a complex, multi-stage procedure aimed at eliminating the source of the parties' conflict, full or partial satisfaction of the rights and interests of the counterparties in conditions where the parties not only do not contribute to each other in the successful resolution of the subject of the dispute, but, on the contrary, make every effort to prolong the conflict or resolve it exclusively in their own interests. In addition, dispute resolution by court, in particular, provides for a mechanism for the forced execution of a court decision in case of refusal to voluntarily execute it. In turn, dispute resolution involves active actions by the parties aimed at reaching agreements on disputed issues, while such reconciliation must be voluntary. Dispute resolution is a certain compromise achieved by the parties in order to prevent greater losses (emotional, material, human, time, etc.) as a result of prolonging the conflict. Its accelerated voluntary implementation is also envisaged (of course, we do not take into account the pretended reconciliation with the aim of prolonging time, abuse of law, etc.). Ignoring the consequences of unresolved conflicts leads to the fact that the parties are dealing not only with a dispute between themselves, but also with the consequences of its non-settlement, which can be much more damaging than the dispute itself [10].

Thus, the settlement of a dispute between the parties is possible both through direct negotiations between the parties and through negotiations with the participation of a third party (person), a legally uninterested participant.

In view of the above, it is proposed to define mediation as an alternative (out-of-court) form of dispute resolution, which involves proceedings aimed at resolving a dispute between two or more parties with the help of a professional disinterested person, whose activities are aimed at achieving agreements between the parties on all essential terms of existing or future legal relations [6].

We consider it necessary to also emphasize that a professional person, whose activities are aimed at directing the intentions of the parties precisely to achieving agreements, a compromise on all essential terms of legal relations, can be either a mediator, a judge or a notary.

Based on the duties of a notary, his activities are aimed at assisting citizens, enterprises, institutions and organizations in exercising their rights and protecting legitimate interests, explaining rights and obligations, warning about the consequences of notarial actions performed so that legal ignorance cannot be used to their detriment [3].

Notary public is a system of bodies and officials who are obliged to certify rights, as well as facts that have legal significance, and to perform other notarial actions in order to provide them with legal certainty [3].

Based on the content of the definition, the main task of notary public is to assist individuals in exercising their subjective rights and providing legal certainty to transactions.

Notary as a system of preventive jurisdiction ensures the performance of public functions that guarantee legal security, and therefore, must meet the modern demands of participants in civil proceedings interested in the stability and indisputability of legal relations [11].

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Most modern countries in the world today are pursuing a strategy of diversification of the

legal profession, due to which representatives of one legal specialty, such as notaries, judges, lawyers, expand the sphere of their professional competence, in particular, mastering new areas of their activity due to not only the main, legally oriented, but also those that are related, that is, those that help to implement the main ones [5].

The activities of a notary consist of a complex of measures, in particular: providing legal assistance, collecting documents necessary for performing a notarial act, checking documents and a draft transaction for their compliance with the legislation, etc. The list of these measures can safely include actions related to the coordination of all terms of the transaction with the parties, and if necessary, ensuring the reconciliation of the parties. The notary's assistance in the reconciliation of the parties is possible by explaining the provisions of the current legislation regarding a specific situation, the legal consequences of concluding a transaction on the terms proposed by the parties, one of the parties, proposals for a variant of resolving the disputed points, etc [12].

The implementation of mediation between the parties by a notary is realistic now, during the development of a national strategy for the implementation of alternative methods of conflict resolution before and outside of court proceedings. The procedure for reconciliation with the participation of a notary is divided into three stages. The completion of such a procedure is the performance of a notarial act or its refusal. If the obligations of a property nature assumed by the parties in the process of reconciliation with the participation of a notary are not fulfilled, the latter may issue an executive inscription on such an obligation.

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ПРАВОВІ ЗАСАДИ ВРЕГУЛЮВАННЯ СПОРУ ЗА УЧАСТЮ НОТАРІУСА ЯК ОДИН ІЗ НАПРЯМКІВ МЕДІАЦІЇ

В *статті охарактеризовано правові засади врегулювання спору за участю нотаріуса як один із напрямків медіації. Провадження з примирення за участі нотаріуса передбачає певну послідовність. Доведено, що примирення за участю нотаріуса має складатися з певних стадій: По-перше, йде підготовчий етап до погодження сторін угоди. Тут нотаріус аналізує надані йому документи, за потреби формулює запити (звернення) до відповідних інстанцій, посадових осіб та інших причетних, оцінює юридичну обґрунтованість і повноту отриманих документів, визначає коло учасників, надає попередні роз'яснення щодо можливостей примирення та отримує згоду на проведення процедури примирення від усіх учасників. Згідно з актуальною версією статті 42 Закону України «Про нотаріат», нотаріус уповноважений вимагати додаткові дані чи документи від фізичних і юридичних осіб, відправляти документи на експертизу, а також перевіряти відсутність заперечень у зацікавлених осіб З'ясування справжніх намірів кожного учасника відбувається шляхом встановлення нотаріусом єдиного розуміння сторонами значення, умов майбутніх правових відносин та їх юридичних наслідків для обох сторін. При цьому визначення справжніх намірів однієї зі сторін може бути проведене нотаріусом за відсутності іншої сторони, щоб уникнути стороннього впливу на її волевиявлення.*

Наголосимо, що саме на цій стадії нотаріус може прийняти рішення щодо неможливості медіації, беручи до уваги, зокрема, відсутність наміру сторін або однієї з них досягти згоди. У такому випадку нотаріус роз'яснює ймовірність відмови у вчиненні нотаріальної дії.

Далі на другому етапі здійснюється організація нотаріусом процесу примирення сторін. На цьому етапі нотаріус представляє позиції сторін, спільно з учасниками визначає питання для обговорення, розробки спільних пропозицій та їх узгодження.

Заключний етап (третій) - вчинення нотаріальної дії або відмова від неї. Зокрема, якщо учасники не досягли згоди щодо ключових питань або умов правочину, а також, якщо вчинення такої дії суперечить законодавству України; не надано інформацію та документи, необхідні для вчинення нотаріальної дії; є сумніви щодо розуміння фізичною особою, учасником, значення, змісту, юридичних наслідків своїх дій, або особа діє під впливом примусу, нотаріус відмовляє в нотаріальному оформленні результатів процесу примирення, тобто у вчиненні нотаріальної дії.

Ключові слова: *адміністративне судочинство, адміністративні процедури, зарубіжний досвід, вирішення спорів, медіація, нотаріус, напрямки удосконалення, спір, правові засади.*