

MEDIATION AS MEANS OF RIGHTS AND INTERESTS PROTECTION BY NOTARIES

Myroslava Dyakovych

Ivan Franko National University of Lviv, Lviv, Ukraine

Abstract: *The role and tasks of the mediation process in dispute resolution is analyzed. In particular the mediation procedure, the role of the notary as a mediator in peaceful conflict resolution and demands to it are considered. Specific changes to the Law of Ukraine "On Notary" in terms of amicable dispute are suggested. Determined that the duty of a notary lies in establishing actual intentions of the parties, appropriateness of which is determined by agreement reached by the parties before coming to a notary. In this connection a notary should master special knowledge and mediation techniques which in its turn requires additional preparation in the sphere of psychology and business negotiations.*

Keywords: mediation, mediator's functions, notarization, mediation procedure.

Mediation is a relatively new phenomenon in Ukrainian legal science. In Ukraine, pursuant to Order of the President of Ukraine of May 10, 2006 No. 361/2006 "On the Concept of Judicial Improvement for Establishing Fair Court in Ukraine According to European Standards", particular attention is paid to development of related institutions, namely those which are directly connected to exercising of right to judicial protection. In particular, it states that in order to decrease the workload in courts it is necessary to develop alternative (extra-judicial) methods of dispute settlement as well as create conditions for stimulation of cheaper and less formalized methods of settlement (Decree of the President of Ukraine "On the Concept of Improvement of the Judiciary for the Establishment of a Fair Court in Ukraine in accordance with European Standards").

In many developed countries methods of alternative dispute settlement are efficiently used as alternative to official judiciary. Today are we looking for ways of attracting other legal institutions, namely notary bodies, and using traditional bodies (state courts and arbitration) for extra-judicial settlement of legal disputes through mediation¹.

¹ L. Nyssanbekova, T. Toktybekov, S. Yessetova, Z. Zhanat, "Some aspects of personality of individual in international law (rights of individual in the international criminal court, rights of migrants, refugees, rights of women and children in international humanitarian law, rights of investors)", in *Journal of Advanced Research in Law and Economics*, 2016, vol. 7, no. 6, p. 1455-1464.

Suggestions as to prospects of mediation development in notarial practice of Ukrainian notaries put forward herein are based on research and analysis of international legislation and notarial practice and are shaped as a scholarly concept and suggestions as to further areas of research for scholars and lawmakers in the sphere of implementation of mediation in Ukrainian notary bodies².

Origin, essence and meaning of mediation

"Mediation" comes from Latin "medius", which means "to take up a position in between two opinions or parties, to suggest a middle way, to be neutral, independent"³. The essence of mediation lies in combination of two, seemingly opposite elements – a high autonomy of parties and significant guarantees of developing a joint position and reaching a mutually beneficial result⁴. This means that during mediation, a mediator does not acquire exclusive authority as to leading the process and making the decision. In addition, a mediator does not have the right to decide imperatively on the direction of discussion – the parties should independently settle their conflict within their position.

Thus, I. G. Cheremnykh suggests that mediation means negotiations between two parties, who are having a dispute, with participation and under supervision of a neutral third party – mediator, who does not have the right to make a binding decision⁵. Consequently, mediation serves as an instrument for protection of rights and interests of persons since disputing parties settle their dispute, trying to find a solution that fits them both using their joint effort. They do all this under the supervision and control of a mediator who establishes equal and trusting relations between the parties and ensures legitimacy of the decisions they make.

² A.V. Kostruba, "Aspects of civil rights and their integration into international social and environmental legislation", in *Journal of Environmental Management and Tourism*, 2018, vol. 9, no. 5, p. 995-1002; A.V. Kostruba, "The place and role of right depriving legal facts in the legal regulation mechanism of civil property relations", in *Utopia y Praxis Latinoamericana*, 2018, vol. 23, no. 82, p. 171-183; A.V. Kostruba, "Right deprivation in the legal regulation mechanism of civil property relations", in *Journal of Legal, Ethical and Regulatory Issues*, 2018, vol. 21, no. 1, p. 1-15.

³ K.E. Georges, *Ausführliches lateinisch-deutsches Hanswörterbuch*, Hahnsche Buchhandlung, Darmstadt, 1983.

⁴ K. Graefin von Schliffer, *Mediation in Notarial Practice (Alternative Methods of Dispute Settlement)*, Walters Cluver, Moscow, 2005.

⁵ I.G. Cheremnykh, *Theoretical Foundations of Independent Notary Bodies in Russia*, Bukvoved, Moscow, 2006.

Notarial activity in general contains elements of mediation. Yet, we cannot treat all the procedures done by a notary during notarial acts to be mediation. With reference to notarial activity, mediation becomes a special form of intermediary activity that is closely connected to notarial activity and stems from obligations of a notary.

Mediation in notarial activities

There is no direct instruction for a notary to perform the duties of mediator in the Law of Ukraine "On Notary" dated by 02/09/1993, No. 3425-XII. Unlike Ukrainian Law, German Law on Notaries (Section 4,5 §20) establishes special authority of a notary for conducting official procedure of extra-judicial dispute settlement. Notarial mediation is also foreseen by the Law of Germany on Settlement of Disputes Connected with Property Rights. According to Orders of German states passed on the basis of Section 5 §20 of the Law of Germany on Notaries, notaries shall act as mediators during disputes between heirs or property owners⁶.

Legislative and practical experience of German notaries is very interesting. Before certification of an agreement, a notary (§3 of the Law of Germany on Certification of Acts, BeurkG, hereinafter – LCA), who acts as a mediator – a person who offers legal assistance (Clause 1 Part 1 of the Law of Germany on Notaries – hereinafter LGN), is supposed to describe his authorities in the document and inform the parties that the agreement is not a suggestion of the notary, but a result of compromise between parties thereto, which is notarized according to authorization of the parties and their interests. In case a notary still has doubts as to completeness, relevance and validity of the solution found, he should mention this when concluding the agreement (Clause 2 Part 1 §14 LGN) and is obliged to do the same before notarization. (§17 LCA). In cases like this, it is recommended to make a note on notarial work done⁷.

When analysing German and Ukrainian legislation one may conclude that the essence of notary's role as a mediator lies not so much in dispute settlement but rather in offering assistance to parties when they determine their interests. A mediator focuses on whether the parties' interests are balanced and if this is not the case, to what extent they can

⁶ G. Riger, *A Notary as a Mediator. Mediation in Notarial Practice (Alternative Methods of Dispute Settlement)*, Walters Cluver, Moscow, 2005.

⁷ Wagner. Dnotz, Beilage, Belgium, 1998.

become an object for exchange⁸. A notary who is doing mediation must firstly assess interests of parties to negotiations. Without disputes and contradictions of interests, there is no need for mediation. A bright example of this phenomenon is observed when an heir wants to receive inheritance and there are no contradictions of interests and, vice versa, when there are several heirs and no agreement as to the will. Thus, a notary must first of all prevent any conflicts both when conducting notarial acts and in the future. If this function of mediation was to be compared with preventive function, a conclusion could be made that prevention and elimination of conflicts between parties is part of preventive function. Unlike other legal professionals, notaries cannot support the interests of only one party to transaction according to their professional duties.

Pursuant to Article 5 of the Law of Ukraine On Notaries, "a notary is obliged to warn of consequences of notarial acts made so that low legal awareness of parties could not be used to their disadvantage". Compliance with this obligation by the notary gives the parties an opportunity, just like during mediation, to make the right decision. It is also necessary to consider the duty of notary of keep confidentiality of any information received in connection with notarial acts made, thus confidentiality of mediation is rooted in the very core of the profession of notary for whom notarial secrecy is a legal duty.

When notarizing documents and agreements, conclusion of a notarial act is very often terminated before parties arrive at a single and correct decision for both of them. For instance, when notarizing a sale and purchase agreement of an apartment, encumbrances on that apartment may sometimes be discovered or a dispute may arise as to vacation date of the apartment on sale. A notary, who acts as a mediator in this situation, guides the negotiations without allowing for them to cease and for a notarial act to be cancelled. He curbs initiation of a conflict, and in addition boosts the process and leads participants to solution of the problem. There are numerous examples like this in notarial practice. These are inheritance cases, cases on property relations, property settlement, alimony and prenuptial agreements. A notary, unlike other legal experts, must take in consideration all legal, social and economic aspects of the case, interests of all the participants and society in general.

A notary must also refrain from unilateral settlement of cases. When giving consultations and explanations to participants, a notary bears higher legal responsibility for the outcome of the case. According to V.V. Yarkov

⁸ D.A. Lax, J.K. Sebenius, *The Manager as Negotiator*. Lax Sebenius LLC, Concord, 1986; Mnookin. *Beyond winning*, Tulumelo, Peppet, 2000.

et al "a notary is not a simple supplier of legal information but someone who ensures its legitimacy, relativity and accuracy"⁹. Another interesting and disputable issue regarding a notary acting as a mediator is the degree of permissible intrusion of a neutral party that precedes formation of participants' will when notarizing a notarial act. There emerges a collision between independence of a notary and the duty of giving legal aid and consultations¹⁰.

The duty of a notary lies in establishing actual intentions of the parties, appropriateness of which is determined by agreement reached by the parties before coming to a notary. Apart from this, a notary specifies correspondence of interests to all other terms of agreement. However, the Law of Ukraine On Notaries does not contain the duty of a notary to participate in drafting of an agreement as it is also presumed that a conflict that may have existed between the parties before conclusion of the agreement has been settled and a notary is only expected to perform the formal act of notarization. The same is also confirmed by Art. 4 of the Law of Ukraine On Notaries which only foresees the right and not the duty of notary to draft agreements and statements.

The main task of a notary is to ensure legal safety of documents (transactions) that are notarized. Before notarization of any agreement, a notary conducts certain procedures, namely, on checking legal norms applicable to the transaction. A notary must also confirm that the parties realize and understand the necessity of adhering to such norms; control actual will of the parties before conclusion of the transaction and consequences of obligations arising out of the transaction. This preliminary control helps eliminate any conflicts. The likelihood of risks is increased without such preventive measures. Mediation with participation of a notary is voluntary. The parties make a voluntary decision on the possibility of discussing the dispute and terminating the discussion as they see fit.

During negotiations a notary as a mediator must demonstrate an ability to conduct such negotiations, an ability to listen and persuade, demonstrate comprehensive knowledge of legislation and information

⁹ V.V. Yarkov, I.T. Medvedev, S.S. Trutnikov, *Comparative and Legal Analysis of Eurasian Economic Community Member States Legislation in the Sphere of Notarial Activity and Recommendations as to Its Harmonization*, Publishing House of Saint-Petersburg University, Saint-Petersburg, 2006.

¹⁰ A. Yessekeyeva, I. Kuderin, K. Altayeva, S. Yergobek, K. Bekmuhametova, "Compare the rules as to passage of risk in international sales transactions under the Vienna Convention and the English common law", in *Life Science Journal*, 2013, vol. 10, no. 4, p. 2924-2929.

about any amendments thereof, lead the discussion and quickly react to changes in mood and opinions. It is necessary to be not only a professional lawyer in the sphere of notarial law but also be a highly qualified psychologist with theoretical and practical experience. It is worth mentioning that mediation in notarial practice must not necessarily result in a notarial act since the parties may not reach agreement and a notarial act will not be concluded. Mediation must be closely connected with conclusion of a notarial act necessary for parties in cases expressly stated in the law or those arising from agreements.

At present Ukrainian regulations on notary bodies do not expressly foresee such function of notaries as mediation, yet we believe that development and support of mediation by notaries is necessary. For this purpose it is important that each notary feel personally involved in the process since mediation is de facto an integral part of notarial functions. In this connection a notary should master special knowledge and mediation techniques which in its turn requires additional preparation in the sphere of psychology and business negotiations¹¹. Such training is obligatory for every notary who wishes to become a professional in the sphere of mediation.

In view of abovementioned, the following suggestions may be put forward concerning development of mediation in notarial practice. Firstly, when drafting the law of Ukraine On Notaries, it is necessary to:

1. determine the status of a notary as an independent counsellor during conclusion of a notarial act;
2. establish the right of a notary to offer legal aid as a mediator in matters of dispute settlement when concluding notarial acts;

¹¹ D. Yedilkhan, G.U. Bektemyssova, "Identifying similar business process models", in *Journal of Theoretical and Applied Information Technology*, 2016, vol. 91, no. 1, p. 152-157; G.U. Bektemyssova, D. Yedilkhan, "Applying of process management in the 'e-license' project", in *ICCAS 2015 - 2015 15th International Conference on Control, Automation and Systems, Proceedings*, 2015, p. 2076-2079; R.K. Uskenbayeva, B.K. Kurmangaliyeva, D. Yedilkhan, "Situational management for process implementation of working operations of the business process", in *2015 54th Annual Conference of the Society of Instrument and Control Engineers of Japan, SICE 2015*, 2015, p. 292-297; R.K. Uskenbayeva, B.K. Kurmangaliyeva, D. Yedilkhan, A.B. Kassymova, "Principles for achieving the optimal performance of the input tasks flow of a business process and optimal performance of the business process", in *2015 54th Annual Conference of the Society of Instrument and Control Engineers of Japan, SICE 2015*, 2015, p. 728-733; R.K. Uskenbayeva, G.B. Bektemyssova, B.K. Kurmangaliyeva, D. Yedilkhan, "Development of the business process for national companies of Kazakhstan with the integration of the project 'E-Government'", in *2015 54th Annual Conference of the Society of Instrument and Control Engineers of Japan, SICE 2015*, 2015, p. 724-727.

3. establish the procedure, mediation stages and payment for such notarial aid in the law as well as obligations of a notary when performing the functions of mediator.