

Notariat and Mediation: New Opportunities of Information Technology in the Context of Competition of Legal Frameworks

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ABSTRACT

The article studies certain legal aspects of the use of mediation in notarial activities. The analysis was carried out on the basis of innovations of Russian legislation in this field, which expanded the scope and possibilities of using mediation in notarial practice. At the same time, the authors analyze the possibilities of using information technology in notarial mediation. The authors conclude that it is necessary to preserve the personal and confidential nature of communication between a notary and one's customers in this case, despite the different trend of justice in civil cases – termination of judges' communication with participants in trials in cases of a simplified and relatively indisputable nature.

In addition, the authors paid attention to the doubtful and non-obvious criteria and conclusions of the annual Doing business ratings regarding notaries, which deny legal and cultural diversity and its capabilities, including in the field of mediation. In this regard, the authors studied the results of the XXIX World Congress of the International Union of Notaries, which took place in November 2019, where all of these issues – notariat, mediation, information technology and Doing business ratings were considered as a system.

Keywords: *notariat, the International Union of Notaries, mediation, conciliation procedures, Doing business rating*

1. BACKGROUND

The development of new information technologies raises a lot of new issues that somehow affect the traditional areas of legal activity, including notariat. The Latin notariat is currently undergoing a difficult period of transformation, explained by both the competition of the main legal systems, the digitalization processes of economics and law, and the need to use relatively new legal mediation technologies, which make it possible, when joining them, to give a synergistic development effect to both the notariat itself and the conciliation procedures.

In November 2019, the regular XXIX World Congress of the International Union of Notaries was held. Regardless of the topic, the focus of the congress line was on information technology and its use in notarial activities, as well as increasing the flexibility and adaptability of notaries to new conditions, and wider use of the mediation potential of notaries. The main focus was on the need to develop the profession in the context of the dematerialization of civil circulation, which in a generalized form includes the creation of notarial acts in a remote mode, the use of blockchain, remote exchange and circulation of notarial acts, electronic apostille, customer verification using biometric data, and a number other technical means and resources.

All of the above, projected on the future-oriented goals of the development of notaries, leads us to the conclusion that it is necessary to actively use information technology in notarial activities, including the field of mediation. This will increase the competitiveness of legal systems of civil law, since it significantly increases the indisputability of civil circulation, speeds up legal procedures and reduces their cost for their end user.

2. STUDY DESIGN

During the study, general scientific and special legal methods were used.

3. RESEARCH RESULTS

The article has consistently examined the relationship of three key issues: Doing business ratings in relation to notaries, the synergistic effect of combining notariat and mediation, as well as the possibilities and limits of digitalization in conducting mediation procedures.

The Congress participants paid great attention to the country's place in the Doing business rating, which depends on a number of circumstances, though not directly related to the digitalization of the relevant legal procedures and their focus on conflict-free resolution of the relevant

issues, but nevertheless essentially dependent on and determined by these factors. The Internet, which was recently used as a little-known technology between computer specialists, has become the driver of transition to a new type of society – a network society, and through it – to a new economy.

In fact, the digitalization of registration of companies and property, the enforcement of contracts and the resolution of insolvency issues surely increase the speed, transparency, and effectiveness of these legal procedures. The focus of such legal procedures to conciliatory resolution of emerging issues reduces the burden on the judicial system, increases the competitiveness and attractiveness of the legal system of a country for local and foreign investors.

However, the attitude to Doing business ratings varies a lot. In the context of this article, we are particularly interested in the report by The Henri Capitant Association of Friends of French Legal Culture, published in 2006, which critically examines the main arguments of a number of the World Bank's annual Doing business reports. Doing business reports are based on a fairly simple premise that since the USA has the best economy in the world, then, accordingly, the US law and the common law system as a whole are the best law in the world that meets the requirements of economic development most adequately. Our colleagues from the Henri Capitant Association examined the arguments of the report in detail and were able to note both the factual groundlessness of many of the conclusions of Doing business reports and the advantages of the civil law system quite accurately, which allow it to protect the rights of participants in civil circulation no less effectively. They criticized the principle of "One size fits all", which is the basis of the World Bank reports, which contradicts the cultural and legal diversity of our planet, based on the cultivation of economic efficiency at any cost and in the short term, without creating the foundations of a sustainable legal society.

However, this seemingly more academic discussion acquired an unexpectedly political feature in our country, when the rating upgrade in Doing business was declared a new development priority for Russia. How justified is this?

Let us pay attention to one aspect only. In addition to artificially adjusted numbers, one cannot but take into account the economic component of the corresponding legal system. For example, the number of disputes from notarized transactions in Europe is about 1 in 1000, while in the USA it is 40-50 times more trending up: From 1999 to 2009, the number of disputes from contractual relations increased by 26.7%, and in real estate – by 44.2%. The number of civil litigations triples each year (1 litigation per 10 adult residents in 2007). In countries of the civil law system, for example, the notariat as one of the elements of the legal system provides a low cost of the maintenance of the entire national jurisdictional system for society (0.5-3% of GDP), while the United States - 5% of GDP or 2 trillion US \$. The Legal Industry, i.e. the aggregate expenditures of citizens, organizations and authorities on the judicial system each year has increased by 382% over

12 years (whereas, for example, the turnover of the automotive industry in the United States has increased by 40% only). A permanent upward trend in the cost of administering justice has become characteristic of many jurisdictions on the other side of the Atlantic as well, which, however, is not a guarantee of its quality and speed. Therefore, for example, at the Congress regarding Doing business rating, a German notary R. Bock rightly stated that, in his opinion, it made no sense, since Germany takes the 4th place in the world in terms of GDP, and only 22nd place in Doing business rating. This approach coincides with the estimates of our French colleagues in their 2006 report.

Notariat and Mediation: What is the synergistic effect? For a public notary, notariat, within the framework of two models of mediation, both private and integrated, is, in any case, a simultaneous form of qualified legal assistance, this is actually one's official activity, which follows from the meaning of the law and is carried out within the framework of one's professional competence.

Apart from that, the introduction of facilitated judicial procedures (simplified and writ proceedings) led to such a result when personal communication between the court and the parties to the dispute started declining. In mediation procedures, a notary interacts with parties to a dispute directly, which is very important for the settlement of disputes, since a lot of conflicts have a legal, economic, and psychological basis. Will mediation, including a remote online one, become a usual notary tool in the new digital era, its near future, as some believe?

It is also important to note that all the features characteristic of mediation and mediator, such as observing absolute neutrality and impartiality, independence from other persons, increased responsibility for one's actions, and many other organically characteristic of notarial activities. Hence the prevalence of views on the "obvious", "natural", "quasi-substantial" connection of notarial functions with mediation. At the same time, judging by open data, an insignificant number of notaries have wished to undergo a special mediation training as of today and are actually implementing this new activity for which they seem to be destined by the very essence of their occupation. Interestingly, even a special Practical Guide in notarial mediation in cross-border cases has already been developed, that is the right place for the widespread use of information technology.

If we analyze the main features of notarial activity, we will see all the inherent features of mediation in the work of a Latin notary, including a Russian one. In particular, this is the impartiality of a notary public, who, by law, must take into account the interests of all parties to a transaction. A notary, unlike representatives of other legal occupations, cannot, by the very nature of one's job, "work" only for one side, one must take into account the interests of all persons involved in a particular notarial act. Also, a notary public is obliged to make a warning about the consequences of legal actions, which allows the parties, including ones of the mediation process, to make the right decision. It is important to take into account the inherent duty of the notary occupation to observe notarial secrecy,

i.e. confidentiality of mediation is at the very core of the notary's occupation, for whom secrecy is a legal obligation.

Thus, the combination of notarial and mediation activities gives a telling synergistic effect that increases the efficiency of mediation and at the same time gives a notary the opportunity to show one's best features.

Novelties of the Legislation on Mediation: New Issues. Federal law dated July 26, 2019, N 197-FZ introduced rather large changes to the Code of Civil Procedure of the Russian Federation, the Arbitration Procedural Code of the Russian Federation, the Code of Administrative Judicial Procedure and a number of other federal laws. In general, this Federal Law is dedicated to the development of the functions of mediation and conciliation procedures in the framework of civil and administrative legal proceedings.

Along with changes to the procedural legislation, notarial legislation was updated. Article 59.1 "Certification of Mediation Agreement" was introduced into the Fundamentals of the Russian legislation on notariat (hereinafter referred to as the Fundamentals). At the same time, Article 12 of the Federal Law "On Enforcement Proceedings" was supplemented with an indication of a new type of enforcement documents – "notarized mediation agreements or their notarized copies".

What is the main content of these novelties? Here we pay attention to a number of points. First, Article 59.1 of the Fundamentals of the mediation agreement is included in Chapter X of the Fundamentals of "Certification of Transactions". Therefore, all general rules on certification of transactions by a notary apply to the mediation agreement.

Second, a notary is provided with a mediation agreement reached by the parties in accordance with the agreement on the mediation procedure stipulated by the Federal Law "On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".

Third, as stated in Article 59.1 of the Fundamentals, a mediation agreement is certified with the mandatory participation of a mediator, mediators, a mediator representative of an organization ensuring the mediation procedure, in accordance with the agreement of the parties on the mediation procedure.

Fourth, based on the general rules for the certification of transactions, a notary is obliged to explain to the parties and the mediator (s) the meaning and significance of the draft transaction presented by them and to check whether its content corresponds to the actual intentions of the parties and does not contradict the requirements of the law (Article 54 of the Fundamentals). Therefore, the mere participation of a mediator or even several mediators in the procedure for entering a mediation agreement does not relieve the notary of general duties, since everyone in this activity performs their duties: notary public – duties established by the Foundations and other federal laws, mediators – in accordance with the Federal Law "On the Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".

We should bear in mind that a notary must verify not only compliance with the relevant conditions provided for in

the Fundamentals for Transactions, but also with other legislation, in particular Civil Law, if it comes to resolving a conflict in the field of civil circulation, for example, Item 1, Article 163 of the Civil Code of the Russian Federation. Fifth, recently the notaries' work on countering the financing of terrorism, money laundering and legalization of crime proceeds in accordance with the Federal Law "On Combating the Legalization (Laundering) of Crime Proceedings and Financing Terrorism" has become a priority. Therefore, when certifying mediation agreements endowed with executive authority, it is extremely important for a notary to avoid situations where, under their guise, dubious agreements aimed at legalizing illegal schemes with money would be certified.

Sixth, can a notary public oneself take actions to coordinate the positions of the parties and resolve the conflict between them, or is one in these cases always bound only by Article 59.1 of the Fundamentals? We believe that a notary always has a choice that ultimately depends on the will of the parties. Firstly, send the parties to the mediator to use the Federal Law procedure "On the Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" and Article 59.1 of the Fundamentals. Or, secondly, to certify such an agreement as an ordinary transaction, with the right to execute a writ of execution on it. The latter authority of a notary follows from Item 1 of Article 90 of the Fundamentals, according to which a notary has the right to execute a writ of execution on any notarized transaction establishing monetary obligations or obligations for transferring property.

How to combine mediation and information technology? Much was said about this at the XXIX World Congress of the International Congress of the International Union of Notaries. The issue was raised on a larger scale – regarding the overall use of information technology in notarial activities and the competition between the two legal systems associated with these prospects. Let us give only some statements. R. Bock (Germany) spoke about the different levels of digitalization of states with liberal and transition economies. He wondered whether the states would retain control over the development of rules for regulating and resolving disputes on private online platforms, and whether the states would transfer these functions to digital giants (the so-called Big Four – Google, Amazon, Facebook, Apple). Today, the digital giants are actively using legal templates with standard legal solutions, which is attractive economically, but negative for traditional notaries. After all, the function of individualizing a contract as applied to specific parties is the most important advantage of the notarial job. Legal standardization has its limits and must take into account the interests of the parties since the modern unification of law and enforcement transfers resources from the state to private companies.

The leave of notary public from this field will reduce the state monopoly of legal regulation and dispute resolution. Digitalization increases, according to R. Bock, the export of US law and the relevance of the common law system,

economic efficiency, which is now at the political forefront of many nations.

Meanwhile, the precautionary principle, which creates guarantees at the stage of the conclusion of a contract and the balance of the parties, is important for Latin Notariat. That is why it is necessary to develop notariat to prevent the transfer of public functions of regulation and dispute resolution to the private sector. Therefore, digitalization, according to R. Bock, is a purely technical process, and not a way to resolve legal issues and implement legal policy.

Professor R. Knipper (Germany) spoke about the same thing – private digital companies threaten the market as they are replacing state regulation and public registers wider and wider. At the same time, the creation of impartial justice and legally reliable systems for citizens is the task of the state, not private companies.

Therefore, regarding the use of information technology in mediation activities involving a notary public, the following can be recommended. A public notary can interact with the parties to a mediation agreement and a mediator both in the mode of personal communication and via remote access in the mode of a video conference. The main point here is the search for an individual solution to the problems of particular citizens and organizations and not the "sale" of a standard contract.

We should not forget about the judicial system experience. For example, notifications of court hearings via text messages to a mobile phone, the use of videophones with the Internet protocol for preliminary hearings, consideration of statements by absent parties or statements that do not contain disputed issues, a video conference with witnesses to testify if they are not physically capable to be present in court.

When taking remote notarial actions, it is possible to use identity authentication systems – through biometric data collection systems that are being created. We believe that there are no obstacles to consider the potential of this technology today as part of the procedures for the development and conclusion of a mediation agreement, which can be carried out remotely with appropriate guarantees of legal security for all participants. However, we should take into account the instrumental limitations of this technology and its inability to replace a competent

4. CONCLUSION

The use of information technology is in line with the main trends in the development of notariat on our planet, increasing the importance of the profession in a competitive environment of the main legal systems on our planet. A notary who, by virtue of one's professional duties, often has the right to bring the various interests of the parties into accordance, can participate in conciliation procedures quite efficiently. The participation of a notary is all the more preferable as the registration of the results of agreements reached by a notary gives them additional stability and indisputability, while ensuring the necessary confidentiality for the parties.

specialist in solving purely legal issues. This is related to a number of the following circumstances:

First, the identification of a party is only a small, technical in content and rather elementary operation as part of notarial certification. Indisputable identification is a prerequisite for notarization of a mediation agreement as such and does not replace it as such.

Second, the content of a notarial procedure is jurisdictional, not technical, and consists in applying a legal norm to a specific factual situation, explaining the legal consequences of the relevant legal actions performed by parties concerned (obligation to provide advice), etc. Obviously, the importance of consulting by an expert in a conflict situation increases many times and the remote format of interaction with the parties will often be far from efficient.

Third, a varied approach prevails in private law, it is based on the optionality of regulation and a high degree of discretion of those interested in a compromise. Accordingly, the use of blockchain technology and biometric identification as its integral part for concluding mediation agreements is possible only to replace elementary and repeated actions, which are not so many during mediation. A mediation agreement a priori does not appear to be either typical or scalable, which is unlikely to enable its transfer exclusively to the digital environment.

Fourth, the compulsory use of biometric data for the purpose of identifying individuals in civil circulation as a general rule is not allowed as invading privacy. Therefore, it seems unreasonable to find a solution when the parties to a legal conflict who have agreed to a "remote" mediation will be deprived of an alternative when their identity is established by a notary. We should not neglect the psychological point associated with the creation of comfortable and trusting conditions for finding an acceptable solution to the conflict: excessive digitalization of the mediation process will do more harm if the parties are not ready for it.

It can also be promising that a notary conducts mediation together with a mediator and/or conciliation procedures with a limited use of modern information technologies, for example, in the mode of video conferencing, in connection with the development of "electronic notariat" and that a notary gets the right to perform notarial actions remotely.

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