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Notaries as Mediators in the Republic of Belarus

Abstract: Mediation as one of the means of conflict resolution is new to the Republic of Belarus. The legislation which regulates relations in the sphere of mediation is also new. The article analyzes the concept of mediation enshrined in the legislation and scientific literature.

The author investigates the possibility of performing the functions of a mediator by a notary who is a professional lawyer and performs a public function to protect the rights and interests of citizens, legal entities and the state protected by law.

Holding an academic degree in law, notaries do not act as officers of state authority bodies but rather as persons enjoying public trust. Thus, they may perform the function of a mediator taking advantage of their knowledge, expertise and practical experience. Notaries cooperate with citizens and representatives of legal persons on daily basis. They do not represent any party but help them avoid disputes and conflicts while remaining impartial and independent. According to Belarussian legislation notaries can be mediators but to this day only a very small percentage of notaries have been involved in this activity. Notarial activities are based on the principles of impartiality, independence and confidentiality, which corresponds with the required rules of conduct for mediators which brings the two disciplines together. The author draws attention to the issues which currently prevent notaries from full involvement into the new scope of activity. In order to ensure a meaningful dialogue between the parties the author suggests that the Belarussian Notaries Act should provide a clear definition whether notaries may carry out mediation simultaneously with notarial procedures or at the time of performing these procedures. Notaries may act as mediators not only concerning the issues related to notarial activities but also when they are solely treated as mediators.

In the article, the author approaches current legislation on mediation and proposes changes in regard to the law concerning notaries that would allow them to join the mediation process more actively.

Keywords: mediation, mediator, notary, principles of notarial activity, notarial acts, notarial certification of mediation agreement

Introduction

The effects of dynamic development of legal relations and regular increase in the number of concluded transactions resulting in the establishment, change or termi-

nation of different legal relations, are more often than not disputes in which participants find it difficult to bring about a resolution without the assistance of professional expertise. The necessity to apply various methods of settling legal conflicts in the practice of law has led to the emergence of new procedures to prevent court disputes and decrease the workload of courts, which are continually resolving more and more disputes.

One of the methods of conflict resolution is mediation (*mediatio*). The mediation procedure may have a positive impact on the process of interaction between the participants of civil law relations because it can remove incompatibilities between the parties to the legal relation, assure privacy, shorten the time required to resolve a dispute and save litigation costs. Moreover, mediation is becoming an indicator of corporate culture. A choice of mediation as a method of dispute resolution contributes to the maintenance of corporate relations based on partnership¹.

1. The description of legal regulations on mediation in the Republic of Belarus

Mediation is a relatively new institution in the Republic of Belarus, which initially started to develop in courts as a means of resolving economic cases. Thus, the sphere of economic disputes should be treated as the place of origin of mediation as a method of conflict resolution.

The legislation regulating mediation relations is also new and is currently undergoing a reality check.

On 12 July 2013 the Act on Mediation² was adopted in the Republic of Belarus. After a few months, Regulation of the Council of Ministers of the Republic of Belarus of 28 December 2013 No. 1150 approved the Rules of Mediation Procedure³. Furthermore, legal acts specifying the principles of issuing a mediator certificate, mediator's qualifications, verification of candidate credibility and submitted documents stipulated in the Act on Mediation, were adopted. In the Republic of Belarus, development of the legislation on mediation is an ongoing process. Therefore, the experience of other countries in the implementation of mediation is significant in determining the path that needs to be followed during the current phase of that development.

1 И.А. Бельская, У. Хелльманн (eds.), *Теория и практика медиации (посредничества) в экономической сфере*, учеб.-метод. пособие, Минск 2015, pp. 40, 111.

2 The Act of the Republic of Belarus on Mediation as of 12 July 2013 No. 58-3 (ЭТАЛОН. Законодательство Республики Беларусь, Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

3 Regulation of the Council of Ministers of the Republic of Belarus as of 28 December 2013 No. 1150 approval of the Principles of Mediation Procedure (ЭТАЛОН. Законодательство Республики Беларусь, Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

Article 1 of the Act defines mediation as negotiations of the parties with the participation of a mediator aimed at the settlement of a dispute (disputes) between the parties through elaboration of a mutually acceptable agreement. In the literature, the term “mediation” has various interpretations. I.S. Kalashnikova, for example, treats mediation procedure as one of the elements of a uniform system of legal dispute resolution and settlement, which is an independent jurisdictional method of legal dispute resolution through negotiations between the parties with the assistance of a neutral party – a mediator⁴.

However, according to E.W. Michajlova, mediation cannot be treated as an independent alternative form of the protection of rights as it is an additional (apart from litigation and arbitration) elective procedure aimed at the resolution of a legal conflict. Negotiations between the parties are pursued with the participation of an independent and impartial person authorized by them. In the author’s opinion, mediation may be applied together (not alternatively) with two independent procedures of the protection of rights – litigation and arbitration⁵.

In my opinion, mediation is not an alternative procedure in relation to litigation, as often referred to in the literature, because the word “alternative” is interpreted in the meaning of exclusive disjunction⁶. The mediation procedure does not exclude the possibility of referring to a court (state or arbitration) in order to defend the right, i.e., mediation may also be conducted if a lawsuit has been initiated in a court.

I believe a mediator plays an important role in achieving a positive result to negotiations. His/her professionalism assures a qualitative analysis of the situation and helps to organize the negotiation process to reach a compromise - a settlement containing mutually agreeable conditions of the dispute resolution between the parties.

Point 1 of Article 4 of the Act on Mediation of the Republic of Belarus, specifies that a mediator may be a natural person holding an academic degree in law or other field of higher education.

It is worth adding that the Act does not unequivocally determine a mediator’s obligatory field of education, but the hint at higher law education does emphasize that just this category of experts may be recognized as the most useful with regard to legal conflict resolution. What matters here is not the fact that a lawyer may resolve a dispute, but that a lawyer may understand the essence of the dispute and its complexity. It allows him or her to take advantage of the mediator’s professional techniques more effectively. For instance, the Rules of Mediation Procedure specify in

4 С.И. Калашникова, Медиация в сфере гражданской юрисдикции, автореф. дис., Екатеринбург 2010, р. 12.

5 Е.В. Михайлова, Процессуальные формы защиты субъективных гражданских прав, свобод и законных интересов в Российской Федерации (судебные и несудебные), автореф. дис., Москва 2013, р. 18.

6 С.И. Ожегов, Н.Ю. Шведова, Толковый словарь русского языка, Москва 1999, р. 23.

point 23 thereof, that during mediation each party has the right to propose their options of the dispute resolution. At the same time, the parties' proposals cannot violate the Republic of Belarus legislation, and the rights and legitimate interests of third parties. This may imply that, most of all, a person having higher legal education is able to assure the compliance of the parties' opinions with the law professionally. Moreover, point 42 of the above-mentioned Rules indicates that upon the parties' request, a mediator may provide help in drafting a mediation agreement, verify the already-drafted mediation agreement with regard to its compliance with the law and a possibility of its approval by a court as a settlement in cases specified by the law. This type of work also requires expertise in law at the level of a professionally qualified lawyer.

It is emphasized in the relevant literature that if a mediator has suitable legal qualifications, he/she should also be responsible for the appropriate resolution of legal issues connected with mediation⁷.

Professional lawyers also embrace notaries whose public function is to protect the rights and interests enshrined by the law. Notaries' activity aims at the assurance of development and stability of civil law relations⁸. Pursuant to Article 4 of the Act of the Republic of Belarus on Notaries and Notarial Activity of 18 July 2004⁹, a fundamental task of notaries' activity in the Republic of Belarus is the assurance of the protection of rights and legal interests of citizens and legal persons as well as state interests through the fulfillment of notarial acts on behalf of the Republic of Belarus. According to Belarusian Presidential Decree No. 523 dated 27 November 2013 "On the organization of notarial activities in the Republic of Belarus"¹⁰ the institution of state notaries has been abolished as of 1 January 2014. Since that date, notaries in the Republic of Belarus have ceased to be state officials.

The modern Belarusian notary service has all the features of a Latin style notary service. Although it has not yet become a member of the International Union of Notaries, progress has been made in this field¹¹.

Point 2 of Article 26 of the Act on Notaries and Notarial Activity stipulates that under the procedures envisaged in the law, a notary is entitled to act as a mediator

7 П. Фар, К. Грефин фон Шлиффен, Б. Вегманн (eds.), Медиация в нотариальной практике (Альтернативные способы разрешения конфликтов), Минск 2009, pp. 25–26.

8 И.Ю. Кирвель, Нотариат и нотариальная деятельность в Республике Беларусь, учебное пособие, Минск 2015, p. 9.

9 The Act of the Republic of Belarus on Notaries and Notarial Activity as of 18 July 2004 No. 305-3 (ЭТАЛОН. Законодательство Республики Беларусь, Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

10 Decree of the President of the Republic of Belarus as of 27 November 2013 No. 523 on the Organization of Notarial Activity in the Republic of Belarus (ЭТАЛОН. Законодательство Республики Беларусь, Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

11 С официальным визитом в Минск прибыл Президент Международного союза нотариата, Белорусская нотариальная палата, <http://belnotary.by/novosti/novosti-bnp/s-ofitsialnym-vizitom-v-minsk-pribyl-prezident-mezhdunarodnogo-soyuza-notariata> (31.01.2017).

in a settlement procedure, a mediator in mediation cases and an arbiter in pleading cases before arbitration courts. This is a new rule of the legislation of the Republic of Belarus because previous provisions on notary service did not envisage the fulfillment of these functions by notaries.

A notary may act as an intermediary and participate in conciliation proceedings in Austria, Belgium, Germany, France, Scotland, Morocco, the Netherlands and Switzerland¹².

Pursuant to Article 9 of the Act on Mediation, information on individuals holding a mediator's certificate is entered into the Registry of Mediators, which is maintained by the Ministry of Justice of the Republic of Belarus. According to statistical data, as of 31 January 2017, 365 individuals held a mediator's certificate¹³ including eight notaries (2.2% of the total). The above statistical data indicates that at present notaries are few in number as mediators.

Pursuant to Article 1 of the Act on Mediation, a mediator is a natural person taking part in negotiations between the parties involved as an impartial intermediary to help them resolve a dispute. Pursuant to point 2 of Article 3 of the Act on Mediation, mediation is based on the principles of the mediator's impartiality and independence, and the mediation procedure's confidentiality. Moreover, point 2 of Article 3 further sets forth that the parties to mediation trust a mediator as person capable of assuring the effective pursuit of negotiations.

According to Article 4 of the Act, mediators must study mediation as defined by the Belarusian Ministry of Justice. Persons with experience as court conciliators are exempt from this requirement. The mediator's certificate is issued by the Belarusian Ministry of Justice based on the Mediation Qualification Commission's judgement. The mediator should not be a civil servant and must comply with all other legislative requirements. Mediators do not have the right to be a representative of any party involved in a mediation procedure. Agreements on the application of mediation may establish additional requirements for mediators.

Pursuant to point 1 of Article 10 of the Act on Notaries and Notarial Activity, a notary may also be a citizen of the Republic of Belarus who holds a higher education degree in law, has worked in a legal profession for at least three years, completed professional training as an intern, passed the qualification examination, holds a certificate of authorization to perform a notary activity, and fulfills other statutory requirements.

12 П. Беке (ed.), *Нотариусы и нотариат в Европе*, Издание Комиссии по европейским делам и Средиземноморью Международного союза латинского нотариата, 2004, pp. 145-167, В.В. Ярков, И.Г. Медведев, *Нотариат и медиация*, "Нотариальный вестник" 2008, No. 9, pp. 13-21.

13 Список лиц, имеющих свидетельство медиатора, Министерство юстиции Республики Беларусь <http://minjust.gov.by/ru/mediation/list-certificat-of-mediator> (31.01.2017).

Due to the above, a notary as a natural person is subject to the similar statutory requirements and limitations as a mediator. Hence there are no formal obstacles for a notary to fulfill the function of a mediator. Furthermore, Articles 7–9 of the Act regulate the principles of notaries' impartiality and independence and notarial confidentiality, which corresponds with the same principles required of mediators. It should be noted that notaries are professional lawyers who cooperate with natural persons and representatives of legal persons on a daily basis and hence have considerable experience both in law and liaison skills. Undeniably, notaries need preparation with regard to mediation, but each experienced notary has more often than not encountered situations when, for instance, the parties to an agreement could not reach a settlement for various reasons such as insufficient knowledge of law or failure to understand the essence of legal relations they are attempting to establish. In such situations, explaining legal provisions and the parties' rights and duties, a notary helps to avoid a dispute while maintaining impartiality and independence.

According to S.K. Zagajnova, the principles of mediation embrace the ethical rules of notary activity, which was the basis of including mediation into the notaries' field of professional activity. Currently, in many countries with Latin notaries, notaries' additional competences encompass carrying out consultations with regard to legal issues, mediation, arbitration, etc.¹⁴

R. Kniper, mentions that notarial acts, a notary's explanations and advice, make the participants to a transaction aware of the legal importance, risk, enforceability and consequences of the actions they take. A notary is not obliged to protect the interests of any one party; only to provide professional and neutral consultation. A notary's competence is based on strict requirements that must be fulfilled as well as liability for any violation of official obligations¹⁵.

We should pay attention to the circumstances which presently do not allow a notary to fully join this new area of activity in Belarus. I think that numerous issues have arisen now that should be resolved statutorily. A notary will only be able to assure the efficient pursuit of negotiations between the parties if it is clearly established whether such an activity should be pursued parallel to their notarial actions, or whether it may be performed during the fulfillment of notarial actions. In the first case, a notary acts as a mediator in a case that is not connected with the performance of notarial actions whereas in the second, the notary is a mediator in cases which arise during notarial actions and are connected with notarial activity.

14 С.К. Загайнова, Примирительные процедуры в практике российского нотариата: современное состояние и перспективы развития: сборник материалов и статей к 10-летию центра нотариальных исследований, М., Центр нотариальных исследований (ЦНИ), 2012, р. 80.

15 Р. Книпер, Экономический анализ нотариата, [пер. с нем.], Германский фонд международного правового сотрудничества, BNotK 2010, pp. 3-5.

Considering the above issue, S.I. Kalashnikova claims that mediation in notary activity may be applied within an optional additional procedure for the resolution of disputes which hinder the fulfillment of notarial actions. Moreover, two kinds of interactions of notaries and professional mediators are depicted: 1) referring parties to a mediator in order to carry out mediation – a notarial action is then postponed until a certain time; 2) notarial certification of agreements concluded with the assistance of a mediator and additionally providing them with the status of enforceability¹⁶.

According to S.K. Zagajnowa, a notary who is not a mediator may recommend the parties to a notarial action going not to a court but to a mediator in order to solve their dispute; the notary should then stop notarial actions for the time of mediation on the basis of the agreement to initiate mediation procedure submitted by the parties. A notary may certify agreements containing mediation clauses and mediation agreements between the parties such as to provide them with the status of enforceability. At present, a similar practice is applied in Germany and France. Notaries who have mastered mediation techniques may apply them directly when fulfilling notarial actions in cooperation with other notaries or mediators. Such activity will contribute to the establishment of good business practices¹⁷.

The author believes that the above-mentioned types of cooperation between mediators and notaries are indeed necessary and are fully justified at the present level of the development of mediation in the Republic of Belarus. Their statutory regulation would prevent numerous disputes within civil law relations.

S.I. Kalashnikova, claims that the application of mediation should be treated as the notary's right rather than an obligation. Assistance in resolving disputes should be an exception to the general principles of notary activity. Moreover, imposing on notaries the obligation to carry out settlement procedures violates one of the fundamental principles of mediation – the voluntary principle, which embraces not only the participants of disputed legal relations but the mediator's as well¹⁸.

Even if we treated mediation as the notary's right not an obligation, the ensuing question is how a notary should explain his or her refusal to carry out the mediation procedure between the interested parties. Such a situation may trigger new conflicts to be solved before a court. For this reason, the function of a notary to carry out mediation should not be a part of his or her obligatory notarial actions. Due to the above, the Act on Notaries and Notarial Activity in Belarus should contain a provision on voluntary performance in the function of mediator.

The author believes that a notary may act as a mediator not only in cases connected with notarial activity but also in other cases when parties apply to him/her exclusively as a mediator listed in the Registry of Mediators. Therefore, the Act on

16 С.И. Калашникова, Медиация ..., *op. cit.*, pp. 8-9.

17 С.К. Загайнова, Примирительные ..., *op. cit.*, pp. 83-85.

18 С.И. Калашникова, Медиация..., *op. cit.*, p. 22.

Notaries and Notarial Activity should contain provisions stipulating principles of mediation in notarial activity.

Pursuant to point 20 of the Principles of Mediation Procedure, mediation is conducted either in the Russian language or Belarusian language. A party submitting documents in another language or who participates in mediation speaking another language should provide translation/interpretation services at their own expense unless explicitly agreed otherwise. The accuracy of translated documents from one language to another must be certified by a notary. Hence a question that arises here is whether a notary who takes part in the procedure as a mediator is authorized to perform such action or whether he/she must refer the parties to another notary. It appears that in this case it should be possible to connect these two notarial competences.

Furthermore, the performance of the function of a mediator by a notary is needed because the terms and conditions of an agreement concluded in the course of mediation requires to be certified by a notary to enable the agreement to become enforceable.

D.L. Dawydzienko indicates that in the global business practice negotiations with the participation of a neutral third-party (mediation) is known, above all, as a method of dispute and conflict resolution, but it may also be purposeful where there is no conflict. For instance, to agree upon terms and conditions of complicated transactions (sale of an enterprise, a cooperation agreement, or agreements of shareholders' corporate membership) and therewith resolve disputes that may arise prior to the conclusion of an agreement¹⁹.

Entrusting an appropriate notary with the performance of specific actions helps the parties agree upon important terms and conditions and envisage those conditions of agreement whose lack therein may lead to questioning the contract's validity. Pursuant to point 1 of Article 25 of the Act on Notaries and Notarial Activity, notaries are obliged to provide assistance to individuals who take part in legal relations through notarial actions. A notary should explain the rights and obligations to the participants of notarial actions and instruct them about the effects of those actions.

B.J. Pawlak, believes that "due to their profession, notaries are excellently qualified lawyers specialized in civil and economic cases. They can draft first-rate legal texts. For these reasons, they are qualified to draft a settlement reached by the parties very well and provide their agreements with the legal status [...] Within this scope, a notary as a mediator assures security to the parties too."²⁰

19 Д.Л. Давыденко, Нейтральное содействие переговорам по заключению и пересмотру условий сделок как новая профессиональная услуга, "Правосудие в Московской области", «Закон» 2009, No. 4, p. 138, 140.

20 B.J. Pawlak, Notariusz mediatorem – korzyści i zagrożenia, "Kwartalnik ADR" 2012, No. 18, p. 79.

To increase a number of notaries among mediators, notarial qualifications should encompass mediation procedures. This function could be fulfilled by the Notary Chamber of Belarus as a body of notary self-government.

Hence B.J. Pawlak, further believes that “there are no obstacles in the system organization of the profession of a notary or the negative social prerequisites to prevent notaries from carrying out mediation which would be connected with the performance of their professional obligations. Moreover, there are no such precluding factors with regard to the doctrinal assumptions of mediation.”²¹

I.I. Cheremnykh, claims that enhancement of the legal regulation of the participation of a notary in the mediation procedure should be performed by the establishment of a system of mediation principles, introduction of mediation procedures, establishment of an appropriate fee for this kind of notarial assistance, and determination of the notary’s liability for it.²²

Conclusions

The above analysis of legal provisions in the Republic of Belarus confirms that, at present, basic conditions and prerequisites of notary’s participation in mediation as a mediator are fulfilled, which may contribute to the stability of civil law relations. Nevertheless, more detailed provisions are necessary to assure a wider participation of a notary in mediation. In particular, legislation regulating the notary’s activity should determine the principles of the participation of a notary in mediation as a mediator. The provision on the voluntary participation of a notary with regard to the performance of the function of a mediator and his or her consent to carry out mediation should be included in the Act on Notaries and Notarial Activity in the Republic of Belarus. It should be clearly specified whether this activity will be carried out parallel to the performance of notarial actions, or whether it may occur during their fulfillment. In the first case, a notary acts as a mediator in the case not connected with the performance of notarial actions whereas in the second, a notary is a mediator in cases which emerge during notarial actions and which are connected with notarial activity.

A notary may act as a mediator not only in cases connected with notary’s activity but also when the parties apply to a notary to act as a mediator. This should be possible when the notary is listed in the Registry of Mediators. Moreover, a notary may certify mediation agreements. The Act on Notaries and Notarial Activity in the Republic of Belarus should contain provisions stipulating the principles of mediation in notarial activity.

21 *Ibidem*, p. 80.

22 И.Г. Черемных, Перспективы участия нотариуса в процедурах медиации, “Право и политика” 2007, No. 3, p. 108.

To increase the number of notaries among mediators, one should postulate actions aimed at the extension of notarial qualifications by the inclusion of negotiation procedures. This could be accomplished by the Notary Chamber of Belarus as a body of notary self-governance.

It appears that these proposals will allow notaries to join the process of the fulfillment of the function of a mediator more actively.

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