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FEATURES OF NOTARIAL PROCEEDINGS FOR CERTIFICATION OF CONTRACTS

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The basics of the notarial process in Ukraine, in particular scientific views and modern approaches to the problem of legal definition of the notarial process, features of notarial proceedings for certification of contracts are investigated in the article.

Thus, the author determined that the notarial process means the activities of notarial bodies carried out in the manner prescribed by law.

The core of the notarial process is notarial proceedings, which include the actions of the notary, persons who applied to him and persons who assisted the notary in performing notarial acts.

The importance of the notarial procedure is not limited to its functional purpose to be a way of origin, change and termination of legal relations.

The author examines the legal significance of the notarization of the contract and determines the stages of notarial proceedings for the certification of contracts.

The article outlines in detail the list of factual and legal actions performed by a notary at each stage of this notarial proceedings.

Analyzing the features of each type of contract, the author outlines a number of certain preparatory actions or circumstances, the presence or absence of which give grounds to perform a notarial act – to certify the contract. However, the actions and circumstances that are mandatory for all types of contracts are also defined.

The article defines the range of actions that must be performed by a notary at the stage of preparation for the performance of a notarial act – a certificate of contract, regardless of the type of contract.

The actions of a notary in the next stages of the notarial process depend on the peculiarities of certain agreements, their content, parties, etc.

Key words: notary, notarial process, notarial proceedings, notary, contract.

Formulation of the problem. The state governed by the rule of law, implementing the protection of the rights of citizens and others, assigns a leading place to the notary as a body of undisputed jurisdiction. Given the large number of transactions that are subject to mandatory notarization, in modern law, the notarial process is an integral part and a way for citizens to exercise their undisputed rights out of court. The complexity and versatility of these issues necessitated a complex, comprehensive analysis of

theoretical, legal and practical aspects of the notarial process, in particular regarding notarial proceedings for certification of contracts. Focusing on these issues requires a thorough rethinking to further improve the institution of the notary, in particular in the context of European integration. In turn, the development of the science of notaries requires a deepening of the theory of the notarial process, including a detailed study of the specifics of notarial proceedings.

Analysis of research problem. Our study's theoretical and methodological basis were the works of both domestic and foreign scientists. Among the well-known scholars who have studied the concept of "notarial process" "notarial proceedings", it should be noted: V. V. Barankova, M. V. Bondareva, Yu. V. Zhelikhovska, T. H. Kalinichenko, Ya. Fursa, and other. Given the significant contribution of scholars in the study of these legal categories, it is necessary to pay attention to the peculiarities of the notarial process of certification of contracts.

The purpose of the article is to determine and analyze the legal nature of notarial proceedings, particularly the certification of contracts, to establish its role and level of implementation in law enforcement practice.

Presenting main material. A clearly defined system of notarial activity is a reliable mechanism for the protection of rights and freedoms in a state governed by the rule of law, and is also necessary to bring certain social relations to the state required by law. Notarial activity, as a kind of legal and in turn a kind of social activity, is aimed at ensuring and protecting the rights and legitimate interests not only of citizens and legal entities, but the state and society as a whole.

Before starting the analysis of notarial proceedings on the certificate of contracts, it is necessary to find out what is meant by notarial proceedings and what elements the notarial procedure includes.

In the scientific literature, the notarial process is defined as a complex system of legal forms of the notary activity and citizens interested in the legal outcome, governmental and non-governmental organizations, governed by legal norms with subsequent consolidation of its results in the relevant notarial acts [1, p. 17].

Referring to the scientific work of V. V. Barankova, it should be noted that the author interprets the notarial process as a form of notarial activity, a kind of legal process, which provides a statutory procedure for notarial acts. The notarial process is considered as a specific legal form of activity, within which the application of legal norms is carried out through the implementation of notaries' legal powers in undisputed cases. The researcher rightly emphasized the existence in the notarial process of a system of requirements for notarial proceedings, which are contained in the Code for the performance of notarial acts [2, p. 25]. Thus, the notarial process means the activities of notarial bodies carried out in the manner prescribed by law. The content of this activity is formed by the mutual rights and obligations of the subjects of the notarial process – notarial bodies and persons who apply for notarial acts. Therefore, the notarial process must be clearly regulated by a special law, as the procedural regulation unite all notaries, regardless of the form of organization of the notary.

The core of the notarial process is notarial proceedings, which include the actions of the notary, the persons who applied to him/her and the persons who assisted the notary in performing notarial acts.

A valuable contribution to the development of the theory of the notarial process was made by S. Ya. Fursa, whose works became a new milestone in the study of this legal category. The scientist interprets the concept of "notarial proceedings" as a set of procedural actions performed by a notary and other subjects of the notarial process, which are aimed at certifying indisputable rights and facts and performing other notarial acts to give them legal credibility in the manner prescribed by law [3, p. 327].

A somewhat similar definition is given by Yu. V. Zhelikhovska, calling notarial proceedings a set of consecutive notarial acts that have legal significance in order to give them legal credibility and a consistent process of its registration [4, p. 85]. From the definitions presented by the authors,

we see that one of the subjects of notarial proceedings is a notary, and the subject and result of its activities – the performance of a notarial act.

Equally interesting is the opinion of M. V. Bondareva, which characterizes the notarial proceedings as a lawful act, which is an element of complex legal structures that give rise to legal consequences [5, p. 55]. The author emphasizes the notarial proceedings as a particularly important, independent element of the legal structure, the absence of which will cause the absence of this composition and prevent the occurrence of legal consequences.

Analysis of the provisions of Art. 34 of the Law of Ukraine “About the notary” [6] (hereinafter – the Law) allows us to note that the classification of notarial proceedings is carried out on various grounds, and this helps to better understand their broad list. Despite all the variety of classifications of notarial proceedings, the common denominator of them is that they have a specific purpose, and therefore all can be classified by purpose.

It so happened that the notarial process is connected, first of all, with civil legal relations. The notary is entrusted with the performance of certain notarial acts aimed at the legal consolidation of indisputable civil rights and facts. Notaries promote the realization of citizens’ rights and prevent their possible violation. The formation of notaries and notarial proceedings is due primarily to the needs of civil law. However, notarial procedures cannot be considered in connection with civil law relations alone, as their main and functional purpose is much broader.

It should be noted that the importance of the notarial procedure is not limited to its functional purpose to be a way of emergence, change and termination of legal relations. For example, a notarized contract provides an opportunity to obtain valuable proof of the existence of certain rights and obligations – a notarized document that reflects the content of the agreement. The value of a notarized document as evidence is determined primarily by its authenticity. And in case of a dispute, a notarized contract makes it easier for the party to substantiate their claims, because the fact officially confirmed by a notary no longer needs to be proved by other means.

Speaking about the importance of notarial procedure, its role as a form of state control over the legality of notarial acts should not be underestimated. Therefore, the notary certifies the contract only if it is concluded that it does not contradict the requirements of the law. The need for such control and the suitability of the notarial procedure for its implementation should encourage the legislator to establish in regulations requirements for notarized transactions.

We consider the opinion of S. Ya. Fursa to be correct, who names three elements of the notarial procedure: the order, rules and fixation of notarial proceedings, which together should ensure a single content and sequence of notarial acts for all notaries of Ukraine and persons authorized by law to perform notarial acts [3, p. 444]. Today, the vector of modern scientific research should be aimed at the development of notarial procedure. It should be clearly enshrined in law, with the establishment of rules for notarial proceedings, which will allow a uthorized persons to perform notarial acts in a certain sequence – from preparatory actions to the preparation of a notarial deed. Therefore, the notarial procedure must be uniform, mandatory and agreed for all persons authorized by law to conduct notarial proceedings.

Considering the notarial proceedings for the certification of contracts, it should be emphasized that such certification is subject to contracts prescribed by law, or those contracts that the parties wish to notarize of their own free will.

As S. Ya. Fursa rightly points out, “acknowledgment of contract, as a general rule, belongs to a one-stage notarial procedure, which goes through three stages: opening, preparation and direct conclusion of the contract, which ends with a certificate of notarial deed. However, there are cases when we can say that the acknowledgment of contract is a multi-stage notarial procedure. This is, in particular, when it comes to certification of previous and main agreements, making changes (additions) to the agreement, etc.” [3, p. 665].

Features of notarial proceedings for certification of contracts

Based on the general rule of three-stage notarial proceedings for acknowledgment of contracts, we note that the opening of notarial proceeding in this case is the application to the notary of the parties of the contract with a request to certify such a contract.

The only thing a notary does at this stage of the proceedings is to find out the intentions of the parties, explain to them their rights and obligations and the legal consequences of the contract, etc., in order to determine which contract, they want to notarize.

The next stage is preparation for the performance of a notarial act.

At this stage, the parties submit to the notary the necessary documents to certify the contract and the notary, studying and analyzing them, establishing the presence or absence of conditions for notarial acts, carrying out appropriate verifications for the presence/absence of obstacles to the contract acknowledgment, decides on the possibility of performing a notarial act (acknowledgment of contract) or refusal to perform it. The set of verifications to be performed by a notary will depend on the type of contract.

Peculiarities of each type of contract are determined by a number of certain preparatory actions or circumstances, the presence or absence of which give grounds to perform a notarial act – to certify the contract.

However, there are actions and circumstances that are mandatory for all types of contracts. In particular:

1. No restrictions on the right for acknowledgment of the contract. Thus, in accordance with Art. 55 of the Law of Ukraine “About the notary” of September 2, 1993 “acknowledgment of agreements on alienation, mortgage of a house, apartment, cottage, garden house, garage, land plot, other real estate is carried out at the location of such property or at the location of a legal entity, or at the registered place of residence of an individual – one of the parties to the contract. Acknowledgment of agreements for alienation, pledge of vehicles subject to state registration is carried out at the location of the legal entity or at the registered place of residence of the individual – one of the parties to the contract” [6]. In addition, restrictions are also set out in Art. 9 of the Law of Ukraine “About the notary”.

2. The terms of the contract must not contradict current legislation.

In accordance with paragraph 1 of Part 1 of Art. 49 of the Law of Ukraine “About the notary” notary refuses to perform a notarial act if its performance is contrary to the laws of Ukraine. “Documents that do not meet the requirements of the law or contain information that degrades the honor, dignity and business reputation of an individual or business reputation of a legal entity” (Part 3 of Article 47 of the Law of Ukraine “About the notary”) are not accepted for notarial acts [6].

3. The presence of legal capacity of legal entities and individuals who have applied to a notary for acknowledgment of contract. As for a legal entity, its legal capacity is checked according to the constituent documents and information of the United State Register of Legal Entities, Individual Entrepreneurs and Public Organizations. With regard to individuals, their capacity is determined by the notary on the passport of a citizen of Ukraine or other documents that prevent doubts about the scope of capacity (Part 2 of Article 44 of the Law of Ukraine “About the notary” [6]), i. e. the same documents on which the notary establishes the person who applied for the contract acknowledgment.

However, in accordance with Part 1 of Art. 30 of the Civil Code of Ukraine of January 16, 2003 (hereinafter – the CC of Ukraine) “civil capacity is the ability of a person to acquire civil rights and exercise them independently, as well as the ability to create civil obligations, perform them independently and be responsible in case of non-compliance. A person who is aware of the significance of his/her actions and can control them has civil capacity” [7].

In order to determine the scope of legal capacity in general, the notary must communicate with the person, find out his/her adequacy, the ability to understand the meaning of his/her actions, and so on. In case of doubt, the legislator obliged the notary to apply to the guardianship authority to find out the absence of guardianship or custody of the person (Part 3 of Article 44 of the Law of Ukraine “About the notary” [6]). If, however, the notary has doubts that the person is aware of the meaning, content and legal

consequences of the contract on the acknowledgment of which he/she applies, then according to paragraph 4 of Part 1 of Art. 49 of the Law of Ukraine “About the notary” notary denies him/her an acknowledgment of contract.

4. The presence of true intentions of the parties to certify the contract. In accordance with Part 10 of Art. 44 of the Law of Ukraine “About the notary”, the notary is obliged to “establish the true intentions of each party for the acknowledgment of the contract, as well as the absence of objections of the parties to each of the terms of the contract” [6]. To this end, the notary establishes the same understanding by the parties of the meaning, terms of the contract, its legal consequences for each party.

5. The presence of duly certified powers of the representative, if the contract is certified with his/her participation. The notary establishes the identity of the representative and finds out whether he/she has the right to enter into a contract and under what conditions.

6. Availability of documents and information required to certify the contract. Such documents and information must be provided to the notary by the parties to the contract. The list of such documents and the content of information is determined by the current legislation depending on the type of contract to be certified.

7. The presence of payment to a notary for the acknowledgment of the contract and the implementation of other payments provided by law. According to Art. 42 of the Law of Ukraine “About the notary” the contract is certified after payment for its acknowledgment [6]. As for other payments, their payment is regulated by special legislation depending on the type of contract.

At the stage of preparation for performance of a notarial act – acknowledgment of the contract, the notary must perform a number of actions that are mandatory regardless of the type of contract. In particular, to establish the facts and determine the regulatory framework to be applied to these legal relations; determine the range of persons whose presence is necessary for the acknowledgment of the contract, identify them and determine the scope of legal capacity; determine the range of persons whose interests are affected by the acknowledgment of the contract, and verify their consent to the acknowledgment of the contract or otherwise ensure the protection of such interests (for example, the consent of the other spouse to dispose of joint property); determine the range of persons who assist and help the notary in the acknowledgment of the contract (for example, witnesses, translators, etc.); verify the documents submitted to the notary for their validity, authenticity and compliance with applicable law; if necessary, request other documents from individuals and legal entities by submitting a request; verify the relevant information according to electronic registers; to verify the fact of application of the sanctions provided by Art. 4 of the Law of Ukraine “On Sanctions” of August 14, 2014 [8] to the parties of the contract, the presence or absence of the parties of the contract in the list of terrorists; draw up a draft contract and applications.

The actions of a notary in the following stages of the notarial process depend on the peculiarities of specific agreements, their content, parties, etc.

Conclusions. Summarizing the above, we can say that A notarized contract receives official status, has a greater degree of protection and guarantees of its implementation in comparison with the contract concluded in a simple written form.

Increased attention to rights and freedoms determines the natural process of further concentration of scientific knowledge on the notarial procedure for certification of contracts. Notarial proceedings for the acknowledgment of contracts is one of the most responsible procedures for the performance of notarial acts, which takes place in three stages, has its own specific peculiarities compared to notarial proceedings for the performance of other notarial acts. The study of these peculiarities and their enshrinement in law is the key to the proper performance of the notary's duty to perform notarial acts, and hence – a reliable protection of the rights and interests of citizens.

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ОСОБЛИВОСТІ НОТАРІАЛЬНОГО ПРОВАДЖЕННЯ З ПОСВІДЧЕННЯ ДОГОВОРІВ

Досліджено основи нотаріального процесу в Україні, зокрема наукові погляди та сучасні підходи до проблеми правового визначення нотаріального процесу, особливості нотаріального провадження щодо посвідчення договорів.

Відзначено, що нотаріальний процес – це діяльність нотаріальних органів, що здійснюється у встановленому законом порядку.

Зауважено, що основою нотаріального процесу є нотаріальне провадження, яке включає дії нотаріуса, осіб, які до нього звернулися, та осіб, які сприяли нотаріусу у вчиненні нотаріальних дій.

Вказано, що значення нотаріальної процедури не обмежується її функціональним призначенням бути способом виникнення, зміни та припинення правовідносин.

Досліджено правове значення нотаріального посвідчення договору та визначено етапи нотаріального провадження щодо посвідчення договорів.

Детально викладено перелік фактичних та юридичних дій, які здійснює нотаріус на кожній стадії нотаріального провадження.

Аналізуючи особливості кожного виду договору, виділено ряд підготовчих дій та обставин, наявність або відсутність яких дають підстави для вчинення нотаріальної дії – посвідчення договору. Також визначено дії та обставини, які є обов’язковими для всіх видів договорів.

Визначено коло дій, які повинен здійснити нотаріус на стадії підготовки до вчинення нотаріальної дії – посвідчення договору, незалежно від виду договору.

Зазначено, що дії нотаріуса на наступних стадіях нотаріального процесу залежать від особливостей тих чи інших договорів, їх змісту, сторін тощо.

Ключові слова: нотаріат, нотаріальний процес, нотаріальне провадження, нотаріус, договір.