Toruń, 13.06.2017 r.

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The protection of rights and legitimate interests of parties to notarial action, as well as other people

A summary of the doctoral dissertation

The aim of this doctoral dissertation was to present the principle of protecting the legal transactions participants' rights and legitimate interests as one of the guiding principles of the Latin notaries, on the example of Polish order, reconstruct its content and evaluate the functionality and effectiveness of legal instruments for its implementation.

To this principle, which is at the same time the primary duty of the notary, the legislator devoted an art. 80 § 2 of the Notary Public Act of 1991, which stipulates that notaries, performing notarial actions, are obliged to ensure that the rights and legitimate interests of the parties and other persons for whom this actions are likely to have legal effects, are upheld. The literature firmly underlines the importance of the signaled regulation, assuming that it fulfills the role as a determinant of the due diligence's content, expected from a notary in accordance with art. 49 of the law on notary, which translates into his responsibility.

The process of notaries formation proved that the profession of a notary is not an institution in itself, in the sense that it guarantees proper protection of the legal transactions, participants' rights and interests solely by the fact that their performers are named notaries. The state has to pass a notary the function of a security guarantor and at the same time endow him with the systemic mechanisms, which allow to fulfill responsibilities resulting from art. 80 § 2 of the law on notary. The number of constructional solutions serve above assumptions, ranging from the legal status of a notary, the evidential value of documents he makes, the impartiality and independence requirement, professional secrecy and obligations related to the performing action such as: the obligation to know the true will of the parties, explanatory and advisory duty, the duties dictated by the mode of action or regulation on the refusal to perform notarial actions.

Chapter I of the dissertation was devoted to historical analysis, indicating the roots of principle in the Polish legal order. The starting point was the deliberations on the formation of the notary institution during the antiquity and the Middle Ages. Since the dawn of history, notaries have been seen as a tool created for securing legal transactions. The notarial model, developed on the basis of the Latin standards, quickly became the dominant model in the world, especially due to the legal precaution that it offered. At present, its strength is increasing with the processes of uniting the Latin notaries countries, taking care of the common assumptions and values shaping the attitude of the Latin notaries.

Chapter II delt with issues concerning the location of the protection principle in the Polish legal system and the interpretation of art. 80 § 2. The analysis included, in particular, the content of the rule - its personal and material scope. Besides the notary, the legal status of the applicant and the deputy of the notary were considered, as well as the consul of the Republic of Poland, including the honorary consul and other persons involved in the preparation of notarial documents. Within the framework of the foregoing considerations, special attention was paid to the designation of entities to whom the protection principle should be pursued. The inconsistency of the legislator in the use of phrases dealing with personal categories has given rise to the need for in-depth interpretation of such terms as parties to notarial action or other persons for whom this action may has legal effects, including extending the protection afforded in principle to the notary himself and the State Treasury or other state entities. The dissertation also focused on the material scope of the principle, which concentrates on taking care of the protection of rights and legitimate interests, updated at the time of the wide notarial action performing.

Chapter III was an attempt to find an answer to the question of the legal status of a notary, who is essentially a contractor on the periphery of professions and public officials. The legislator has given him the character of a person of public trust who realizes public tasks in a way that is independent of public administration structures, thus demonstrating functional relationships with public authorities and, at the same time, not being a public servant. Qualifying a notary as a person of public trust is considered as condition *sine qua non* of the Latin notary institution in general. The deliberations therefore covered the features that determine the existence of the following designation, as well as whether its lack enables the implementation of the protection principle.

Chapter IV was devoted to discuss the basic duties of a notary in connection with notarial action performing. The analysis considered the obligation to know the true will of the parties, the explanatory and advisory duty, the obligation of professional secrecy and the

obligation to clear and transparent edition of the notarial documents. Under Chapter V, however, were classified those notary's obligations which directly relate to the mode of action understood as a marked process, a sequence of behaviors of a notary, that all-together constitute the notarial action. Particularly there were developed such themes as: the verification of presence and identity of the appearing parties, the rules of dealing with disabled or limited-skills persons, the reading and signing of notarial documents and some of the secondary obligations that compile the broadly understood mode of action.

In Chapter VI, the attention was drawn to the institution of refusal to perform notarial action, as an exception from the notarial compulsion. The general requirement in this regard is introduced by art. 81 of the law on notary, stating that a notary has to refuse to perform an unlawful notarial action. It is supplemented by the regulation of art. 84 and 86, referring to the grounds of refusal dictated by the need to maintain the notary's impartiality, as well as verification of the legal capacity of parties. Apart from the indicated provisions, a refusal to perform actions may be caused by the situations necessitating the need to protect the fiscal interests of the State Treasury and notary. In addition to the statutory regulations, there are also basis for refusal, which are found in the Notary Public's Code of Professional Ethics. In the end, this section highlighted the issue of the refusal procedure.

The last chapter was devoted to considerations about the existence of a protection principle in the Anglo-American notarial model. Overview of the basic, constructional elements of notarial system in England and the United States of America, does not allow to identify the legal role of *notary public* with the role of Latin notary. The differences in the formation of these two notaries emphasize the shortcomings of Anglo-American solutions, which have been recognized in the literature, especially in the context of the USA financial crisis of 2007-2010. During this period, the idea of enriching the *notaries public* with the powers typical for Latin notaries, was firmed up.

The result of the research proved that the Notary Public Act of 1991 does not provide sufficient legal instruments to protect the rights and legitimate interests of legal transactions participants. Therefore, the author pointed out the direction of changes in the construction of the protection principle and also formulated *de lege ferenda* proposals towards its true and full realization.