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FOREIGN EXPERIENCE IN ADMINISTRATIVE AND LEGAL FRAMEWORK FOR NOTARIAL SECRECY AND ITS POTENTIAL APPLICATION IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to analyze the foreign experience of administrative and legal provision of notarial secrecy and the possibility of its use in Ukraine. ***Results.*** The relevance of the article is that the development of a democratic and legal state requires awareness of the peculiarities and features of legal institutions, which have been forming at various stages of society's development. The use of the legal experience of foreign countries enables to improve the regulatory mechanism for certain legal relations. Accordingly, the notarial system in Ukraine, in particular its constituent parts, cannot progress in isolation and should follow the general trends of its development in the European notary system. The Latin notarial system includes more than fifty countries that are united in the International Union of Latin Notaries, which is an international non-governmental organisation created to promote, coordinate and develop notarial activity in the world. It is emphasised that French notaries are lawyers of wide specialisation, and they have a monopoly on the execution of certain acts. These include acts of sale of real estate, division of property upon divorce, inheritance and donation, marriage contracts. In addition, one of the most important functions of notaries in France is consulting in the field of taxation. When clients contact them on these issues, they comprehensively analyse the situation and try to find the best options for its solution in full compliance with French law. ***Conclusions.*** It is clarified that the legislative ambiguity in the United States regarding the regulatory mechanism for notarial activities does not allow us to clearly trace the preservation of notarial secrecy. However, it is certain that this shall be required, as it fully ensures the rights of a person applying for a notarial act. It is concluded that the Anglo-American type of notary organisation is characterised by provisions based on legal customs. Notaries of this legal family mostly perform actions to confirm certain facts (for example, dates), or to store original documents, at the request and consent of the parties concerned. The competence of notaries includes only the certification of documents and signatures. The Anglo-Saxon (Anglo-American) type of notary is characterised by being based on precedents formed by legal practice, and not on codified legal regulations, as well as provides for the possibility of using any evidence.

Key words: notarial secrecy, legislation, notary, notaries, notarial acts.

1. Introduction

A democratic and legal state cannot develop without understanding the peculiarities and features of legal institutions, which have been forming at different stages of the development of society. The use of legal experience of foreign countries enables to improve the regulatory mechanism for certain legal relations. Accordingly, the notarial system in Ukraine, including its components, cannot develop in isolation and should follow the general trends of the development of the European notary system.

The Latin notarial system includes more than fifty countries that are united in the

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International Union of Latin Notaries, which is an international non-governmental organisation created to promote, coordinate and develop notarial activity in the world.

The purpose of the article is to analyze the foreign experience of administrative and legal provision of notarial secrecy and the possibility of its use in Ukraine.

2. Administrative and legal regulation of notary activities in Italy, Germany and France

The country with the most effective notarial system is Italy. In essence, the activity of notaries in Italy is to interpret the will of the parties when they intend to draw up a contract in accordance with the law and relevant provisions, which significantly reduces legal risks (Le funzioni del Notaio, 2017). Italy has one of the oldest notary laws in force (“legge notarile”, 1913), according to which a notary is an official who performs the functions of accepting or issuing documents. In this regard, the role of documenting and certifying documents performed by the notary is extremely important, thereby protecting the public trust, accurately representing the will of the parties, showing confidence in what has been said and done in his/her presence, reproducing the full identity of what is written in the document (Il ruolo del notaio in Italia e la differenza con l’Inghilterra, 2017).

A notary in Italy is an official authorised by the Italian State to register all types of contracts concluded between legal entities and individuals and to certify the last will of individuals, giving these acts the status of an official document. A notary operates in the field of family legal relations; real estate (purchase and sale of houses and apartments, offices, land, warehouses, workshops, donations, division, mortgage, etc;) establishment and changes in the company’s charter (transition to private or corporate form, establishment and closure of firms, amendments to the charter, assignment and lease of the company, etc.) The competence of Italian notaries is subject to strict checks by the state, which contributes to the security of its activities in relation to residents and non-residents of the country (Notarius v Italii – osobennosti professii, 2020).

Italian legislation does not contain a concept of “notarial secrecy”. Instead, the Code of Professional Ethics of the notary contains a paragraph entitled “On secrecy”, paragraphs 38-39 of which oblige the notary to respect “professional secrecy” in the course of his/her activities, as well as to take all possible actions to preserve it (*Consiglio Nazionale del Notariato, 2008*).

The Spanish legislation pays special attention to the control of compliance with the requirements for admission to the profession of notary. This is due to the fact that Spanish notaries are characterised as “high class” lawyers. They perform purely notarial functions and spend the rest of their time teaching at universities and drafting legislation. The direct drafting of contracts and the provision of additional notarial services is mainly carried out by lawyers. In this regard, Spain has relatively high requirements for candidates for the position of notary. In addition, they shall pass five exams: civil, commercial, mortgage (real estate transactions), notary, administrative law and procedure, each of which includes both theoretical and practical parts. Upon successful passing of the exams, the candidate is allowed to participate in the competition (Kohutych, 2018, p. 155). The winners of the competition receive a diploma of notary on behalf of the King of Spain and the right to practice notarial activity. Control functions over the proper performance of notaries’ duties at the central level are concentrated in the National Council of the Spanish Notary, and at the local level - in the regional notary chambers (Martyniuk, 2015, pp. 99).

The modern notarial system in Germany is also the result of a long development. The notarial system in Germany has been formed for a long time, and its specificity is due to the factors of historical formation of the State. For example, the Left Bank of the Rhine applied the French notary system, in Bavaria it was forbidden to simultaneously hold the positions of a notary and a lawyer, in Prussia notarial acts could be performed by notaries-lawyers and notaries, and in the North and Central German lands only lawyers worked as notaries (Rajman, 2004, pp. 50–56).

The specificity of the German notarial system is the absence of a single regulatory act that would regulate the notarial process and the right of notaries to charge tariffs. In addition to the Federal Notary Regulation, there are many special legal regulations that supplement it. The certification process is regulated by the Law on the Establishment of Mandatory Forms of Documentation and the costs and tariffs by the Law on the Costs and the Voluntary Jurisdiction. Both laws, together with the Federal Regulation on Notaries, define the status of the notary in the general legal system (Ilina, 2013, p. 151).

Not only German citizens can be notaries. Notaries can conclude cooperation agreements with each other, according to which they will perform in the same premises. Profit from such activities is received in equal shares. A novice notary is obliged to work for 5 years in the dis-

trict where he/she first registered, and only after that the district can be changed. Acting notaries have an advantage over candidates for registration in the district, so candidates usually first register in a small settlement, and after 5 years try to change the district (Official website of the Chamber of Notaries of Ukraine, (2018).

A notary in Germany has broad powers: certification of documents, signatures of persons and copies of documents; issue powers of attorney, which are entered into a single register; register newly created legal entities, or make changes to the statutory documents of existing ones; certify the conclusion of a marriage contract; provide legal support for real estate transactions.

France played a significant role in the formation of the notarial system. As for the modern French notarial system, its organisational structure consists of three levels. The first level is the national level, represented by the Superior Council of Notaries of France. The second is regional, represented by the Regional Council of Notaries. The regional level is formed in the same regions where there are regional courts of appeal. And the third level is departmental, which characterised by the Notary Chamber of the Department, established in one or more departments of France. A special feature for all the above structures is that they are professional public associations based on compulsory membership of notaries (Ordinance of France on the status of a notary, 1945).

The French model, on the contrary, provides for the initiative of the notary him/herself from the moment the interested person applies to him/her. The notary and his/her numerous assistants fully take care of all the clients' concerns, starting from collecting the necessary documents, negotiating with other interested parties, drawing up and certifying the document and ending with the registration of the notarial act in the competent authorities. The French model is a conveyor belt with an individual approach, where the notary and the employees of the notary office provide the legal result desired by the client. Naturally, such a "flexible" approach is not without its drawbacks. Ignoring formalism sometimes underestimates the public law component of the notary profession, which can become the basis for a one-sided attitude of the notary to the performance of his/her duties (Ilina, 2013, pp. 148–152).

French notaries are lawyers of wide specialisation, and they have a monopoly on the execution of certain acts. These include acts of sale of real estate, division of property upon divorce, inheritance and donation, marriage contracts. In addition, one of the most important functions of notaries in France is consulting in the field of taxation. When clients contact them on these issues, they comprehensively analyse the situation and try to find the best options for its solution in full compliance with French law.

The participation of the notary, who is a fiduciary of his/her clients, is subject to professional secrecy. This obligation, which applies to him/her in the same way as to any employee of his/her office, concerns the drawing up of acts, as well as the exchange of correspondence or oral confidential information. Any breach of this obligation entails criminal, civil and disciplinary sanctions (Organization and role of notaries in France, 2018, p. 22).

French legislation, in particular Law 2004-130 of February 11, 2004, the Monetary and Financial Code in Article L 561-1 CMF protects the secrecy of legal advice provided by a notary, but obliges notaries to notify the public prosecutor of the Republic of the actions taken if they suspect the criminal origin of the funds, used in transactions of purchase and sale of real estate, enterprises, opening bank accounts, trust management, etc. (Ilieva, 2006, p. 218).

The principles of notarial activities in the countries of the Anglo-Saxon legal system (Great Britain, USA, Australia, Singapore, India, etc.) are quite different. Some scholars separately distinguish several subtypes within this type. For example, H.Yu. Hulievska distinguishes countries in which this system exists in parallel with other legal systems (Argentina, Bahrain, Brunei, Egypt, Cuba, Israel, Denmark, Finland, etc.) (Hulievska, 2004, p. 128).

3. Peculiarities of notarial activity in the countries of the Anglo-Saxon legal system

The main characteristics of the Anglo-Saxon notarial system are: the specifics of the regulatory registration of the notary institution in the respective country; understanding of the definition of "notary"; a list of requirements for applicants for the position of a notary; the procedure for admission to the profession; characteristics of the procedures for performing notarial acts, both general and special; competence of notary bodies (Ilina, 2013, p. 150).

According to R. David and C. Joffre-Spinoza, the United States of America and the United Kingdom are typical representatives of the Anglo-Saxon notarial system (David, Zhoffre-Spinozi, 1999, p. 53).

The peculiarity of the notarial system's organisation in the USA is the absence of a single specialised state legal institution. In general, there is no Federal legislation on notaries in the United States, the main legal aspects of the organisation of notarial activities in the United States are reflected in

the model law of the United States "On Notaries" and in the United States Uniform Law on Notarial Acts, while a specific list of notarial acts, requirements for persons, which intend to perform notarial acts, the legal status of notaries and the peculiarities of the organisation of their activities are regulated by the laws of individual states. This is the reason for the diversity and ambiguity of the notarial institution in the United States (Bondarieva, 2006, p. 153).

Under US law, a notary is any person authorised by the State to perform notarial acts, who exercises his/her or her competence either as the main activity or simultaneously with other types of business activities. In the first case, the notary, as a rule, carries out his/her activities as an employee, and they are aimed at servicing the relevant enterprise or institution. However, even in this case, the notary remains independent in all matters of professional activity and retains the right to perform notarial acts not related to the service of his/her employer in his/her free time. In addition to notaries, powers to perform notarial acts are granted by the laws of certain states to certain officials who can be conditionally divided into two groups: persons whose competence is determined by law and does not require additional confirmation, and persons whose right to perform notarial acts shall be confirmed in each case by local regulations. The first of these groups of officials includes judges, officers of the active military forces of the United States, officers of foreign military forces of the United States, officers of foreign military forces, officials of consular posts of a foreign state in the United States. The second group of persons who have the right to perform notarial acts only if they have a special permit to do so, includes, for example, the head of the federal prison (Bondarieva, 2006, p. 154).

The analysis of the model legislation of the United States allows concluding that the competence of notaries under the United States Model Law on Notaries includes such notarial acts, the performance of which does not require special legal knowledge and special qualifications of the notary: acknowledgement, that is, signing a document in order to give it legal force, jurat, that is, certification of the fact of acceptance of written testimony under oath, affirmation, certification of legal facts, certification of the fidelity of copies of documents, protests of payment documents (Bondarieva, 2006, p. 153–159).

American notaries do not certify the correctness of the facts stated in the document, but only certify the signatures on them. Therefore, such "notarised" documents have no evidentiary value neither in courts nor in state bodies. Such underdevelopment of the notary system, on the one hand, causes a huge burden on the courts, and on the other hand, minimizes state interference in the notary system (Martyniuk, 2015, pp. 99).

Such legislative ambiguity in the United States regarding the regulatory mechanism for notarial activities does not allow us to clearly trace the preservation of notarial secrecy. However, it is certain that this shall be required, as it fully ensures the rights of a person applying for a notarial act.

The organisation of control over notarial activities in Florida is somewhat different from the all-American model. State authorities here are vested with much broader control powers, which is due to the introduction of the civil notary system since 1998 (civil-law notary). Florida notaries have much broader powers than their colleagues from other states: they not only certify signatures on documents, but also provide legal advice, certify the correctness of the document content, execute powers of attorney, etc. (Hulievska, 2004, p. 131).

Relying on the review of the notary system in England, O.O. Vysiekantsev argues (Vysiekanktsev, 2012, p. 412) that notaries can be only persons who have a "certificate of the right to act as a solicitor" or a notarial certificate issued by a state body whose powers include the decision of admission to the performance of notarial acts (Judges of the provincial courts of Canterbury and York). In general, there are three classes of notaries: general notaries ("notaries-scribes"), who have the right to exercise their powers throughout the country, district notaries (solicitors), who have the right to perform notarial acts in the territory of a particular notarial district and church notaries, who work in courts. All court registrars shall be notaries and members of the Ecclesiastical Law Society of England (Bondarieva, 2006, p. 154). Notaries in England and Wales are the third and oldest (notaries began their professional activity in England in 1553) branch of the legal profession, they are the owners of the official seal and documents certified by them have evidentiary value. Notaries in England and Wales are public officials and their duties include the following: preparing and executing private and public authentic acts and legal documents, which are sealed with the notary's signature and official seal and are accepted and recognised throughout the world (The Notaries Society of England and Wales, 2018).

As in the United States, British notaries shall have professional indemnity insurance for the entire period of validity of the certificate of the right to practice notary or solicitor's certificate by concluding insurance contracts

in the amount of at least 100 thousand pounds (Halsbury's Laws of England, 2016, p. 201).

The subject competence of the British notary is determined by its focus on servicing external civil turnover, so the powers of notaries in the UK include the following categories of cases:

drafting and authenticating transactions, including wills, certifying legal facts for their subsequent validity both in the UK and abroad;

certification of authenticity of copies of documents and signature of the person on the document to give them evidentiary value;

keeping records of notarial acts (registers) containing the originals of all certified and authenticated documents; issuing authentic copies of certified and authenticated documents; taking oaths and declarations for further use in court proceedings in the UK and abroad; making protests of bills of exchange; making maritime protests, etc. (Silverman, 2001).

The British notary's competence also includes the certification of copies of documents that are considered by courts and state bodies both in the UK and abroad as original documents; protest of bills of exchange in non-acceptance, certification of non-payment of bills of exchange, preparation of acts of payment (Derhilova, 2017, p. 140).

The basic rules for the performance of notarial acts by British notaries are as follows: prohibition of unjustified refusal to perform a notarial act; the need for fair, adequate remuneration of the notary and the absence of an obligation to act free of charge; impartiality of the notary and prohibition to act in their own interests; impossibility to delegate their powers to another person; the need to act in good faith and in good faith within their own territorial and subject matter competence, etc. (Derhilova, 2017, p. 140).

The procedure for admission to the profession of a notary has certain peculiarities: the professional competence of a candidate for the position of a notary is confirmed by a certificate for the right to carry out the activities of a solicitor or a certificate for notarial practice (Bondarieva, 2006, pp. 153–159).

It is difficult to determine the main aspects of ensuring notarial secrecy in the UK. In general, it should be noted that there is no legislative (statutory) protection of commercial secrets, and, accordingly, there is no clear legal definition of commercial secrets. However, this branch of law, which includes certain elements of regulatory mechanism for real and obligatory rights, has been developing for 150 years on the basis of judicial precedents and was called law of confidence. It regulates, first of all, relations in the field of entrepreneurial activity, but these provisions are also applied to protect state secrets and privacy (Confidential information in the legislation of foreign countries, 2014).

As in the United States, UK notaries are required to have their professional activities insured for the entire period of validity of the certificate by concluding an appropriate insurance contract.

To sum up, it can be stated that the Anglo-American type of notary organisation is characterised by provisions based on legal customs. Notaries of this legal family mostly perform actions to confirm certain facts (for example, dates), or to store original documents, at the request and consent of the parties concerned. The competence of notaries includes only the certification of documents and signatures. The system of the Anglo-American type is characterised by the fact that codified laws are few, the sources of legal norms are mainly precedents formed by legal practice. In order to ensure the basic principle of civil turnover, that is, freedom of transactions, it is possible to use any evidence (Maikut, 2012).

Therefore, the analysis of the above types of notaries reveals that the division of national notaries into Latin notaries and Anglo-Saxon notaries is conditional. There is no universal (single correct) model of both the Latin type notary and the Anglo-Saxon type notary, since they are based on a set of features that distinguish one model of national notary from another model, and, as a rule, are reflected in the sources (forms) of regulatory mechanism for notarial relations in foreign countries.

The rule of notarial secrecy is provided by the legislation of many countries of the world. In particular, according to Art. 23 of the Interim Regulations of the People's Republic of China on Notarization, notaries who perform notarial acts in notary offices are obliged to keep the secrecy of notarial acts. At the conference of national organisations of notaries of the European Union in 1995 in Naples, the Code of Notary Ethics was adopted, which enshrines a set of norms common to all notaries of the European Union. Paragraph 1.2.3 provides that as a fiduciary of his/her clients, the notary is obliged to keep the secrecy of the notarial act in accordance with the applicable national legislation. The obligation to keep the secrecy of notarial acts is imposed not only on the notary, but also on his/her colleagues who work with them in professional partnership, and employees; at the same time, the provisions of the current national legislation shall be observed. Regarding the Code of Ethics, professor H. Schippel argues that without the inclusion of the obligation to keep the secrecy of the notarial act trust between the notary and his/her clients is impossible, and without such trust, in turn, it becomes

impossible for the notary to properly perform his/her official duties of notarisation and advising the participants in legal relations (Shippel', 1997, pp. 11–15).

4. Conclusions

It was concluded that the Anglo-American type of the notarial system's organisation is characterised by provisions based on legal customs. Notaries of this legal family mostly perform actions to confirm certain facts (for example, dates), or to store original documents, at the request and consent of the parties concerned. The competence of notaries includes only the certification of documents and signatures. The Anglo-Saxon (Anglo-American) type of the notarial system is characterised by being based on precedents formed by legal practice, and not on codified legal regulations, as well as provides for the prospect of using any evidence.

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ЗАРУБІЖНИЙ ДОСВІД АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ НОТАРІАЛЬНОЇ ТАЄМНИЦІ ТА МОЖЛИВОСТІ ЙОГО ВИКОРИСТАННЯ В УКРАЇНІ

Анотация. Метою статті є аналіз зарубіжного досвіду адміністративно-правового забезпечення нотаріальної таємниці та можливості його використання в україні. Актуальність статті полягає в тому, що розбудова демократичної та правової держави не може відбуватись без усвідомлення особливостей та ознак правових інститутів, формування яких відбувалось на різних етапах розвитку суспільства. Використання правового досвіду зарубіжних країн дає можливість вдосконалювати регулювання тих чи інших правовідносин. Відповідно, й розвиток нотаріату в Україні, зокрема й його складових частин, не може відбуватись ізольовано та має слідувати загальним тенденціям його розвитку європейської нотаріальної системи. До системи латинського нотаріату входять більше п'ятдесяти країни, які об'єднані у Міжнародний союз латинського нотаріату, який є міжнародною неурядовою організацією, створеною для сприяння, координації й розвитку нотаріальної діяльності у світі. Наголошено, що Французькі нотаріуси – це юристи широкої спеціалізації, причому на оформлення певних актів вони мають монополію. До таких належать акти купівлі-продажу нерухомості, розділу майна при розлученні, успадкування та дарування, шлюбні договори. Крім того, однією з найважливіших функцій нотаріусів у Франції є консультування в області оподаткування. При зверненні до них клієнтів з цих питань вони комплексно аналізують ситуацію і намагаються знайти найоптимальніші варіанти її рішення в повній відповідності з французьким законодавством. З'ясовано, що законодавча неоднозначність в США щодо регулювання нотаріальної діяльності не дозволяє однозначно простежити забезпечення збереження нотаріальної таємниці. Проте певно що, така вимога повинна висуватися, оскільки це повною мірою забезпечує права людини яка звертається за вчиненням нотаріальної дії. Зроблено висновок, що для англо-американського типу організації нотаріату властиві положення, засновані на правових звичаях. Нотаріуси цієї правової сім'ї здебільшого виконують дії щодо підтвердження окремих фактів (наприклад, дати) або зберігання оригіналів документів, за бажанням і згодою зацікавлених осіб. Нотаріус наділений повноваженнями лише щодо посвідчення документів і підписів. Для англосаксонського (англо-американського) типу нотаріату характерним є те, що вона заснована на прецедентах, утворених юридичною практикою, а не на кодифікованих нормативно-правових актах, також передбачає можливість користуватися будь-якими доказами.

Ключові слова: нотаріальна таємниця, законодавство, нотаріат, нотаріуси, нотаріальні дії, нотаріальні дії.

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