INTERNATIONAL UNION OF LATIN NOTARIES

XXIII INTERNATIONAL CONGRESS OF LATIN NOTARIES

Athens (Greece), October 2001

THEME I

"THE NOTARIAL FUNCTION IN AVOIDING DISPUTES: NOTARIAL ADVICE AND MEDIATION AS TECHNIQUES"

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FINAL RESOLUTION

Recommendations of the Congress

Regarding counselling and mediation, and where applicable, regarding Arbitration, and more specifically the functions and activities tied to the profession of notary, national and international legislators, the other competent bodies of States and the National Notarial Councils are encouraged and invited to:

- Respect the fundamental principles and the specific characteristics of counselling, mediation and arbitration, if these functions and activities are carried out by a notary belonging to the Latin Notariat system,
- Include and strengthen provisions, in national and international legal systems, concerning the mandatory or recommended intervention of notaries in matters mentioned above and below,
- Promote the primary aim of National Notariats and the INTERNATIONAL UNION OF LATIN NOTARIES of fulfilling the purpose of conflict and dispute prevention, to relieve congestion in State courts and contribute to safeguarding legal and social peace.

Counselling

1. Notarial counselling, (and ultimately, consultation of a notary) and the specific notarial functions under a given legal system, is aimed at informing clients about all aspects related to their legal problems and implementing the true will of the parties. Owing to its specific characteristics, notarial counselling may be viewed as the culture of conflict and dispute prevention.
2. Notarial counselling is provided in compliance with the legal system (a feature of public office) and concurrently in the spirit of services rendered to persons on the legal market (a feature of self-employment).
3. Notarial counselling is impartial vis-à-vis the parties involved regardless of any undue influence and is focused strictly on the legitimate needs of the legal service consumer.
4. Notarial counselling takes into consideration all legal and social aspects and all parties to a legal transaction and is therefore multilateral and strategic : it is geared towards the results and aims pursued by the parties, without being limited to partial, unilateral or purely tactical or provisional counselling ; it differs from other professions and consultants who serve only one part of a given legal transaction.
5. Notarial counselling is marked by the spirit of prevention of immediate or further conflicts; its field of application is extrajudicial in the strict meaning of the term, without neglecting, in any case, the settlement of disputes and the harmonisation of diverging interests irrelevant to court cases.
6. As to specific content, notarial counselling embraces the entire range of legal transactions, including, as the traditional notarial specialisation, all information concerning international and cross-border affairs, as well as private law. In this respect, counselling is unlimited, taking into account that notaries – who have to bring themselves up-to-date continuously – must have a good command of every aspect of counselling required.
7. Besides the traditional legal field of notaries, that is to say, counselling tied strictly to the drawing up of notarial deeds or other documents, counselling, in its modern and current form, is extended without restrictions to all legal matters, aside and independently from the drawing up of documents: notaries provide information and counselling concerning every aspect of law.
8. Notarial counselling is covered by the specific responsibility of the notary, who does not merely provide legal information, but guarantees the legality, pertinence and reliability of his/her counsel.
9. National Notarial Councils promote, check and oversee the activities of notaries in the field of counselling, updating, if necessary, the ethics, the training of notaries, the fees to ensure adequate remuneration, and all this

to the advantage of the players on the legal market and in fulfilment of the public functions of the Notariat.

Mediation

1. Mediation is an adequate method to settle conflicts and a useful means to harmonise the diverging interests of the parties to a transaction or other.
2. Mediation is functional to friendly settlements, pre-judicial management of conflicts and offers systematic, procedural and instrumental tools to build or rebuild legal and social peace between the parties. As an intermediate method and level, mediation falls between the parties in conflict and the courts of the State (or Arbitration courts) and its main aim is the prevention of disputes and the safeguard of the legal, social, psychological, personal and other interests of the parties.
3. This special management of conflicts - the pertinence of which is generally accepted, despite differences of opinion regarding details relating to content and procedure - is based on a new legal and social culture which, in case of conflict and diverging interests, commits persons or institutions to themselves in the first place and in particular to their individual potential to reach friendly agreements, i.e. this mandatory or voluntary mediation aimed at a slowing down premature access to State courts and relieving the latter from congestion, in the firm belief that the courts of the State are overburdened with work, badly equipped from a technical point of view, sometimes not specialised in this field despite the manifest need and very slow and costly as far as paperwork is concerned; these inappropriate characteristics fail to preserve or rebuild peace between the parties to a dispute.
4. According to the concept of mediation, the parties to a dispute and their advisors, to whom the mediation procedure is open, have to find a neutral mediator who can initiate a friendly procedure and adopt appropriate techniques with a view to settling the dispute. The parties to the dispute take action and decide about their conflict and how to settle differences. The purpose of this procedure is to come to a solution « found by the parties », and not « provided by a third party».
5. Within the framework of mediation, it is important to distinguish between different cases and affairs. The assistance of a mediator, even if specifically trained in mediation, does not automatically guarantee the competency required to find an adequate solution to every conflict or divergence of interests in legal and social life. Mediation, intended correctly, is tied to specific competency, as it should be specific, according to cases and different matters. It is in this spirit that in all chiefly legal matters, or matters that, aside from social and special aspects pertain to law, it is necessary to involve a mediator who has full legal competence guaranteed by specific training and full command of mediation methods and practices.

Moreover, a mediator should also be neutral, impartial and independent, enjoy public and private confidence due to his/her functions and professional responsibilities and be firmly determined to commit himself/herself to a specific case of mediation.

6. If, for these reasons and to be successful, mediation has to fulfil all the foregoing preliminary conditions, it is for their special, professional qualities and experience as «moderators» between parties, that notaries are well suited to serve as mediators and have to act as notaries – competent mediators in conflicts of a legal nature; without excluding the individual advisors of the parties from this notarial procedure (such as, tax consultants, and others). To this end, they will need special training, complete technical facilities and, where necessary specific ethics and adequate consideration, besides their good command of law, as notaries are required to choose freely whether to render mediation services in addition to their notarial functions.

7. The outcome of a mediation has to be fixed in a written agreement, which should produce incontestable legal effects, as is highly recommendable. If a mediator were not a notary or at least a general jurist, he/she would be forced to turn to a competent or co-competent third party to draw up the necessary deed. This would imply involving a second person, as well as higher costs, and may undermine the notion of the secrecy of mediation.

   Now, notaries who act as mediators have the privilege of offering their professional services to document the solutions found by the parties. Based on their direct, genuine experience of the mediation process, they can transcribe the agreement between the parties in a notarial deed or record in compliance with all the formalities established by law. A notarial deed also has the additional advantage of being enforceable and can therefore put an end to any uncertainty regarding the definite enforcement of the transaction. As a result, notaries have the extraordinary faculty of offering all the services related to legal mediation and its definite implementation « by one and the same hand».

8. To promote notarial mediation, it is advisable that notarial councils, supervisory bodies and entities supporting the notarial profession promote the involvement of notaries in mediation, establishing adequate ethical rules, organising the training of notaries and urging notaries to include clauses in their deeds which envisage mediation in case of conflict and, where necessary, arbitration, before filing a lawsuit. Notarial councils should ensure that there is fair remuneration, both social and adequate, offering their good services in support of notaries – mediators and establishing, if necessary, mediation chambers and centres, all to the advantage of the reliability and pertinence of notarial mediation and with a view to preventing disputes, the primary function of the profession of notary.

Arbitration

1. In the case of conflicts that have not been settled neither by counselling and adequate advice nor by mediation, Arbitration – from the vantagepoint of the profession of notary – is the ultimate means to settle disputes out of State courts. In the spirit of dispute prevention, arbitration may be considered as the final stage in the settlement of conflicts out of court, in the strict meaning of the term. This stage has an additional advantage deriving from the confidence of the parties who freely choose their arbitrators, and the specific competence of those who concretely decide about the matter, a condition that generally precedes the choice of the arbitrators.

   In this specific and restricted sense, we can still make reference to dispute prevention which, without arbitration, would be undoubtedly « condemned » to be settled in State Courts.

2. The Notariat represents the profession of Amicable settlements, of conflict and dispute prevention in the broad meaning of the term. However, since not even Mediation can settle all legal conflicts, the Notariat - represented by competent, adequately trained, capable notaries authorised to fulfil the function of arbitrator - offers the assistance of notaries in this field; the notaries concerned make the most of their professional expertise to the benefit of the negotiating parties, and of their legal competence; notaries may exercise the function of arbitrator voluntarily, either within a board of arbitrators or individually.

3. Within the framework of Arbitration and depending on the situation in the countries concerned, National Notarial Councils could, if deemed appropriate, set up boards of arbitrators, made up preferably of notaries, on top of Mediation Chambers, to offer the public the institution of Notarial Arbitration, with a view to combining the experience of notarial mediation and the practice of arbitration, with the intention of establishing an adequate code of conduct, acceptable remuneration and relative control.

4. Lastly, notarial arbitration should not be seen as an additional function of notaries, but as an extraordinary activity, that is compatible, in most of the cases, with other notarial activities and fits in with habitual notarial functions, which are primarily intended for and addressed to Counselling and Mediation, that is to say the «Amicable Settlement of Disputes», and the spirit of conflict and dispute prevention, the principal purpose of the profession of notary.

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