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NOTARIAL FORM *AD SOLEMNITATEM* IN MONTENEGRIN LAW

The paper considers the notarial form of legal transactions in Montenegrin law. Notarial legal transactions constitute a novelty within a legal system of Montenegro. Notaries started their work only five years ago. The author hereto pays special attention to the significance and functions of notarial form. The law provides for a notarial form as a prerequisite of validity of a number of the most significant contracts in the area of inheritance, family and obligations law. The author has analysed regulations pertaining to notary activities when making legal transactions in a form of notarial deed and specified that a constitutive form of certain legal transactions has given positive results in practice. Legal certainty has increased, especially in legal transactions pertaining to real estate. By impartial instructions to the parties, a notary makes sure the contracts constitute a result of true will of the parties engaged, that parties understand the legal consequences of undertaken transaction, that valid transactions are concluded and that conduct of court cases is avoided. If these contracts are not concluded in the form of notarial deed, they will not be legally effective. Notarial deed on any legal transaction shall acquire the status of public document and under certain conditions it may also obtain the status of executive title. The probative force of a legal transaction shall thus be increased in general and shall provide the execution without the participation of the court.

Key words: Notary. – Notary form. – Notary deed. – Solemnization.

1. INTRODUCTION

A form is an eternal companion of contracts. Throughout the history, the contract law has never freed the contracts from the form.¹ From

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¹ Rudolf von Jhering wrote: Form is the archfoe of arbitrariness, the twin sister of freedom (*Die Form ist die geschworene Feindin der Willtür, die Zwillingsschwester der*

the earliest ages until today it has been present in a contract law, but not always to the same extent, shape and meaning.² Form, according to various criteria, can be verbal, written, public, solemn, real, electronic, constituent/essential (*ad solemnitatem*) and evidentiary (*ad probationem*). Notarial form has a special significance among the public forms. However, notarial form of legal transactions constitutes a novelty in Montenegrin law.

Notarial service was introduced into a legal system of Montenegro by Law on Notaries, 2005.³ Thereby Montenegro joined the majority of European and Non-European countries that have a tradition in implementation of this institute. In Montenegro, unlike some countries having centuries long experience in implementation of notarial service, so far there has been no significant impact of notaries. In medieval coastal towns (Kotor, Budva, Bar, Ulcinj), notariat was substantially developed,⁴ but influence of notaries in Old Montenegro was negligible, in the extent of impacts of Venetian and Austro-Hungarian law. Notariat had not been practically affirmed while Montenegro was a part of the Kingdom of Yugoslavia, that is, at the time of validity of the Law on Public Notaries from 1930.⁵ Notaries were repealed in 1944⁶ and did not exist in a socialist Yugoslavia.

The idea of re-introducing notaries into a legal system of Montenegro came on a wave of a wider movement of public notaries' reform in Central and Eastern Europe at the beginning of 90s of the last century, following the fall of communism in socialist countries. In these so-called

Freiheit), See R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford 1996, 88 fn. 125.

² See on that in detail: S. Perović, *Formalni ugovori u građanskom pravu*, Belgrade 1964², 12 et seq.

³ *Official Journal of Montenegro*, No. 68/05.

⁴ Notary service has been legally shaped by provisions of Statutes of some cities, and a developed notarial activity has been substituting the vagueness of statutory provisions. The occurrence, establishment, legislative and practical actions of notaries in medieval communes of Montenegrin coast were also influenced by factors from the other side of the sea and from inland. Thus, the profilation and actions of notaries in Montenegrin coastal towns were also influenced by Roman *ius commune*, Byzantine and Serbian law, as well as local customary law. In the beginning, the same as in all other towns, notarial activities were taken by priests and then, somewhere faster and somewhere slower it came to the laicization of notary service. See V. Korać, "Notarijat u srednjovjekovnim komunama jugoistočnog Jadrana – uticaj na moderna evropska rješenja", *Harmonius – Journal of Legal and Social Studies in South East Europe*, Belgrade 2013, 118–133.

⁵ The Law was published in the *Official Journal of the Kingdom of Yugoslavia*, No. 220-LXXXVI dated 26 September 1930.

⁶ Notary service introduced into the legal system of the Kingdom of Yugoslavia by the Law on Public Notary 1930 was definitively repealed in 1944, although it had never taken hold in the entire territory of Yugoslav community.

transition countries in the process of affirmation of the rule of law and judiciary reform the emphasis was on introduction or privatization of notaries. That request was widely supported by the governments of the Western European countries, judiciary authorities, faculties of law, numerous professional associations, individuals and international vocational organizations, especially by International Union of Latin Notaries (UINL) and the Council of the Notariats of the European Union (CNUE).⁷

By adoption of the Law on Notaries (hereinafter: ZNot),⁸ Montenegrin legislator adheres to the Latin concept of notary service. A so-called Latin model of notariat implies legally arranged and organized service performed by notaries as autonomous and independent professionals, individuals to whom the state has transferred its authorities for making public documents which, under certain conditions, may be executive titles. Thus, the citizens and other legal entities became entitled to a free and independent notary service with a possibility of choosing a trustworthy notary at their own discretion.⁹ In addition to drawing up, acknowledging and maintaining documents on legal transactions and other facts, these public officers provide legal advice and assist citizens, entrepreneurs and companies, taking into account the interests of each party. Public authorities constitute a barrier to all other legal matters to fall under the competence of notaries.¹⁰ Their work involves independent action – separate from the practice of law and other free professions – impartial treatment, with the obligation of instructing the parties and keeping the professional secret. Notaries from a Latin model are not allowed, as holders of public authorities, to carry out any other activity, but to exclusively practice their own profession. It is independent from other state services and institutions, but also from its clients because it will always refuse to take illegal activities the party demands.¹¹

In Montenegro, as well as in other countries that have adopted the Latin model of notariat, there is a limited number of notaries (total of 65 in Montenegro), and the state territory is divided in areas in which individual notary may perform his functions. *Numerus clausus* and the territorial principle provide efficient, independent and effective operation of notary service. Positioning of registered offices of notaries corresponds to

⁷ K. Woschnak, “Javnobilježnička reforma u Srednjoj Europi od 1989. do 1995. iz austrijske perspektive”, *Javni bilježnik* 39/2013, 9.

⁸ *Official Journal of Montenegro*, No. 68/05, 48/08.

⁹ S. Zimmerman, A. Schmitz-Vornmoor, “Javnobilježnička služba u Europskoj uniji, Filozofija struke i trendovi razvoja, harmonizacija i ujedničavanje”, *Zbornik Pravnog Fakulteta u Zagrebu* 6/2009, 1224.

¹⁰ D. Hiber, “Pojam beležnika (notara) i beležničkog (notarijalnog prava)”, *Javnobeležničko pravo* (ed. D. Hiber), Beograd 2006, 18.

¹¹ Ch. Seger, “*Lex est quod notamus* – O uvođenju latinskog Notarijata u tranzicijskim zemljama Istočne i Jugoistočne Evrope”, *Nova pravna revija – časopis za domaće, njemačko i evropsko pravo* 1–2/2000, 25.

the interests of clients who demand notary service and is also justified by public interests because it is therefore limiting the unloyal competition.¹² Pursuant to a principle of free access to a notary, any natural person and legal entity, local or foreign one, may turn to any notary in Montenegro.¹³ Notary will accept any local citizen who has selected him/her as a trustworthy person, as well as a foreigner¹⁴ or a stateless person and will not deny it a requested service only because it is not permanently residing on the territory of his/her notary area.¹⁵ Thereat, the trust will be their main determinant. It is very important for a party asking for a notary service that the statements made before the notary shall remain the secret. The duty of keeping a secret shall primarily protect the public trust in the obligation of keeping secret since the trust is necessary for the principle of the rule of law,¹⁶ but will also be in the interest of clients themselves.¹⁷

Notariat rests on the principles of independence and impartiality. These two fundamental principles are also functionally related principles of notary service arising from the position of a notary as holder of public authorities. Independence means freedom from the impact of state authorities, especially of executive authorities. Notary does not act upon the order and instructions of administrative or judicial authorities. He is not under the subordination relation. Civil law legal principle of coordination of wills applies to a notary, and not the subordination rule that is applied in administrative law.¹⁸ Without prejudice, a notary may exercise its service only if saved from external impacts, if acting in accordance with positive regulations and if subordinated solely to the Constitution and the law. Independence manifests as factual (in subject-matter), personal and organizational one.¹⁹

¹² J.-F. Pillebout, J. Yaigre, *Droit professionnel notarial*, Paris 2012, 22.

¹³ On the principle of free access to notary in German law see C. Armbrüster, N. Preuß, T. Renner, *Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare – Kommentar*, Berlin 2009, 49 *et seq.* On the same principle in Serbian law see (among many others) D. Đurđević, *Javnobeležnička delatnost*, Belgrade 2014, 39–46; A. Jakšić, “Notarijat kao javna služba”, *Javnobeležničko pravo* (ed. D. Hiber), Beograd 2006, 98. See on the right to choose a notary in French law J.-F. Pillebout, J. Yaigre, 127.

¹⁴ Compare C. Armbrüster, N. Preuß, T. Renner, 49 Rn. 77.

¹⁵ In that respect see M. Povelkić in: M. Povelkić, Sh. Schalast, V. Softić, *Komentar Zakona o notarima u Bosni i Hercegovini*, Sarajevo 2009, 90.

¹⁶ H. Eylmann in: *Bundesnotarordnung, Beurkundungsgesetz: BNotO BeurKG – Kommentar* (Hrsg. H. Eylmann, H.-D. Vaasen), München 2011³, 231 Rn. 3.

¹⁷ See S. Formage, M. Liatti, “Le secret professionnel du notaire a travers le prisme du droit patrimonial de la famille”, 2014, 2 *et seq.*, available at <http://dumas.ccsd.cnrs.fr/dumas-01064970/document>, last visited 6 May 2015.

¹⁸ J. Salma, “Konvergencija evropskog notarijalnog prava”, *Zbornik Pravnog Fakulteta u Novom Sadu* 2/2012, 46.

¹⁹ See N. Preuss, *Zivilrechtspflege durch externe Funktionsträger*, Tübingen 2005, 179–186.

Counseling of parties when making of a notarial deed shall be a principle task of the notaries. Counseling is connected to impartiality of a notarial profession. Impartial counseling and instructing of parties shall constitute an essential notary duty, grounded by the famous French *Law 25 Ventôse* from 1803 that laid down the foundations for a contemporary model of Latin notariat.²⁰ Thereby, one will have to be guided by a consciousness and honesty principle. As a general clause originating from a Roman term *bona fides*²¹ consciousness and honesty remain the standard of notary conduct in performing their activities.

2. MANDATORY FORM OF NOTARIAL DEED

Montenegrin legislator decided that a certain number of legal transactions has to be concluded in a mandatory form of a notarial deed. A notarial deed is the most important notarial act, the most important document made by a notary, the most creative form of notarial activity. A notarial deed is made by a notary following the request of a party (parties), according to the rules of notarial procedure and by observing elements of the legally prescribed form. He writes down their statements of will for the purposes of execution of their interests.²² Observance of rules with regard to the form and contents of notarial deed as well as procedures of compiling of this act provide a good guarantee that the respective legal transaction will be valid and the parties thereto shall execute their intended legal consequences. Besides, a contribution to legal certainty also constitutes legislator's commitment to consider a notarial deed as public document which in certain cases may also be considered as executive title.

When determining the *ad solemnitatem* form the legislator benefited by comparative legislative practice, without any special and detailed review. Traditional activities of notary are related to some of the family and inheritance relations, as well as to the relations caused by immovable

²⁰ “Charte constitutive du notariat moderne, la loi française du 25 Ventôse An XI (1803) 22 circonscrit la profession autour du statut d’officier public traditionnellement reconnu au notaire”, A. Roy, “Notariat et multidisciplinarité: Reflet d’une crise d’identité professionnelle?”, *Revue du Notariat* 106/2004, 8, <https://papyrus.bib.umontreal.ca/xmlui/handle/1866/767>, last visited on May 6, 2015; See on that in detail D. Knežić-Popović, “Zakon Ventôse, kodeks modernog notarijata”, *Arhiv za pravne i društvene nauke* 1–2/2009, 49.

²¹ M. J. Schermaier, “*Bona fides* in Roman contract law”, *Good Faith in European Contract Law* (eds. R. Zimmermann, S. Whittaker), Cambridge University Press 2000, 63 *et seq.*

²² Compare: K. Wagner, G. Knechtel, *Kommentar zur Notariatsordnung*, Wien 2006⁶, 10 Rn. 14.

property.²³ According to the Law on Notaries, the following contracts have to be concluded in mandatory form of notarial deed: 1) marriage contracts and contracts on property relations between persons living in the common law community, 2) contracts on disposition of property belonging to juvenile persons and persons without capacity to contract, the scope of which are immovable property or valuable movables and rights; 3) contracts on distribution and use of assets during lifetime, contracts on life-long maintenance and inheritors' declarations; 4) sales contracts by retaining ownership right; 5) promised gifts and agreements on gift in cases of death; 6) contracts regulating transfer or acquisition of ownership or other *in rem* rights over immovable property.²⁴ Legal transactions whose subject is transfer or acquisition of ownership or other *in rem* rights on immovable property appear to be: the sale contract, barter, donation, hypothec contract, contract on fiduciary transfer of ownership, contract on servitudes, partnership and settlement. Some contracts on company status changes appertain to this group, such as, for example, the contract on separation and merging of companies that possess immovables in their assets. If any of these legal transactions has not been concluded in a form of a notarial deed, it shall be deemed as absolutely null and void. In addition to that, a principle of parallelism of forms applies in our law, meaning that power of attorney for entering into any of these legal transactions will have to be made in a form of a notarial deed.²⁵ The same principle applies to the preliminary contract,²⁶ as well as to the consent of a third person.²⁷ However, it does not apply to the contract on distribution (division) of things because ownership is not transferred and immovable property trade is not executed, considering that co-owners already had ownership.²⁸ It is different if contract on distribution is an integral part of a marriage contract or sale contract. Different modalities are possible at joint construction contracts and, subject to whether the property rights are transferred under the contract (for example, ownership on the land on which the building was built), we will know if the validity of the contract requires notarial form. But, if we speak about co-investing of the construction, whereat the decision on building permit and use permit is written under the names of contracting parties, form of notarial deed is not required as validity requirement since there is no transfer between the co-

²³ V. Gomez-Bassac, E. Pidoux, *Droit notarial*, Paris 2011, 10.

²⁴ Article 52 para. 1 ZNot.

²⁵ See Article 86 Law on Obligations, *Official Journal of Montenegro*, No. 47/08, 4/2011 (hereinafter: ZOO).

²⁶ Article 40 para. 2 ZOO.

²⁷ Article 22 para. 2 ZOO.

²⁸ See Decision of the Supreme Court of Serbia, Rev. No. 5478/97 dated 24 September 1998, "Court decisions", *Anali Pravnog fakulteta u Beogradu* 1–2/2002, 193.

investors of a joint construction, considering that ownership is acquired by original and not derivative mode of acquisition.

According to the explicit legal provision, the parties shall be entitled to also require a form of a notarial deed for other legal transactions.²⁹ The parties may require a form of a notarial deed for a legal transaction for which the law stipulates a different form. Freedom to choose the form is a manifestation of freedom of contracting.³⁰ For example, for each apartment lease contract, the ZOO stipulates a form of public certified (legalized) document (so-called qualified written form), but parties may agree on a form of a notarial deed. The agreed form must then be stricter, to be in a hierarchical relationship with the statutory one and to absorb a prescribed form within.³¹ Agreeing on a form stricter than the one stipulated by the law shall not violate the public interest, and shall additionally protect the private interests of the parties hereto.³² Notarial deed, as a stricter form, may replace a written form or a form of legalized document.³³

Notarial deed is not the only form of contract in which immovable property can be transferred. The legislator has prescribed a competing form of solemnized notarial document. In Montenegrin notary law, solemnization specifies a deed on certification of a private document made by the notary. By this notary action, the certified private document obtains the capacity of a notarial deed. Therefore, a private document is by solemnization turned into a public document.³⁴

The original 2005 Law on Notaries text did not envisage a solemnization.³⁵ The 2008 reform introduced a possibility of solemnization of all legal transactions without compiling a special notarial deed.³⁶ Legislations of Croatia and Serbia do not allow solemnization of private documents on legal transactions concluded in a mandatory form of a notarial deed. The same was in the legislation of a former Kingdom of Yugoslavia. Also, legislation of Bosnia and Herzegovina does not envisage sol-

²⁹ Article 52 para. 4 ZNot.

³⁰ R. Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, Tübingen 2006², 393 Rn. 1044.

³¹ M. Vuković, *Obvezno pravo, knjiga II*, Zagreb 1964, 76.

³² See on that in detail M. Karanikić Mirić, “Ugovorena forma ugovora o otuđenju nepokretnosti”, *Srpska politička misao* 2/2015, 322 *et seq.*

³³ Compare for German law D. Leipold, *BGB I: Einführung und Allgemeiner Teil*, Tübingen 2008⁵, 230 Rn. 18; See also § 126/4 BGB and § 129/2 BGB.

³⁴ K. Wagner, G. Knechtel, 252 Rn. 1.

³⁵ See V. Korać, “Notari i notarska služba u Crnoj Gori”, *Zbornik Pravnog fakulteta u Podgorici* 36/2008, 314 *et seq.*

³⁶ Article 14 Law on Amendments to the Law on Notaries, *Official Journal of Montenegro*, No. 48/08.

emmnization of legal transactions by a notary. We deem it would be more appropriate and would have more justification if Montenegrin legislator adopted the solution already existing in Croatian and Serbian law, because wide possibility of certifying documents on legal transactions practically equalizes solemnization and notarial deed. And solemnization, according to its legal nature, is treated as the middle ground between the legalization (certification of signature) and making of notarial deed.³⁷

In Montenegrin law, any private document on a legal transaction is eligible to be solemnized. The following may be drawn up in a form of a private document: contracts on disposition of property belonging to persons without capacity to contract, the scope of which are immovable property, contracts on life-long maintenance, sale of immovable property, hypothec contract and all other legal transactions the parties may ask to be solemnized. A solemnized document is equated with the notarial deed, and the parties may choose whether they will enter into a legal transaction prescribing a notarial form *ad solemnitatem* in a form of a notarial deed or in a form of a solemnized private document.

Therefore, the notaries do not have an exclusive monopoly in providing legal services. The parties may write the contract that has to be concluded in mandatory notarial form (for example, hypothec contract, or sale of immovable property) alone or with assistance of a legal expert and certify such written private document before the notary. Montenegrin legislator equalized the notarial deed and notarial solemnization and made them competing forms, which is not customary in comparative law. Such a solution has its good and its bad sides. The benefits lie in prevention of the notary monopoly, where they would be the only ones to make contracts whose validity requires notarial form. The parties are hereby given the opportunity, in the market of providing legal services, to choose whether their contract is going to be made by a lawyer, notary, or any other legal expert. The negative side of this solution reflects in a possibility to also solemnize a private documents on legal transactions for which is prescribed a notarial form *ad solemnitatem*. Thus preventive function of a notary is weakened, since he is not taking part in making of the legal transaction from the beginning, and is not compiling the text of a legal transaction (contract, will), regardless of the fact that only a private document, which is in accordance with legal provisions on a form and contents of notarial deed, may be certified. Instructing and counseling the notary is providing before and during the written editing of the legal transaction; having a different meaning from the warnings and clarifications the notary has to make in the process of solemnization. When the parties bring a written legal transaction text for their certification, the actions of counseling, introducing with the contents of a legal transaction

³⁷ D. Đurđević, 229.

and giving the statement that it complies with the true will of the parties are in practice brought down to the formality. Still, in the notary practice so far, the parties were the ones dominantly selecting a form of a notarial deed. In addition to the freedom of choice, notarial solemnization was practiced in less than 10% of cases. The reasons why the parties are more frequently deciding to use the form of a notarial deed compared to the form of notarial solemnization lie in the confidence which notaries as holders of public authority have. But, there are also financial reasons (at solemnization, the party is paying to both the notary and the lawyer). *De lege ferenda* a certain number of the most significant legal transactions should be designated as transactions that have to be concluded in the exclusive form of a notarial deed and private documents on these legal transactions would not be suitable for the solemnization.

A similar solution was also prescribed in Serbia, but applied only for a few months in 2014. Since the beginning of 2015, following the agreement between the government and lawyer's profession representatives, solution for concluding the immovable property trade contracts in a form of a notarial certified (solemnized) document was adopted.³⁸ However, parties may still agree on notarial deed as a form stricter than the legally prescribed one. This is a dominant opinion in Serbian legal theory,³⁹ based on the principle of autonomy of will and the general provision of the Law on Obligations (Article 69), allowing the parties to agree upon a special form for the validity of their contract.

Pressure of lawyer's (advocate) profession in Serbia, Bosnia and Herzegovina and Macedonia had an impact on amending of legal solutions regarding the form of the immovable property trade contracts, with their request to abolish the exclusive monopoly of notaries in the market of legal services. Therefore, after 15 years of application, the Constitutional Court of the Federation of Bosnia and Herzegovina repealed the provisions of the Law on Notaries (Articles 6, 27, 73) that guaranteed exclusivity in making certain legal transactions to notaries. The judgment explained that notary service had been thus directly favoured in relation to the law practice, which was contrary to the Constitution. This, in turn, created inequalities before the law and discrimination in relation to other legal professions to enter contracts and other legal transactions.⁴⁰ In Macedonia, a special solution on participation of lawyers in the procedure of providing notary services was proposed. Proposal of the new Law on

³⁸ The Law on Public Notaries, *Official gazette of the Republic of Serbia*, No. 6/2015.

³⁹ See (instead of many) M. Karanikić Mirić, 320 fn. 19.

⁴⁰ See Decision of the Constitutional Court of the Federation of Bosnia and Herzegovina, No. U-15/10 dated 02 December 2015, *Official gazette of the Republic of Federation of Bosnia and Herzegovina*, No. 30/16.

Notaries envisages mandatory participation of lawyers, as attorneys of the parties in question, when drafting a notarial deed, if legal transaction value exceeds the amount of 20,000 euros. Additionally, it is envisaged that a lawyer drafts contracts and preliminary sale contracts as well as documents on legal transactions to be solemnized by a notary, if the amount of transaction exceeds 10,000 euros.⁴¹ Such compromise of traditionally opposed interests between the notary and legal profession is not, in our opinion, in accordance with the concept of Latin model of notariat. However, position of the European Commission certainly contributed to this by striving for economic liberalization and deregulation of the Latin notarial system whose rules, allegedly, are hindering business operations. In this regard, back in 2011, the European Court of Justice passed the judgments that nationality may not be a condition for obtaining the status of Notary, nor an obstacle for providing of notarial services,⁴² which is a potential threat to endangering the character of a notarial deed as a public document, being the main product of notarial activity.

Solution on a role of notary in transactions of immovable properties practically constitutes the most significant novelty in operation of notary service in Montenegro.⁴³ Laying down of a notarial deed as essential form for legal transactions transferring ownership and other *in rem* rights on immovable property is fully justifiable according to our opinion. Since these are the things of high value and a significant commercial resource governed by a larger number of regulations, whose sales is often

⁴¹ Article 54, 55 and 56 para. 3 Proposal of the new Law on Notaries, available at http://www.pravdiko.mk/wp-content/uploads/2015/12/copy_of_predlog_notarijat_do_vlada_20122015_1.pdf, last visited 15 May 2016.

⁴² See Judgments C-47/08 *European Commission v Kingdom of Belgium*; C-50/08 *European Commission v French Republic*; C-51/08 *European Commission v Grand Duchy of Luxembourg*; C-53/08 *European Commission v Republic of Austria*; C-54/08 *European Commission v Federal Republic of Germany*; C-61/08 *European Commission v Hellenic Republic*, available at <http://curia.europa.eu/>, last visited 30 May 2014.

⁴³ Legislator envisaged that a mandatory form of notarial deed is used for making legal transactions whose subject-matter is transfer of *in rem* rights on immovable properties, which is not a frequent provision in a comparative legislation. *Ad solemnitatem* notarial form for immovable properties sale is envisaged by German (§311b and §925 BGB), Greek (Article 369 Civil Code), Swiss (Article 216 Law on Obligations), Bosnia-Herzegovina (Article 73 Law on Notaries) and by French law to a certain extent (see Article 1601–2 Code Civil for so-called VIC (*a vente d'immeuble à construire*)). Law on Public Notaries of Serbia, in its original text, also envisaged that immovable properties disposal contracts are made in a form of notary deed, but enforcement of this provision was postponed in two years (See Article 82 para. 1 and Article 182 Law on Public Notaries, *Official gazette of the Republic of Serbia*, No. 31/11, 85/12 and 19/13). This legislative solution was changed by reform of the Law from 2014 (*Official gazette of the Republic of Serbia*, No. 121/2014) and the mandatory form of notarial deed was envisaged only for the immovable properties disposal contracts concluded by persons with incapacity to contract.

the subject of court disputes, a notarial deed is the most optimal form for contracts conveying rights on these objects. Such stand is also advocated in legal theory of some other countries of former SFRY which have adopted a similar provision.⁴⁴ This provision of the Law on Notaries shall contribute to legal certainty in this area, especially with immovable property sale contracts and hypothec contracts, as the most frequent legal transactions whose subject is related to immovable properties. It will to a significant extent remedy the obvious weaknesses in immovable property files kept in the public register. Real estate cadastre has not been prepared for the entire territory of the state yet, the data are often inaccurate and their updating is not complete. Notaries will therefore contribute to certainty in transfer of rights on immovable properties, they will verify ownership of transferor, update the entries into real estate cadastre and prevent multiple sales. Electronic connection between the notaries and real estate cadastre will by all means contribute to the same.

The mandatory form of a notarial deed has superseded the former private document on legal transaction conveying the rights on immovable property by public document which may also serve as executive title. A former practice of preparing the forms of immovable property contracts⁴⁵ by parties themselves, by pettifoggers or real estate agencies was eliminated. Often in these cases right of preemption has not been observed, existence of joint ownership of spouses has not been observed, legal and material deficiencies, which caused numerous litigations on contract annulment.⁴⁶ In addition to their duty to make notarial deeds on contracts that conveys ownership and other *in rem* rights on immovable property, notaries may, by will of their parties, be entrusted the other jobs related to immovable properties, such as having a direct insight into the public register, obtaining the consent of a third party, control of the price maturity, payment of the price through notarial account intended for parties, submission of application for registration, registration of notes and priority notice in real estate cadastre.⁴⁷

Now the notaries are checking if the seller, or other transferor of *in rem* right is the sole owner or there is the title of many persons (joint owners). Thus they are preventing the litigations that have often been

⁴⁴ D. Đurđević, 230–231; M. Živković, V. Živković, “O uvođenju javnog beležništva u Srbiji”, *Zbornik Pravnog Fakulteta u Zagebu* 2/2013, 440 i 441; M. Škaljić, “Uloga i značaj latinskog tipa notarijata u oblasti stvarnih prava u Bosni i Hercegovini”, *Referat na stručnoj konferenciji – Uloga i perspektiva notarske službe u BiH*, Sarajevo 2013, 9 *et seq.*

⁴⁵ This refers to contracts that convey ownership and other *in rem* rights on immovable property (e.g. sale contract, donation, hypothec contract).

⁴⁶ In that respect M. Škaljić, 13.

⁴⁷ M. Powlakić in: M. Powlakić, Sh. Schalast, V. Softić, 139.

conducted in cases when a spouse alienated or pledged immovable property without the knowledge of other spouse. Likewise, they may also check the tax debt encumbering the respective immovable property as well as so-called overheads (electricity, water, utility bills) that have not been settled by the transferor of rights on the respective immovable property.⁴⁸ This solution will in future eliminate unregistered ownership that had not been a rarity in the past, especially in the period of social ownership dominance, where donation and sale contracts have been concluded, but no registration of the ownership was entered into the public registers. Additionally, a mandatory notarial deed provides regular settling of tax duties with regard to the sale of immovable property, since notary submits a copy of a notarial deed to the competent tax authority.⁴⁹ Further on, when making the deed on acquisition of *in rem* right on immovable properties a notary controls the scope of foreigners' rights to acquire ownership over immovable properties in Montenegro and at the same time investigates a client when there is a risk of money laundering.

3. MULTIFUNCTIONALITY OF A NOTARIAL DEED

The form of legal transactions in modern law is not a purpose to itself. Different forms (written, real, solemn, electronic, notarial) should in a specific case reach the expected goals and protect certain interests. Formal requirements, as tools of legal techniques,⁵⁰ are instrumentalized in order to transport content to the intended recipient.⁵¹ A contract form may be in the public interest, interests of the contracting parties and third parties interest. Although the rights and duties of the contracting parties arise due to their freely expressed will, and not the form, it often happens that the law or parties themselves require fulfillment of a certain form as a prerequisite for the validity of the contract (*forma ad solemnitatem* or *forma ad substantiam*⁵²). On the other hand, the form is sometimes just only way of providing evidence about the contents and entry into the contract (*forma ad probationem*). A protective and evidence functions of the form are most frequently indicated as objectives of the form, but registration and control functions are also significant.⁵³ Authentication, iden-

⁴⁸ M. Škaljić, 12.

⁴⁹ Article 82 para. 4 ZNot.

⁵⁰ See G. Grumetto, "La Forma" in: F. Pasquale (a cura di), *Il contratto*, Milano 2012, 893 with reference.

⁵¹ P. Mankowski, "Information and Formal Requirements in EC Private Law", *European Review of Private Law* 6/2005, 781. Form is a loyal servant of a substantive purpose, substance reigns over form.

⁵² This notion is used almost exclusively in Italian literature.

⁵³ H. Kötz, A. Flessner, *European Contract Law, Volume I: Formation, Validity, and Content of Contract; Contract and Third Parties*, Translated by Tony Weir, Oxford

tification, communication, information, demarcation, warning, regulatory and control functions have been recently introduced.⁵⁴

All legal systems are to a greater or lesser extent familiar with the formalization of the declaration of intent.⁵⁵ Observance of the form will lead to expenditures, efforts, loss of time and delay in entering into a legal transaction.⁵⁶ Freedom of choosing the form will facilitate legal traffic, and for the form prescribed by law – as an exemption from this principle – a justification will be required. Expenditures related to the observance of the form will have to be worthwhile. There is a link between the rules governing the procedure of making a notarial deed and the objective the form of the same deed has to reach.⁵⁷ Its worthiness will mostly depend on the purpose of the form. Legal traffic will have to be subject of overall benefits through form. Regulations regarding the form cannot always easily demonstrate it since their essential benefit constitutes of preventing inefficient, hasty and unconsidered legal transactions. Costs of individual participants shall make one factor and benefit of the society as a whole, through effects, shall make the other factor.⁵⁸

In legal theory we distinguish formal and material functions of the forms of notarial deed.⁵⁹

4.1. Formal functions of a notarial deed

The first formal function is shown in creating the increased probative force of notarial deed as public document.⁶⁰ Practically, the most frequent objective of the form is the probative force since formalization provides the documentation and the documentation enables, if necessary, additional presentation of evidence.⁶¹ Original of a notarial deed must be

2002, 78 *et seq*; S. Perović, 42–44; S. Cigoj, *Obligacije*, Ljubljana 1976, 323; S. Perović, *Obligaciono pravo*, Belgrade 1980, 196; O. Stanković, V. Vodinelić, *Uvod u građansko pravo*, Belgrade 2007⁵, J. Radišić, *Obligaciono pravo*, Belgrade 2008⁸, 112; 165 Z. Rašović, *Građansko pravo*, Podgorica 2009², 278.

⁵⁴ See P. Mankowski, “Formzwecke”, *Juristen Zeitung* 13/2010, 663–668. In this paper, the author discerns 16 form functions.

⁵⁵ See historically and comparatively K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Tübingen 1996³, 359–371.

⁵⁶ P. Mankowski (2010), 662.

⁵⁷ C. Armbrüster, N. Preuß, T. Renner, 8 Rn. 14.

⁵⁸ P. Mankowski (2010), 663.

⁵⁹ R. Arnet, “Form folgt Funktion: Zur Bedeutung der öffentlichen Beurkundung im Immobiliarsachenrecht”, *Zeitschrift des Bernischen Juristenvereins (ZBJV)* 149/2013, 402, http://www.rwi.uzh.ch/lehreforschung/alphabetisch/arnet/person/publikationen/Separata_ZBJV_05_2013_Arnet.pdf, last visited 15 May 2015.

⁶⁰ R. Arnet, 402.

⁶¹ P. Mankowski (2010), 663

kept since there is always a possibility of issuing transcript. Notarial deed shall be a dispositive (constitutive) public document since the document contains a legal transaction undertaken by parties hereto (e.g. contract, will).⁶² Notarial deed as public document shall have a full probative force.⁶³ The principle of legal evaluation of evidence shall apply to it and on the other side the principle of free evaluation of evidence for the private document.⁶⁴ The Law prescribes that the court must consider what is acknowledged or determined in a public document as true.⁶⁵ The court shall not evaluate its authenticity, its probative value as it evaluates the probative value of private document. The assumption of authenticity and accuracy shall apply to a public document. It means that the document was issued by the authority designated hereto as issuer⁶⁶ and that the contents of the document is true (accurate), that is, that the contents of the document conform with the facts.⁶⁷ However, these are rebuttable presumption (*praesumptio iuris tantum*), and evidence may be presented contrary to the public document. Authenticity of public document in case of any doubt shall be verified by the court *ex officio*. According to the Article 226 ZPP, the court may, for the purposes of avoiding any doubt about authenticity of the aforementioned document, demand from the authority from which it originates to make a statement in that regard. Suspicion with regard to the authenticity of public document that may arise due to its formal appearance, formal deficiency or content, the court may prove by other means of evidence.⁶⁸

When making a notarial deed the notary shall verify the entire procedure of making the document, including statements regarding the personality of party, as well as the time and place of making the statement. The document compiled with regard to the statement shall constitute a full evidence of the confirmed (verified) procedure.⁶⁹ The form will pro-

⁶² Compare L. Rosenberg, K. H. Schwab, P. Gottwald, *Zivilprozessrecht*, München 2010¹⁷, 674 Rn. 9

⁶³ Compare B. Poznić, *Komentar Zakona o parničnom postupku*, Belgrade 2009, 606. It seems that the expression *full probative force* comes from phrase *vollen Beweis*. See § 415/1 German *Zivilprozessordnung* and § 292/1 Austrian *Zivilprozessordnung*. Expressions *pleine foi* from French *Code Civil* (Article 1319) and *piena prova* from Italian *Codice civile* (Article 2700) have the same meaning.

⁶⁴ See G. Stanković, *Građansko procesno pravo, Prva sveska, Parnično procesno pravo*, Niš 2007, 433.

⁶⁵ Article 226 Law on Civil Procedure, *Official Journal of Montenegro*, No. 22/2004, 28/2005, 76/2006, 47/2015 48/2015 (hereinafter: ZPP).

⁶⁶ See W. H. Rechberger, D. A. Simotta, *Grundriss des österreichischen Zivilprozessrechts*, Wien 2010⁸, 450 Rn. 796.

⁶⁷ W. H. Rechberger, D. A. Simotta, 452 Rn. 798.

⁶⁸ B. Poznić, 607.

⁶⁹ N. Preuß in: C. Armbrüster, N. Preuß, T. Renner. 29 Rn. 14; P. Jansen, *FGG – Kommentar*, Berlin 1971, 40 Rn. 45; Compare P. Limmer in: H. Eylmann, H.-D. Vaasen, 1007 Rn. 7.

vide authenticity and guarantee the accuracy of stated wills. The form will disable any manipulation after giving the statement and will mitigate the risk of forging it, which will lead to increasing trust (authentication function of the form).⁷⁰ This function of the form shall be accompanied by identification function indicating the statement originates from a specified person. A handwritten signature in particular is providing a unique and inseparable connection to the signatory.⁷¹ Original of the notarial deed is kept and there is always a possibility of providing a transcript. Besides, a full evidence also refers to the identity of a person giving the statement.⁷²

Therefore, a notarial deed establishes a full evidence of accuracy and completeness of the process of compiling the document,⁷³ as well as a comprehensive evidence that the statement has been given at the place and at the time and before the notary as indicated in the deed.⁷⁴ It is deemed the statements of will given before the notary are full and accurately reproduced.⁷⁵ Therefore, even besides a possibility of contesting the notarial deed within certain meaning, the notarial deed is used for the simplification of legal protection procedure and thereby for making it more efficient.⁷⁶

Other formal function of a notarial deed is manifesting full legal grounds for acquisition of rights. It constitutes a legal ground which, both in formal and substantive meaning, includes all elements necessary for entry into the real estate registers (cadastre of real estate, land registers, etc.).⁷⁷

4.2. Material functions of a notarial deed

One of the material functions of a notarial deed is warning function. The parties thereto may use a prescribed form as protection from hastiness. A complex procedure of compiling and structure of a notarial deed protect the parties from reckless bonding by legal transaction.⁷⁸ That

⁷⁰ P. Mankowski (2010), 664

⁷¹ *Ibid.*

⁷² N. Preuß in: C. Armbrüster, N. Preuß, T. Renner, 29 Rn. 14.

⁷³ See P. Limmer in: H. Eylmann, H.-D. Vaasen, 1008 Rn. 7;

⁷⁴ H.-J. Ahrens in: B. Wiczorek, R. A. Schütze (Hrsg.), *Zivilprozessordnung und Nebengesetze – Grosskommentar*, Zweiter Band, 3. Teilband, 2. Teil, Berlin 2010, 647 Rn. 28.

⁷⁵ This does not apply to so-called substantive probative force. See N. Preuß in: C. Armbrüster, N. Preuß, T. Renner, 30, Rn. 15; P. Limmer in: H. Eylmann, H.-D. Vaasen, 1008 Rn. 7; P. Jansen, 40 Rn. 45, fn. 42.

⁷⁶ P. Mankowski (2010), 663–664.

⁷⁷ R. Arnet, 402.

⁷⁸ *Ibid.*, 403.

is how the form protect the autonomy of will from itself,⁷⁹ which is preventing negative aspects of freedom of contracting.⁸⁰ That is why it is said the form has seriousness function.⁸¹

As an independent professional, a notary is, through counselling and instructing, enabling the vagueness to be remedied and that possible contracting parties make a mindful decision on whether to enter into the contract in a form of a notarial deed or not.⁸² If they make the decision to enter into a legal transaction in a form of a notarial deed, the expert advice of a notary may either clarify or avoid divergent interpretation of its contents and thus diminish the potential for any dispute.⁸³ But not only that, if a legal transaction is executed in a form of a notarial deed there is less possibility to endanger the autonomy of will by unbalance between the contracting parties.⁸⁴

Principle of instructing parties consists of commitment of notary to 1) clarify facts, 2) examine the will (intention) of parties, 3) instruct them on legal consequences of intended legal transaction and 4) fully, clearly and specifically enter such statements of the parties thereto into the notarial act.⁸⁵ Establishing facts makes the basis of proper instructions.⁸⁶ Notary shall himself examine the accuracy of factual statements of the parties. He should instruct the parties about a significance of legal terms they use and if they are used within their true meaning.⁸⁷ Therefore, a notary duty is to establish if legal terminology used by a party actually conforms to its will.⁸⁸ Notary must clarify to participants a true meaning of their statements and direct legal requirements for the intended legal success. Instruction includes all aspects necessary according to a true will of the parties thereto for the implementation of formally effective (valid) deed.⁸⁹

A procedure of compiling a notarial deed, specially the duty to instruct, compensates the deficit of experience and knowledge of a weaker

⁷⁹ P. Mankowski (2010), 665.

⁸⁰ R. Arnet, 403

⁸¹ P. Mankowski (2010), 665 with reference.

⁸² R. Arnet, 403.

⁸³ See P. Mankowski (2010), 666.

⁸⁴ R. Arnet, 404.

⁸⁵ See Article 48 ZNot; Compare C. Armbrüster in: C. Armbrüster, N. Preuss, T. Renner, 273 Rn. 17.

⁸⁶ Compare K. Wagner, G. Knechtel, 242 Rn. 8

⁸⁷ C. Armbrüster in C. Armbrüster, N. Preuss, T. Renner, 273 Rn. 20.

⁸⁸ N. Frenz in: H. Eylmann, H.-D. Vaasen, 1141 Rn. 5.

⁸⁹ *Ibid.*, 1143 Rn. 9. In that respect compare V. Softić in: M. Povlakić, Sh. Schallast, V. Softić, 180 without any reference and D. Đurđević, 83 with reference on judgment of the Federal Court of Justice of Germany (BGH).

contracting party.⁹⁰ Besides that, a notarial deed additionally builds and secures autonomy of will of the parties by providing them a competent legal expert who shall support parties in using the freedom of creation of their legal transactions through counselling and instructing. In the procedure of compiling a notarial deed, a neutral expert will present the possibilities, chances and risks of creating a intended legal transaction and thus enable the autonomy of parties to be implemented in reality.⁹¹

4. CONCLUSION

Introduction of notaries and notarial form of legal transactions into the legal system of Montenegro has its justification. For the first five years of notarial practice there has been a substantial increase of legal certainty, especially in the area of legal transactions whose subject-matter is transfer or acquisition of ownership and other *in rem* rights on immovable property. A number of court disputes regarding legal transactions concluded in a notarial form *ad solemnitatem* has been substantially reduced.

Notarial form of legal transactions has its justification through its objective. The objective of *ad solemnitatem* form consists of the protection of private interests of parties, third party interests and public interest. As a preventive judge, notary guarantees entry into a valid legal transaction matching the true will of the parties. Performance of fiscal duties regarding the trade of real estate is more efficient, public records on acquisition, change and termination of *in rem* rights on real estate are better, and prevention of money laundering when entering into legal transaction is more successful. By prescribing a mandatory notarial form for certain legal transactions the State commits both natural persons and commercial entities, when entering into major contracts, to subject themselves to control of a legal professional who holds a public authority.

Observance of strict rules of the form and procedure of compiling a notarial deed guarantees validity of undertaken legal transaction, ensures that the parties will achieve their intended objectives, that third party interests will be protected and public interests obtained. Notary, as a legal expert and impartial trustworthy professional, by instructing and counselling, renders his services to his parties with a huge guarantee that their statements of will are going to create a legal transaction to implement their interests. Notarial deed on legal transaction acquires the capacity and probative force of public document and may become an executive document, if a debtor of monetary obligation or certain quantity of fungi-

⁹⁰ See R. Arnet, 405

⁹¹ *Ibid.*, 406.

ble things accepts the execution without a delay. It contributes to the speed of legal trade because rights and duties are easier to prove and execution is ensured without the participation of the court.

Besides the reasons of legal certainty, promptness of real estate records and fiscal regularity, an important reason for commitment of Montenegrin legislator to prescribe a mandatory notarial form for legal transactions related to real estate, was also financial stability of notaries. Notaries generate major income from fees paid for compiling of notarial deeds containing legal transactions regarding the transfer or acquisition of ownership and other *in rem* rights on immovable property. As legal experts, notaries would unlikely have any motivation to dedicate to this profession if these jobs would be excluded from their competencies. Notary practice in Montenegro most frequently recognizes notarial deeds of real estate sale contracts and hypothec contracts.

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