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DEFINITION AND PARTICULARITIES OF THE NOTARIAL ACT

George Cristian SCHIN[1]

Abstract

The notarial act represents one of the most important categories of civil legal acts. The lack of a clear definition of the term "notarial act" and the complex legal nature of the notarial procedure have generated contradictory discussions in the specialized legal literature.

Following the example of continental law, the Romanian law and Moldovan law are dominated by the great consensuality principle. Under this principle, notarial acts represent a variety of civil legal acts, and in practice these legal acts are deemed to have been concluded when the parties reach a willful agreement on all the essential clauses.

In Romania, the notarial act is defined mainly by the Law no.36/1995 on Notaries Public and notarial activity, while several regulations regarding notarial acts are found in the legislation of the Republic of Moldova. According to Moldovan legislation, the notarial act is the document drafted, signed and sealed by the notary, having public authority and the probative force prescribed by law. In this respect, the Law no.1453/2002 on Notarial activity and the Law no.69 /2016 on the organization of the activity of notaries ensure a comprehensive regulation of notarial acts in the Republic of Moldova.

Keywords:

Notarial act, civil legal act, authentic act, legal fact, Notary, authentication, document, probative force, enforceable force, civil legal relationship, consensuality principle.

1. Preliminary data

In everyday life, the civil legal relationships are largely governed by notary acts. Non-participation in the conclusion of notarial acts, from the most insignificant to the most complex, is practically equivalent to getting us outside the sphere of the civil legal circuit.

So, the notarial act represents an integral part of our existence, and from this perspective, the detailed and in-depth knowledge of the particularities of the notarial act becomes extremely important and fully justified in the context of a society bearing the mark of perpetual

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transformations and upheavals, and a speed becoming more obvious by day in the conclusion of legal acts and permanent diversification of their sphere.

The presence of the notarial act in the frame of legal realities shall make the participants in the legal relationships to believe that the legal facts confirmed by this act are true. The facts documented by the drafting of the notarial acts are examined in the civil circuit as indisputable, the legality of which being established by a public figure authorized by law – the Notary.

In this scientific undertaking concerning to the notarial act, we shall first approach the concept of civil legal act, and then we shall use the legal and civil analysis of the notarial acts, by reference to the legal definitions taken from the legislation of Romania and the Republic of Moldova. We shall conduct the scientific research of the notarial act by based on the opinions presented in the field of notarial law in Romania, the Republic of Moldova, France, the Russian Federation and Ukraine.

We shall pay special attention to the peculiarities by which the notarial act can be distinguished from other legal acts of the civil circuit. In this context, we shall make considerations on the most important opinions emerging from the legal doctrine of specialty. We shall insist in particular in defining the concept of "notarial act" in relation to the notions of "legal act", "authentic act" and "legal fact", after which we shall thoroughly analyze the legal nature and particularities of the notarial act.

2. Delimitation of the notarial act from related acts

Civil legal act and notarial act

The interest in approaching the legal and doctrinal definitions of the civil legal act in the context of notarial research is explained by the fact that the notarial act is one of the most important categories of the manifestation of civil legal acts. Between the civil legal act and the notarial act there is a part-whole correlation, where the civil legal act represents the genus, and the notarial act represents the species. The general provisions on the legal act provided by the civil codes of the Republic of Moldova and Romania are applicable to the notarial acts.

The delivery of a civil legal relationship is preceded by the existence of structuring premises, namely: legal facts, legal standard and subjects. Legal acts are defined as those circumstances, human actions, natural events or phenomena - to which the law confers legal force, that is, they give rise, modify or extinguish juridical relations (O.Niemesch (2016): 3-4). Also, the doctrine on civil law mentioned that any fact, any event or any material act

having a juridical effect, i.e., gives rise, modifies or extinguishes a right, bears the generic name of legal fact (V.Pînzari (2004): 116). Civil subjective rights are transmitted and extinguished by committing facts, which in the broadest sense - *lato sensu* - comprise different elements of social life (R.Matefi (2017): 7-8). Certain legal acts serves as grounds for the emergence of civil rights and obligations.

The doctrine classifies the legal facts in lawful and unlawful facts. The lawful facts are those "human actions committed without the intention of giving rise to legal obligations, which nevertheless produce such effects in the power of law, without breaking the rules of law" (O.Niemesch (2016): 4), and the unlawful facts are those facts are contrary to legal norms and are committed without the intention of producing legal effects, effects which, however, occur under the law.

Another classification divides the legal facts into legal events and human actions. Legal events are those natural facts (circumstances) occurring beyond the people's control, but their occurrence giving rise, modifying or extinguishing the legal relationships under the law. For example, the passage of time, people's birth and death etc. Human actions are not carried out beyond the control or the knowledge of people but, on the contrary, they are voluntary acts of people that, once produced, give rise, change or extinguish the legal effects (L. Chirtoaca (2015): 102). There are several kinds of human actions: deliberate, negligent or imprudent and, depending on whether or not they are permitted by law, the actions are divided into lawful (civil law acts) and unlawful actions. Of these, the most common are the lawful actions, known as civil legal acts. For example, the issue of a power of attorney, the drawing of a will, the conclusion of a sale-purchase contract are nothing but actions that fall within the term of a civil legal act.

The literature supports almost unanimously the idea that the term "legal act" has two meanings: a) the manifestation of the will taking legal effects, according to the provisions of the civil codes of the Republic of Moldova and Romania; b) the written document of the legal act, i.e. a probative instrument used with the civil legal act during the civil procedural law (S.Baieş, N.Roşca (2011): 146). The basis of civil legal acts are the contracts, which are aimed at obtaining a concrete legal result (S.Baieş, Gh.Mîţu, O.Cazac (2015): 41).

The Articles 195-241 of the Civil Code of the Republic of Moldova (2002) regulates the civil legal act. These regulations are of a general nature because they apply to all civil legal acts. The legislator of the Civil Code of

the Republic of Moldova defines the civil legal act in Art.195 as the manifestation of the will of physical and juridical persons to give rise, modify or extinguish the civil rights and obligations.

The definition of the civil legal act is also found in the art.1166 of the Civil Code of Romania (2009), according to which "the contract is the agreement of wills between two or more persons with the intention to establish, modify, transmit or extinguish a legal relationship". The article 1324 of the Romanian Civil Code complements this legislative text, according to which "the legal act involving only the manifestation of its author's will is unilateral".

We note that there are many definitions of the civil legal act in the specialized doctrine, but they do not differ significantly from the legal notion. Most of the authors have shown that the civil legal act is voluntary and presumes the intent to produce legal effects, i.e. the person's desire to conclude such an act (I.D. Romosan (2018): 45). This desire, intent, also called internal will, shall be notified to third persons (L.Chirtoaca (2015): 37).

Authentic Act and Notarial Act

Before conducting the legal analysis of the notarial act, it is necessary to elucidate why the authenticity is required for certain acts. The explanation lies in the fact that due to a certain social and economic instability in the Republic of Moldova and Romania in the field of juridical operations of any kind (a matter that can be ascertained empirically from the activity of any professional in law), the document under private signature would be in a real difficulty because:

- the parties may no longer recognize the document or the signatures;
- the parties may no longer agree to the terms of the legal act they have initially consented to;
- one party can take advantage of the constraint on the other's behalf to conclude the legal act, the lack of knowledge about the document concluded, etc;
- the high probability of vitiating the consent, including the use of obscure, ambiguous, insufficient expressions within the document, etc.

If the documents are drafted by people who are less familiar with legal principles and terms, there is a risk that documents may be exposed to poor or inaccurate drafting that may not reflect the true intentions of the contractors. Therefore, the presence of formalism in drafting the authentic acts is indeed a guarantee of regularity, regardless of its presentation.

In the common language, the term "authentic" means what is true, in opposition to "what is false." Etymologically, the term comes from the Greek language and means "the one who acts for himself" (V.Rapp-Cassigneul (2016):32). The authenticity of the act is imposed by the legislator in order to safeguard a public interest or to protect the parties against a consent given with relative ease for an act of special significance (M.Buruiana (2006): 475).

The analyze of an authentic act shall take into consideration the meaning of *instrumentum probationis* (the means of proof) of the document, and not the *negotium iuris* (manifestation of willpower producing legal effects). Thus, in the most common purposes, the authentic act is the document which was said to belong to a certain person and whose content is undoubtedly attributed to him/her. The term authentic act is used in this sense to show that both the content of the document and its material preparation are the certain work of a certain person. In this case, the authenticity is regarded as opposed to the possibility of document counterfeiting by forgery.

In order to acquire the attribute of authentic act, a legal act must meet certain requirements required by law. These requirements refer to: the drafting of a document by a civil servant, the material and territorial competence of the official in relation to this document drawing up, the drawing up of the document according to the formalities prescribed by law. Failure to meet any of these requirements lacks the act of its authentic character. In a narrow way, we say that the notary is not a public servant. However, the State delegates some of its authority to the notary in order to perform a service of general interest. That's why, according to Article 3 paragraph (2) of the Law of the Republic of Moldova regarding the law no.145/2002 on the on notarial activity, *the notarial act, bearing the seal and the signature of the person carrying out the notarial activity, is of public authority, is presumably legally and verifiably and shall have evidential value and enforceability*.

The above finding shall not result in the identification of the authentic act with the notarial act, though, in practice, when it comes to finding some expressions of the will of subjects of law, the notarial documents are the norm, as most of authentic instruments are drawn up by notaries (I.Popa, A.Moise (2013): 189). All acts made by civil servants within the limits of their duties are authentic. Thus, the documents issued by other authorities, such as central and local public administration, courts of law, criminal prosecution bodies, etc., should be considered authentic acts: civil status acts, planning permits issued by municipalities, certificates issued by

the cadastral body, court decisions, documents drawn up by bailiffs, orders of the prosecutor, the minutes prepared by the investigating officials etc. The authentic act or document is a preconditioned piece of evidence that people are increasingly using because of the benefits provided compared to the private documents.

In general, the authentic form is not a condition for the validity of the legal act, since Moldovan law and Romanian as well as the Continental law are dominated by the great consensuality principle. For example, Article 202 (2) of the Civil Code of the Republic of Moldova establishes that the authentic form is imposed only exceptionally as a condition of validity of the legal operation, as is the case: the legal act granting the child protection mandate in the future (art.48^{14} para. (3)), the alienation of immovable property (art. 212 (a)), the legal act establishing the servitude (art.431 paragraph (2)), the mortgage contract (art.468 paragraph (2)), the sale-purchase contract of the enterprise as a complex unique patrimony (art. 818), the promise of donation (art. 830).

Except when the authentic form is required by law, the parties may agree to conclude any legal act in this form. The consequences of non-observance of such an agreement are the same as for non-observance of the authentic form required by law (Art.213 Civil Code of the Republic of Moldova).

The establishment by law of the mandatory authentic form for some civil legal acts has different ends such as: a) to warn the parties about the importance of the legal act for their patrimony, for example in the case of the mortgage contract (art. 468, para. 2) of the Civil Code of the Republic of Moldova); b) ensuring the freedom and certainty of consent, for example, in the case of the will (art.1458); c) exercising control of the company by public authorities over the documents of general legal importance, for example, the articles of incorporation of a companies (art.107, paragraph (1)).

The authentication of civil legal documents in the Republic of Moldova is usually carried out by notaries in accordance with Law 1543/2002 on Notary Public. The same law provides the cases where legal documents are authenticated by other persons authorized to perform notarial activity. Thus, the legal acts (apart from contracts for the alienation of immovable assets and pledge agreements) concluded by the natural and legal persons of the Republic of Moldova on the territory of other states are authenticated by the Consuls (art.36 of the Law). According to Article 37 of the same law, the authentication of certain legal acts is carried out by the persons with positions of responsibility empowered by the local public

authorities (authentication of wills, some types of power of attorney, contracts for the alienation of real estate).

The Civil Code of the Republic of Moldova provides for the possibility of authenticating civil legal acts by other persons too. For example, Article 252 (4), (5) of the Code provides for the conditions for the issue of proxies are equivalent to those notarized. The wills authenticated by the persons indicated in art.1459 of the Civil Code are assimilated to the legal acts authenticated by the notary.

In all cases, the authentic instrument has a particularly strong probative value because its power results from the fact that it has been received and authenticated or even drawn up and authenticated by a state official or a notary. As soon as the document was drawn up, it takes the form and exterior appearance of an authentic document prepared in a proper manner. According to this, any document made by a public agent within the limits of his duties enjoys a presumption of authenticity.

The formalities provided by the law are intended to inform the parties about the consequences that certain legal acts may have on their patrimony, caution that can be made either directly or by delaying the conclusion of the contract, thus providing the necessary time for reflection and analysis (D. Marcadé, B.Mion, M.Moussinet (2018): 78). Also, in certain matters, the control over legal acts that are of importance beyond the interests of the parties is thus ensured. In addition, the presence of the notary has the effect of an effective control regarding the compliance with legal provisions at the conclusion of contracts, but also the prevention of disputes by the advice provided.

Even so, some of the authentic acts are challenged for some of the reasons mentioned above. If that entries in the public registers would not depend on authentic documents, all these reasons for legal uncertainty would be induced in the public registers, at the risk of seriously disrupting the circuit of documents of any kind and the real estate. This may happen because the registrars of documents and goods do not and cannot verify the essential elements of the legal act which was the basis for the conclusion of a translational property contract (for example, how could the registrars verify the consent of the parties?).

Secondly, the advantages of authentic acts compared to those under private signature are indisputable, at least in terms of their probative value and enforceability. The persons use the notary offices for authentic documents not only when they need this form for the validity of the act, or when such form is requested by other people with whom they interact

during their activities, but especially because the authentic documents provide legal certainty (C. Barbieru, C. Macovei (2018): 84). Of course, legal certainty is not and cannot be perfect, but the safety provided by the notarial authentic documents is the most successful of possible solutions.

Thirdly, we appreciate that the rigor of the rule of law in the everyday life shapes the conduct of the subjects of law. It is well known that lax regulation can be exploited negatively by the participants in the civil circuit. That is why, at least in certain areas, a rigorous legal control must be provided, regardless of the will of the participants in the civil circuit. For example, the real estate segment is definitely one of these areas, and we advocate here, without reservation, the introduction of a formalism meant to make the acquirers of property more informed and surer of the right entered into their patrimony.

The Canadian doctrine (J.Van Boxstael, J.Vanderschuren (2015): 115-116) and the Belgian doctrine (C. De Wulf, J.Bael, S.Devos (2013): 134) mentioned that a possible disappearance of the notarial authentic document would not depart the parties from the legal rigor, but just would redirect them to the attorney's certificate. We do not agree with that opinion, because the experience so far demonstrates that the lack of authentic form does not necessarily determine the incidence of the form of the certified attorney's document but, more often than not, that of a simple, signed document private. This is definitely not the way to ensuring the stability and security of legal transactions. The attorney must be the legal counsel of a single client involved in a legal relationship, while the notary is bound by the law to be impartial and concerned about the stability of the legal relationship vis-à-vis all parties involved.

We plead for the formalization of the act, but not its consensualization, as we are convinced of the advantages that this form can generally bring to the dynamic security of the civil circuit. The notarial formalism is a necessity determined by the need to guarantee the legal circuit, since the authentic act is a part of the state's legal patrimony and therefore this "national good" must be protected like any other of similar value. All these advantages made the legislator to give to the really important documents the formalism prescribed by the law, where the form became a condition for the existence of the document.

3. Definition of notarial act

Doctrinal definitions of the notarial act

The doctrine of specialty mentioned that the result of notarial activity is expresses by the issuance of notarial acts. The notion of "notarial act" is polysemantic and can be used in two ways: dynamic and static. Thus, the issuance of the notarial act is a long process, consisting in accomplishing the work according to several consecutive stages. This is the *dynamic* meaning of the notarial act (A.O.Inshakov (2017):24). On the other hand, the notarial act is regarded as the final outcome of the notarial activity, which acquires a material form of expression (document), this being the *static* sense of the notarial act (Constantinescu E., Chibac Gh., Bondarciuc O. 101).

The explanation of the essence of the notarial act needs to be based on the fact that the notarial act is one of the forms of legal acts. In relation with this, the essence of the notarial act is appropriated by the general system of legal acts, to which the particularities of all notarial acts issued by notaries, public authorities, persons with positions of responsibility, other persons empowered by law with notarial tasks are added.

The elucidation of the significance of the notarial act requires to take into account that the notarial act has the form and content of any civil legal act. Within the sphere of notarial law regulation, the term "act" (*actus* - action, *actum* - document) has the legal meaning of a document issued by a public authority, a person with positions of responsibility or a non-commercial organization, within the limits of powers conferred by law (V.Rapp-Cassigneul (2016): 56).

The notarial act has many definitions in the literature. In Romania, some authors have mentioned that the notarial act represents the activity of notaries, secretaries of local councils, diplomatic missions or consular offices, as well as other public entities, in order to facilitate to natural and legal persons nonlitigious civil legal relations, as well as to ensure their exercise of rights and the protection of their legitimate interests (I.Leş (2014): 87); M.Teaca (2018): 66). In this respect, the doctrine of the Romanian notarial law presented also other relevant opinions regarding the definition of the notarial act, such as: the notarial act is the decision taken by the notary during the notarial procedure (B.Ciucă (2010): 44); the notarial act is the written proof of the will of the parties confirmed by the notary (M. Moise (2006): 137); the act accomplished by the notary bearing his/her seal and signature is of public authority and has the probative value prescribed by the law (C.Mladen (2008): 32).

In the Republic of Moldova, the definition of the notarial act is presented in the Commentary on the Law on Notarial Law No. 1153-XV of 11.04.1997 (now abrogated). The author of the Commentary noted that the notion of a notarial act is a generic name for all categories of activities that are carried out by notaries in order to facilitate the legal issues, thus ensuring the protection of interests and the exercise of civil rights (E.Mocanu (1999): 7).

The Ukrainian researchers *K.Cijmari* and *D.Juravliov* mentioned that the notarial act is the decision taken by the person notarized at the request of the persons concerned within the competence granted to him/her by law (K.Cijmari, D.Juravliov (2016) : 76). In this context, the authors distinguish a number of particularities of the notarial act: it is issued on behalf of the state, the request comes from the person concerned, the issuer needs to be empowered with notarial powers, the act has a well-established recipient.

The French doctrinarian *S. Torricelli-Chrifi* defined the notarial act as the "external form of notarial action" because the notarial act can take the form of a notary's action as a result of its performance (S. Torricelli-Chrifi (2015): 144). According to the author's opinion, the form of the notarial act represents the manifestation of its external aspect, and the content of the notarial act is manifested through all the essential features that characterize it as a well-defined legal fact and distinguishes it at the same time from other legal facts.

It is interesting to note that as regards the notarial law in the Russian Federation, there are two groups of opinions on the determination of the concept of a notarial act. The first category includes the authors *E. Batuhtina*, *V. Argunov* and *N. Sucikova*, who takes the views that the notarial act is a document issued by a notary or by a person authorized by law with notarial powers (E.B. Batuhtina (2016): 65 -66; Argunov V.V. (2017): 133; N.V. Sucikova (2015): 56). In this context, they mentioned that the notarial acts represent administrative decisions, issued by the notary during a notarial procedure, expressed in a written form, based on the provisions of the law and aimed at the rise, modification or termination of the subjective rights and obligations of natural and legal persons.

The second category of researchers (*E. Tkacenko, R. Fomiceva, D. Bâkovici*) gave the notarial act a broader definition (E.V. Takacenko, R.V. Fomiceva (2016): 55; D.A. Bikovici (2012): 213-215). Thus, in their opinion, the notarial act is a decision issued according to procedural rules by a special subject, which is empowered by the state and reflects the will of the state. This special subject matter is empowered to confirm certain subjective rights

of natural or legal persons as well as legal facts, basing his/her decisions on the rules of substantive law.

The notarial act entails the rise, modification or termination of civil rights and obligations of the subjects of the legal relationship. As an act of enforcing the norms of law, the notarial act is at the same time a legal fact capable of generating legal effects. The notarial acts are derived because they embody the outcome of an entire content of primary legal facts, expressed in a systemic form (D. Marcadé, B. Mion, M. Moussinet (2018): 67).

The development of legal relationship by the notary is correlated with the legal facts which, in turn, are reflected in the notarial acts. On the basis of these, the notary or other authorized persons may conclude on various legal consequences, including the personal and real rights of the person (D.Rotaru, G.Rădulescu, E.Ungureanu (2014): 44). The notarial acts form the basis of the main tasks of the notaries, such as: protection of the rights and interests of the person, assurance of the lawfulness of the civil circuit, assurance of the probative value of the legal documents. By issuing the notarial act, the notary ensures the confirmation of legal deeds, prevents the violation of the subjective human rights by the participants during the civil relations, creates the necessary legal conditions for the realization of the subjective rights.

Legal definition of the notarial act

The legislation of the Republic of Moldova defines the notarial act based on the Law no.1453/2002 on notarial activity. According to art. 3 paragraph (2) of the Law, the notarial act is the act drawn up by the notary, signed and sealed by him/her, having public authority and the probative value prescribed by the law, i.e. the action of the notary performed on behalf of the Republic of Moldova, according to national law, aimed at protecting the rights and legal interests of the person. Further, the Law No. 1453/2002 on notarial activity, provides in Article 4 that the notarial acts are performed under the conditions and in the manner established by the law. Ministry of Justice of Republic of Moldova elaborates and approves the regulations on the performance of notarial acts, the form and content of notarial registers, as well as the special forms on which the notarial acts are drafted.

Important aspects regarding the definition of the notarial act may be found in the Law no.69/2016 on the organization of the activity of notaries, which, in art.3 (3)-(4) stipulates that any notarial act presented to the public authorities, courts or to another jurisdiction, as evidence, confirms the facts set forth therein and found by the notary until proven otherwise. The facts

authenticated, certified or found by a notary do not require to be subsequently proved before public authorities, courts or other jurisdictions, unless the notarial act has been annulled by a court order.

It is worth noting that a short definition of the notion of "notarial act" was given in the Republic of Moldova into a draft law on the organization of the activity of notaries[2]. According to art.3 of this draft, the notarial act is a legal and truthful confirmation of the authenticated legal acts and of the established facts. Unfortunately, these provisions have been excluded from the project during the stage of the draft law examination in the Parliament of the Republic of Moldova.

Aspects that define the notarial act were set forth in the draft law on the notarial procedure[3]. According to art. 4 of the draft text, the legal act takes the authentic form according to the law or at the request of the interested person. The notarial act is performed only at the request of the parties and is carried out in a written form. The draft law also stipulated that, besides the basic text of the legal act, the notarial act should include the name, surname, signature and seal of the notary, including conclusions on the findings and circumstances established personally by the notary.

In Romania, the notarial act is defined by the Law no. 36/1995of Notaries Public and notary activity. According to Article 7 of the Law, the act performed by the notary public, bearing the seal and his signature, is of public authority and has the probative force and, as the case may be, the enforceable force prescribed by law. In order to prevent the disputes, the Public Notaries have the obligation to verify that these documents do not contain clauses contrary to law and accepted principles of morality, to require and clarify to the parties the content of these acts in order to make sure that they understand their meaning and accept their effects.

Legal nature of notarial act

The lack of a clear legal definition of the phrase "notarial act" as well as the complex legal nature of the notarial procedure have caused contradictory discussions in the legal literature.

In the Russian Federation, the opinion frequently found in the literature is that the notarial act is an act of law enforcement, and the notary

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2 http://www.e-democracy.md/files/td/aviz-adept-proiect-lege-notari-mj-08-04-2013.pdf (vizitat 04.07.2018).

3 Portalul oficial al Ministerului Justiției din R.M., http://www.justice.gov.md/public/files/transparenta_in_procesul_decizional/coordonare/2017/martie/PL_Procedura_notariala0304.pdf (vizitat 06.07.2018).

is a representative of the state power. In this context, the Russian researcher T. Kalinicenko pointed out that the notarial act is a decision of public nature issued by the notary in a specific situation, expressed in a written form, based on the law and aimed at the arise, modification or termination of the subjective rights and obligations (TG Kalinicenko (2009): 12). In the opinion of the quoted author, the essence of the notarial act is expressed by the volitional element of the state power. The public power of the state manifest through the Notary in drafting the notarial acts and ensuring the control of their legality. However, in the author's view, such an approach is risky because it ignores the private nature of the notarial act and raises the interest of the state above the private interest of the citizen.

The notarial act cannot be regarded independently of the legal fact, so that the doctrine attempted to establish the differentiating criteria between the two sources of the legal relations, each of these criteria being centered on the role that the will in their delivery. In the light of the notary's right, the legal fact has been qualified as "an essential prerequisite for the appearance or termination of a notarial legal relationship" (V.Rapp-Cassigneul (2016): 43), considering that "the facts to which, in specific circumstances, the notarial law establishes legal relevance or legal effects in the sense that it generates, modifies or quashes notarial legal relations are called legal facts" (S. Torricelli-Chrifi (2015): 122).

From the point of view of legal facts, the notarial act has a dual nature - on the one hand, it can confirm the occurrence of the material legal rights and obligations to the participants in the substantive legal relations, and thus representing a legal fact of the substantive law, and on the other hand – it is a legal fact of the notarial procedure, in which the results of notarial actions are established. We may deduce therefore that the notarial act is a conglomerate of rules of substantive and procedural law, in which both the content and the manner of application of the norms of law are established.

The notarial act also needs to be examined as a primary unit of the notarial procedure manifestation, and as a means of establishing evidence of the presence or lack of legal facts. Thus, the drafting of the notarial act is related not only to the influence on a certain circle determined by subjects of the notarial legal relationship, but also to the formation of a whole complex of social relations, provided that each social relationship shall operate individually.

In drawing up the notarial acts, the Notary is first and foremost based on the application of the substantive law and finalizes them under the

rules of procedural law (notary law). Thus, in carrying out the notarial actions, the notary applies those substantive legal provisions that establish the circle of facts needed for the confirmation of a certain right, as well as the circle of circumstances to which the establishment of the legal fact is related.

The rules for the performance of notarial acts are set by the rules of procedural law (the notary law). In this context, we say that notarial acts are legal acts of the notarial procedure, because they give rise to procedural effects for the participants. By way of example, we bring the authentication endorsement, which is a legal fact that belongs to the procedural law (the notary law). The notarial act is considered to be fulfilled from the moment when the notarial act of authentication is applied, which implies the rights and obligations of the notary and beneficiary during the notarial procedure.

The notarial act is *strictly individual*. The action of the notarial act is meant to give substance to legal regulations with reference to a specific situation. Thus, the notarial act is regarded as a variety of civil legal acts and differs from the scope of regulatory acts, which is not limited to a specific situation.

The notarial act has an external form which, depending on the action performed by the notary, acquires the particularities of the procedural form established by law. As a rule, the form of the notarial act is the written form and the notary act itself has the appearance of a document, containing the requisites prescribed by law.

The legal force of the notarial act is given by the fact that, according to the law, it confirms certain facts or authenticates certain rights established by the notary. Thus, the notarial act has a probative force (N.V.Bogatireov (2015): 124-125). Despite the fact that, according to the civil procedural law, no evidence has any pre-established force for the court, in the notary's case the facts established by him are clear and incontestable. We can give as example the authenticated notarial legal acts attesting the existence of a fact or a right confirmed by an act, unlike a written legal act in a simple form and which, in the event of a dispute, requires additional evidence to confirm the facts indicated in the act.

Particularities of notarial act

The notarial act is characterized by a series of peculiarities, which distinguish it from other legal acts of the civil circuit. So:

1) The notarial act is issued whenever it becomes necessary to officially confirm legal acts or certain rights belonging to natural or legal persons;

2) Like other acts of law enforcement, the notarial act is legally empowered and has the capacity to give rise to legal effects. The deprivation of the notarial act of legal power and legal effects can take place in the event of the holder's withdrawal from the notarial act drafting or if the act has been declared invalid. The legal power of the notarial act does not depend on the personal qualities of the notary who issued that act.

3) The notarial acts are drawn up within a special procedure consisting of stages, built up strictly under the law. When carrying out notarial actions, the notary is required to apply not only the procedural rules, but also the corresponding rules of the substantive law.

All notarial acts, besides the general characteristics, have also other particularities allowing their categorization. These categories, characterized by individual signs and peculiarities, are called notarial procedures. Thus, in the specialized doctrine of the Republic of Moldova, the authors *E.Constantinescu, Gh.Chibac* and E.*Bondarciuc* highlighted the following types of notarial procedures: authentication of transactions (notarial actions regarding authentication of sale-purchase contracts, exchange, donation etc. .), authentication of legal deeds (notarial actions regarding the confirmation of the existence of the person in life or the date of the document presentation), confirmation of non-litigious facts, the performance of protection actions, etc. (E.Constantinescu, Gh.Chibac, O.Bondarciuc (2001): 102).

An important feature of the notarial act is that the capacity of reflecting and expressing all the essential stages of the notarial procedure, existing until the appearance of the act, as well as of determining the prospects of fulfilling the most relevant social relations.

4) One of the main purposes of the notarial acts is to give rise and modify the legal relationships, being expressed with objectivity by the person authorized by law with notarial powers. In this context, the notarial act is always a public act, able of preventing the occurrence of a law dispute and thus facilitating the application of legal rules.

5) The doctrine of notarial law has specified that the notarial act can be examined as a legal fact, arising from the expression of the will of the persons concerned and in connection with which the notary, expressing the will of the state, may intervene in the enforcement of legal rules in order to prevent the violation of the legitimate rights and interests of the person, and

to ensure as effectively as possible the development of State functions" (S. Torricelli-Chrifi (2015): 167).

6) The notarial act has an important role to play in the process of achieving the role of the protection of law. Despite the fact that the institution of the notary is not fully adapted to solving all the disputes that arise, the basic idea is to realize its preventive potential, where prevention is an inalienable part of the whole objective of obtaining and achieving the legal defense goal. In connection with this, it was pointed out that the notarial act removes any obstacles to the realization of rights and obligations, but also to the fight against abuse of rights (D.Marcadé, B.Mion, M.Moussinet (2018): 58). Thus, we can say that the notarial act manifests itself as a constitutional guarantee for the supervision and defense of the rights and freedoms of persons.

At the same time, the notarial act constitutes the necessary protection for the parties in initiating and carrying out commercial and civil legal relations. The formalism applied to the conclusion of legal documents is a guarantee for the security of civil relations. The parties are protected against possible contractual risks and defects due to the intervention of a public authority.

7) The notarial act also needs to be examined as a document, which must create conditions for the removal of direct or indirect circumstances due to which the rights and obligations of the person may be violated. The Moldovan researcher *E.Mocanu* has this vision regarding the notarial act. The author takes the view that the notarial acts are documents drawn up prior to the commencement of a litigation, which is why the notarial acts are also called preconstituted documents and can be used in case of need as evidence in the court (E.Mocanu (1999): 7).

8) The same civil subjective right may be ensured, as appropriate, by notarial or judicial acts. The notarial act serves as a legal basis that excludes the need for repeated recognition of the same fact during a legal action. The choice of notary or jurisdictional form of protection of civil subjective rights is not an absolute factor and is left to the discretion of the parties concerned. However, the notarial activity falls within the scope of non-litigious legal relations, because in the event of divergences between the subjects of the notarial act, the notary is required to refuse the drawing up of the notarial act and to recommend to the parties the appeal to the court.

Generally speaking, the notarial act is the decision issued by the notary or by other persons authorized by law with notarial powers, drawn up within the limits of a special procedure consisting of stages whose sequence is

based on the provisions of the law and aimed at giving rise, modifying and terminating the subjective rights and obligations of the person.

References:

Argunov, V.V. (2017). Notarialinii akt v sudebnom dokazivanii po grajdanskim delam: istoriko-teoreticeskii ocerk (Notarial deed in the judicial proving of civil cases: a historical and theoretical essay), in Vestnik grajdanskogo protsesa (Russian Federation), no.6.

Barbieru, C., Macovei, C. (2018). Activitatea notarială. De la teorie la practică (Notary activity. From theory to practice). Printing House Universul juridic, București.

Baieș, S., Roșca, N. (2011). Drept civil. Partea generală (Civil law. The general part), ediția a IV-a, Printing House Centrală, Chișinău

Baieș S., Mîțu, Gh., Cazac, O. (2015). Drept civil. Teoria generală a obligațiilor (General Theory of Obligations). Printing House Centrală, Chișinău.

Bogatireov, N.V. (2015). Notarialinii akt kak forma osushcestvlenia ohranitelinoi functsii prava (Notarial act how form the benefits of protection rights functions), in Vestnik Saratovskoi gosudarstvenoi iuridiceskoi akademii (Russian Federation, no.1.

Batuhtina, E.M. (2016). Ispolnitelinaia sila notarialinogo akta v prave Rossii i Frantsii: sravnitelino-pravovoe isledovanie (The executive power of the notarial deed in the law of Russia and France: comparative legal study). Izdatelistvo Statut, Moskva.

Bikovici, D.A. (2012) Pravovoi status notariusa v Rossiskoi Federatsii (The legal status of a notary in the Russian Federation), in Molodoi Ucionii (Russian Federation), No.10.

Buruiană, M. (2006). Comentariul Codului civil al Republicii Moldova (Commentary on the Civil Code of the Republic of Moldova), Volumul I, Printing House Centrală, Chișinău.

Constantinescu, E., Chibac, Gh., Bondarciuc, O. (2001). Notariat: manual pentru studenții facultăților de drept (Notary: manual for law students). Printing House Pontos, Chişinău.

Ciucă, B. (2010). Răspunderea juridică în activitatea notarială, Monografie (Legal liability in the notary's activity, Monograph), Printing House Universitară, București.

Cijmari, K.I., Juravliov, D.V. (2016). Teoretiko-pravovi osnovi notariatu v Ukraini (Theoretical and legal foundations of the notary in Ukraine). Isdatelistvo Tsul, Kiev.

Chirtoacă, L. (2015). Drept civil. Teoria generală a obligațiilor (General Theory of Obligations). Printing House Print-Caro, Chișinău.

Inshakov, A.O. (2017). Notariat v grajdanskom oborote: v Rossii și za rubejom, Monografia (The notary in civil circulation: in Russia and abroad, Monograph), Izdatelistvo Iurlitinform, Moskva.

Kalinicenko, T.G. (2009) Notarialinii akt: poneatie, soderjanie, klassificatsii (Notarial act: concept, maintenance, classifications), in Notarialinii Vestnik (Russian Federation), no.5.

Leș, I. (2014). Elemente de drept notarial. Curs universitar (Elements of notarial law. University course), ediția a 3-a, Printing House C.H.Beck, București.

Matefi, R. (2017). Teoria actului juridic civil (The theory of civil legal act). Printing House Hamangiu, Bucharest.

Marcadé, D., Mion, B., Moussinet, M. (2018). La formalisation des actes notariés, Pratique notariale, 2e édition. Edition Lexis Nexis, Paris.

Niemesch, O. (2016). Faptul juridic licit (Lawful legal fact). Printing House Hamangiu, Bucharest.

Moise, M. (2006). Actul notarial ca instrument de garantare a drepturilor omului (Notarial act as a guarantee of human rights), in Dreptul (România), No.11.

Mladen, C. (2008). Drept notarial. Note de curs (Notarial law. Course notes), Printing House Sitech, Craiova.

Mocanu, E. (1999). Comentariul la Legea cu privire la notariat nr.1153-XV din 11.04.1997 (Commentary on the Law on Notarial Law no.1153-XV of 11.04.1997), Printing House Arc, Chișinău.

Pînzari, V. (2004). Unele considerente cu privire la definirea actului juridic în Codul civil al Republicii Moldova (Some considerations regarding the definition of the legal act in the Civil Code of the Republic of Moldova), the Magazine Studia Universitatis Babes-Bolyai (Romania), no.1-2.

Popa, I., Moise, A. (2013). Drept notarial: organizarea activității, statutul notarului, proceduri notariale (Notarial law: organization of the activity, notary status, notary proceedings), Printing House Universul Juridic, Bucharest.

Romoșan, I.D. (2018). Drept civil. Obligații (Civil law. Obligations), Printing House Hamangiu, Bucharest.

Rotaru, D., Rădulescu, G., Ungureanu, E. (2014). Actul autentic notarial între teorie și practică: noțiuni teoretice, comentarii, modele (The authentic notary act between theory and practice: theoretical notions, comments, models). Printing House Notarom, București, 2014.

Rapp-Cassigneul, V. (2016). Droit général et droit notarial, 4e édition. Edition Defrénois, Paris.

Sucikova, N.V. (2015). Ispolnitelinaia nadpisi notariusa (Executive inscription of the notary. Monograph) Izdatelistvo Statut.

Teaca, M. (2018). Drept notarial. Note selective de curs (Notarial law. Selective course notes), Printing House Pro Universitaria, București.

Torricelli-Chrifi, S. (2015). La pratique notariale, source du droit. Edition Defrénois, Paris, 2015.

Tkacenko, E.V., Fomiceva, R.V. (2016). K voprosu o pravovom statuse notariusa v Rossiskoi Federatsii (On the Legal Status of the Notary of the Russian Federation), in Vestnik Tambovskogo universiteta (Federația Rusă), no.5.

Van Boxstael, J., Vanderschuren, J. (2015). Clauses abusives et force exécutoire de l'acte notarié. À propos de l'ordonnance Banco Popular Español, de l'arrêt et de l'ordonnance Sanchez Morcillo de la Cour de justice de l'Union européenne, in Annales de Droit de Louvain: revue trimestrielle (Canada), no. 2.

De Wulf, C., Bael, J., Devos, S. (2013). La rédaction d'actes notariés: droit des personnes et droit patrimonial de la famille. Edition Kluwer, Gand.

Legislation

Civil Code of the Republic of Moldova no.1107 of 06.06.2002. In: the Official Gazette of the Republic of Moldova, 2002, no. 82-86.

Romanian Civil Code adopted by Law no.287 of 17.07.2009. In: the Official Gazette of the Republic of Moldova, 2009, no. 511.

Law no.1453 / 08.11.2002 on the notarial activity. In: the Official Gazette of the Republic of Moldova, 2002, no. 154-157.

Law no.69 / 14.04.2016 on the organization of the activity of notaries. În: the Official Gazette of the Republic of Moldova, 2016, no. 277-287.

Law no. 36 / 12.05.1995 on the Notaries Public and the notarial activity In: Republished in the Official Gazette of Romania, 2018, no. 237.