

OUTLOOK FOR DEJUDICIALISATION

RECOMMENDATIONS

from

the INTERNATIONAL UNION OF NOTARIES

On the possibilities of transferring or sharing competence between judges and notaries in non-contentious matters

Recommendations issued following the Symposium held in Brasilia on November 9, 2023 on the theme of
Dejudicialisation

The current phenomenon of *dejudicialisation*¹, observed in many countries, is part of the broader present-day move towards the contractualisation of law, the promotion of individual rights, the emergence of new freedoms and the gradual withdrawal of public order. Dejudicialisation is also increasingly the response of public authorities to the backlog in courts. Everywhere, the State is seeking to rationalize its public actions in judicial matters to prevent and reduce the excessive workload of Courts².

Nevertheless, very few States are willing to rely entirely on the autonomy of the will and refrain completely from accompanying human and family relationships. Rather than total privatization of matters, particularly family matters, such as divorce, inheritance law, vulnerable persons law (...) we are increasingly witnessing the substitution of public authority: competences originally exercised exclusively by the judge are transferred entirely to or shared with another authority.

Since notaries are :

- Highly qualified law practitioners;
- Public officials appointed and supervised by the State to confer authenticity on legal acts and contracts contained in the documents they draft;
- Holders of public authority.

And since they:

- exercise their function impartially and independently ;
- are responsible for the legal effectiveness of their acts;

¹ Understood here as the phenomenon of removing from the jurisdiction of the civil courts matters that had previously fallen exclusively within their jurisdiction.

² cf. in particular the work of the CEPEJ-SATURNE working group within the framework of the Council of Europe.

- contribute, through the legal certainty they provide, to the proper administration of justice and the maintenance of social peace,

Notaries are the most suitable public authority to act as an alternative to judges in non-contentious matters.

The judge's role, whether in voluntary jurisdiction proceedings, or in non-contentious matters, is to ensure the free and informed consent of the parties, or to check the legality of agreement and that the latter is balanced. Judges are, of course, entirely legitimate in this mission. While a judge is perfectly legitimate in this role, the absence of any dispute to be settled naturally leads us to note that he is not the only one to carry this legitimacy as a public authority: it is also at the heart of the function of the notary, a genuine voluntary jurisdiction official. This observation paves the way for a possible transfer or sharing of powers in various areas.

As a result,

Considering the intention of States to rationalise their action and improve the efficiency of their public services, and in particular to reduce the backlog in courts and speed up legal proceedings;

Considering the nature of certain non-contentious matters, which are suitable for the transfer of competences;

Noting the proximity of the professions of notary and judge (owing to their status, training, ethics, discipline, etc.), recognised also by the European Court of Human Rights, which qualified the notary as “out-of-court magistrate” in *Ana Ionita v Roumanie* decision (21st March, 2017);

Working to improve public service, the good administration of justice and the maintenance of social peace;

The International Union of Notaries (UINL) makes the following observations and recommendations to the Presidents of member Notariats:

1. On the tasks and matters that can be the subject of the transfer or sharing of competences, and the opportunities for collaboration between the judge and the notary:

The following non-judicial tasks may, in the absence of disputes to be settled, be the subject of the transfer or sharing of competences between judges and notaries, or collaboration between them:

[N.B. The list is indicative and not exhaustive]

The Couple

- divorce or legal separation by mutual consent, where applicable, in the absence of minors
- Change in matrimonial property regime
- Celebration of marriage
- Concluding, registering and dissolving partnerships
- Non-contentious procedures in the administration of joint property when one of the spouses is incapacitated
- Authorising one spouse to represent the other and express the consent of the spouse prevented from doing so

Parentage

- Receiving consent for adoption;
- Adoption of persons of full age;
- Child recognition ;
- Receiving consent in the context of medically assisted procreation, and where applicable, surrogacy

Succession

- Issuance of affidavits/ certificates of succession / European certificate of inheritance
- Procedures for opening and validating wills;
- Inheritance options:

Collection of a waiver of inheritance, acceptance up to the net assets (subject to the benefit of the inventory);

Issuing authorisation for accepting or waiving an inheritance or legacy, if authorisation is required;

- Procedures relating to vacant and unclaimed estates
- Opening of succession
- Drawing up an inventory,
- Issue of a legacy;

- Submission of executors' accounts and removal of executors, authorisation of acts of disposition by executors
- Liquidation and division operations, in the context of both amicable (out-of-court) and judicial divisions (in the latter case, in collaboration with the judge).

Persons

- Rectification of purely material errors on civil status certificates;
- Court approval or authorisation to carry out acts of disposal, security agreements or other acts relating to the property and rights of minors or adults subject to a judicial protection measure;
- Authorisation of donation of organs
- Establishing in advance powers of representation such as lasting powers of attorney; possibility of designating or excluding in advance a guardian/legal representative (guardian, administrator, etc.);
- Out-of-court agreements on alimony and changes thereto

Others

- Taking of oath; testimony, written evidence ;
- Issue of apostilles, legalization formalities;
- Participation in out-of-court settlement of disputes/performing mediation/conciliation procedures
- Enforcement procedures

2. About the place of the contract :

- *Importance of and need for advice:* The freedom given to the parties to determine their agreements makes it essential to have a qualified legal professional to inform them about the rule of law, the various possible choices and their consequences.
- *Impartiality:* The freedom given to the will of the parties naturally falls within a non-contentious framework, and the advice offered should not create any difficulties. Impartiality is therefore required when providing assistance in the drafting of contracts, which take the place of judgements in dejudicialised sectors.

- *Retaining the presence of a public authority to check legality:* The correct application of the Law by the parties, on the one hand, and checking compliance with the Law in contracts, on the other, advocate checking and verifying these contracts as soon as they are signed (ex-ante) and not through subsequent litigation (ex-post) which would be based on a poorly drafted contract or incorrect application of the Law.

3. About the place of the authentic notarial instrument

- *Probative force and enforceability:* Since the aim here is to propose a substitute for a court decision, the unsurpassable probative force and enforceability embodied in judgments handed down in the last instance immediately appear to be the perfect attributes for maintaining the quality of the act (*instrumentum*) substituting the judgment that has now been set aside.
- *Entry in public registers:* Many court decisions are entered in public registers relating to personal status (adoption - recognition of parentage - divorce - registered partnerships - etc.) and entry in these registers of private agreements, instead of judgments, could only greatly reduce the security expected of such registers. Here again, the notarial act seems to be able to replace the judge's decision with equal security.
- *Storage:* The security reasons necessarily connected with these acts make it essential that they be stored; the notarial act inherently contains this legitimate requirement.

Brasilia, 10th November 2023