RIN
Revista Internacional del Notariado

Unión Internacional del Notariado
Union Internationale du Notariat
International Union of Notaries

# DIALOGUE
## BETWEEN LEGAL SYSTEMS

SCRIVENER NOTARIES

SEPTEMBER 26, 2023 | LONDON

## The added value of the notarial act
International Union of Notaries

131
SPECIAL EDITION

Unión Internacional del Notariado
Union Internationale du Notariat
International Union of Notaries

*Nuestra Unión es el puente*
*que vincula a notarios de 91 países*

# RIN 131

EDICIÓN ESPECIAL


**RIN**
Revista Internacional del Notariado

**ONPI**
Institución Editora

**SEDE PERMANENTE**
Avenida Las Heras 1833. Piso 4º (C 1024AAO)
Ciudad Autónoma de Buenos Aires - República Argentina

**DIRECCIÓN Y REDACCIÓN**
Avenida Las Heras 1833. Piso 4º (C 1024AAO)
Ciudad Autónoma de Buenos Aires - República Argentina
Teléfonos: (0054) 11 4809-7161 / 6851
Mail: onpiuinl@onpi.org.ar
www.onpi.org.ar





DISEÑO Y DIAGRAMACIÓN: M. CECILIA ALCOBA

Queda hecho el depósito que previene la ley 11.723,
Nº de Registro de la Propiedad Intelectual 1432 Expte. 151.770.





RIN 131 | Edición Especial | Mayo 2024


*Nota: Los artículos se publican en el/los idioma/s en los que fueron elaborados por los autores. Las traducciones de los textos originales fueron realizadas mediante la IA.*

*Remarque : Les articles ne sont publiés que dans la/les langue/s dans laquelle/lesquelles les auteurs les auront rédigés. Les traductions des textes originaux ont été réalisées grâce à l'IA*

*Note: Articles are published in the original language/s in which they were written by the authors. The translations of the original texts were carried out using AI.*

ORIGINAL LANGUAGE

# NOT. LIONEL GALLIEZ

UINL PRESIDENT| LEGISLATURE 2023 - 2025

## PROLOGUE

Dear Colleagues,

The Conference, which took place in London on 26 September 2023, inaugurates the first in a series of meetings organised by the International Union of Notaries, and in particular by the Working Group set up at the beginning of my legislature.

We have chosen to name these encounters *"Dialogue between legal systems".*

*Dialogue* is the well-known source of philosophical reflection, as the Socratic example teaches us.

*Dialogue* is also the source of legal knowledge, which most often arises from debate in the courts, in the academic and even in parliament.

These events are and will continue to be an opportunity to bring together continental law notaries and representatives of other legal systems, and will be held each year on a different continent.

The aim of this working group is to pursue academic exchanges between legal professionals, in particular with representatives of Common Law systems, with a view to openness and exchange, within a framework of mutual respect.

The International Union of Notaries is committed to reciprocal respect, and the best way to achieve it is to get to know each other. The aim is also to let participants from different legal systems know about the importance and usefulness of the notarial profession.

The Scrivener Notaries of London were chosen to organise the first of these meetings and they did it so brilliantly, we had no doubt. I would especially like to thank the Chairman, Edward Gardiner, and our Councillor Nigel Ready, as well as all the Scrivener Notaries of London, for their warm welcome and their great commitment to organising this wonderful event, which took place in the magnificent setting of Apothecaries Hall. The conference was also an opportunity to celebrate together the 650th anniversary of the prestigious Worshipful Company of Scrivener, and we congratulate it most warmly once again!

As I said in my introduction speech, I was delighted that the Society of Scriveners Notaries in London has agreed to organise this event, as I believe it has a special role to play in our Union.

A role as interpreter and bridge between two legal worlds to improve our mutual comprehension.

They play this role with warmth and friendship, as we could all see from the way they received us.

The chosen theme of "*The Added Value of The Notarial Act and The Law of Evidence*" is of key importance, as these are the most distinctive values of the Civil Law system, those that characterise us and distinguish us from other legal systems.

I invite you to read the different contributions and look forward to seeing you next December 2024 in Puerto Rico for the second "Dialogue between legal systems" meeting!

*Lionel Galliez*

PROGRAMME

# Dialogue between legal systems

## THE ADDED VALUE OF THE NOTARIAL ACT

PROGRAMA

# Diálogo entre los sistemas jurídicos

## EL VALOR AÑADIDO DEL ACTA NOTARIAL

**INTRODUCCIÓN**

**Edward Gardiner (INGLATERRA)** | Presidente, Society of Scrivener Notaries.
**The Rt Worshipful Morag Ellis KC (INGLATERRA)** | Master of the Faculties.
**Lionel Galliez (FRANCIA)** | Presidente de la Unión Internacional del Notariado (UINL).

**Introducciones y presentaciones por los representantes de los notariados invitados.**
**Tema principal:** "El notario, según el derecho de las naciones, tiene crédito universal".
Una perspectiva de la fuerza probatoria del acta notarial en las jurisdicciones de *common law*, de derecho civil e híbridas.

**MODERADOR**

**Nigel Ready (INGLATERRA)** | Not. Scrivener, Consejero Gral. de la UINL y miembro de la CCNI.

**ORADORES Y PANELISTAS**

**The Rt Hon. Lord Justice Lindblom (INGLATERRA)** | Pdte. Sup. de los Tribunales, Inglaterra y Gales.
**Cyril Nourissat (FRANCIA)** | Prof. de Derecho, Universidad Jean Moulin Lyon III.
**Naivi Chikoc Barreda (QUEBEC)** | Prof. Asistente, Facultad de Derecho, Departamento de Derecho Civil, Universidad de Ottawa.
**Melissa Goh (SINGAPUR)** | Directora, Academia de Derecho de Singapur.
**Larissa Oebel (ALEMANIA)** | Notaria Candidata, Bundesnotarkammer.
**Michael Clancy OBE WS (ESCOCIA)** | Director de Reforma Legislativa, Sociedad de Derecho de Escocia *(Law Society of Scotland).*

**Introducción a la conferencia y al orador principal** | **Jonathan Coutts (LONDRES)**
Not. Adjunto. Responsable de Asuntos Notariales de la Worshipful Company of Scriveners.

**"Los Notarios y el Scriveners Company"** Breve historia de los últimos 650 años.
**Iain Ostrowski-Rogers (INGLATERRA)** | Notario Scrivener.

**Conferencia Notarial Anual Wilfrid Phillips | 650º Aniversario de los Scriveners.**
**Orador principal**
**Jens Bormann LL. M (ALEMANIA)** | Pdte. del Bundesnotarkammer, Cámara Federal de Not.

**Preguntas y repuestas | Discusiones**

PROGRAMME

# Dialogue entre les systèmes juridiques

## LA VALEUR AJOUTÉE DE L'ACTE NOTARIÉ

**INTRODUCTION**

**Edward Gardiner (ANGLETERRE)** | Président, Society of Scrivener Notaries.

**The Rt Worshipful Morag Ellis KC (ANGLETERRE)** | Master of the Faculties.

**Lionel Galliez (FRANCE)** | Président de l'Union Internationale du Notariat (UINL).

**Introductions et brèves présentations des représentants des notariats invités.**
**Sujet principal:** "Le notaire, selon le droit des nations, a un crédit universel". Une perspective sur la force probante de l'acte notarié dans les juridictions de droit commun, civil et hybrides.

**MODÉRATEUR**

**Nigel Ready (ANGLETERRE)** | Scrivener notary, Conseiller Général de l'UINL et membre de la CCNI.

**ORATEURS ET PANÉLISTES**

**The Rt Hon. Lord Justice Lindblom (ANGLETERRE)** | Président Supérieur des Tribunaux, Angleterre et Pays de Galles.

**Cyril Nourissat (FRANCE)** | Professeur de Droit, Université Jean Moulin Lyon III.

**Naivi Chikoc Barreda (QUÉBEC)** | Professeure Assistante, Faculté de Droit, Département de Droit Civil, Université d'Ottawa.

**Melissa Goh (SINGAPOUR)** | Directrice, Académie de Droit de Singapour.

**Larissa Oebel (ALLEMAGNE)** | Candidate Notaire, Bundesnotarkammer.

**Michael Clancy OBE WS (ÉCOSSE)** | Directeur de la Réforme Législative, Société de Droit d'Écosse *(Law Society of Scotland).*

**CONCLUSIONS** | **Presidentes Lionel Galliez et Edward Gardiner**

**Introduction à la conférence et à l'orateur principal** | **Jonathan Coutts (LONDRES)**
Notaire Adjoint (responsable des affaires notariales) de la Worshipful Company of Scriveners.

**"Les Notaires et la Worshipful Company of Scriveners"** Brève histoire des 650 dernières années.
**Iain Ostrowski-Rogers (ANGLETERRE)** | Scrivener notary.

**Conférence Notariale Annuelle Wilfrid Phillips | 650ème anniversaire des Scriveners**
**Orateur principal**
**Jens Bormann LL. M (ALLEMAGNE)** | Président du Bundesnotarkammer, Chambre Fédérale des Notaires.

**Questions et réponses | Discussions**

ORIGINAL LANGUAGE

# Edward Gardiner (ENGLAND)

## Chairman, Society of Scrivener Notaries

Fellow notaries, colleagues and friends, on behalf of the Society of Scrivener Notaries it is my great pleasure to welcome you all to Apothecaries Hall, to the City of London and to the inaugural UINL Dialogue meeting between legal systems.

This Dialogue meeting was initiated by President Galliez when he took office at the beginning of this year and we are honoured that he has invited the Society of Scrivener Notaries to cohost the meeting as part of our celebrations to mark the 650th anniversary of the Worshipful Company of Scriveners.

It was on this very day, 26th September, in the year 1373 that the Scriveners Company was formally established as a corporate body governed by ordinances granted by the Lord Mayor of the City of London.

We are pleased that, to help us celebrate our important anniversary, we have notarial representatives with us from Asia, Africa, North America, South America, Europe and Australia, every continent in the world except Antarctica!

Apothecaries Hall, where we are, was built in 1672 following the destruction of the previous Hall during the Great Fire of London in 1666 when the Scriveners Hall was also burnt down, but the Scriveners Hall was sadly not rebuilt.

This Hall was also where I sat my final scrivener notarial examinations some 35 years ago and it is fitting that the recent CAE meeting in Rome arranged by President Valentina Rubertelli at San Lorenzo in Miranda in the Roman Forum was also the headquarters of the Noble Society of Roman Apothecaries

The theme of this meeting is “The added value of the notarial act”. Whether we practise in a civil law, common law or other legal system this is a topic which I am sure will be of great interest to us all.

Incidentally, the quotation in your programmes "a notary by the law of nations has credit everywhere" is from an 1802 judgment of Lord Eldon, then Lord High Chancellor, in which he accepted the facts stated in the certificate of a notary without further proof. We will be hearing more about this later on.

Our expert and distinguished team of international panellists will be introduced later this morning and I am very grateful for the time I know they have all given up to prepare for our discussions today.

Scrivener Notaries have collaborated with notaries across the world for the last 650 years with the purpose of assuring legal security in cross border transactions. As with many other common law notariats our role is focused on international rather than domestic matters.

I am sure that meetings such as this can only help to strengthen the bond between notaries of all jurisdictions.

There are of course fundamental differences in the daily role and competencies of civil law notaries and many other notaries but our essential role, whether in the digital or the more traditional paper world, of providing legal security, either between the parties to a transaction or for the benefit of others who rely on the contents of our notarial acts is, at its heart the same.

As you will see from the programme after these introductions we have invited some of our visiting common-law notariats from outside the United Kingdom, who might not be so well known to you all, to introduce themselves and their profession.

Following this it will be time for our first guest speaker, Lord Justice Lindblom, that has kindly agreed to speak to us between sittings at the High Court and we should certainly not keep one of our most senior judges waiting!

After a lunch break we will be continuing our discussions and then later on we are looking forward to a special 650th Anniversary Lecture to be given by our friend Dr. Jens Bormann and you will also be hearing a little bit more about the Scriveners Company and Scrivener Notaries over the last 650 years.

I am now pleased to introduce The Right Worshipful Morag Ellis, KC, the Master of the Faculties, the regulator of notaries in England, Wales and certain other jurisdictions.

Morag Ellis was called to the Bar in 1984 and appointed Queen's (now King's) Counsel in 2006. She continues to have a busy practice at the bar where she has been praised, I quote, for "her strong analytical skills and an ability to distil advice on complex regulation concisely", qualities which she admirably deploys in the governance of our profession.

ORIGINAL LANGUAGE

# The Rt Worshipful Morag Ellis KC (ENGLAND)

## Master of the Faculties

It is a great privilege to be invited to speak at this event and to welcome so many visiting notaries from other jurisdictions to the UK so I want to start by thanking the organising committee for asking me to do so. On behalf of all of us, I would like to extend those thanks to the Society of Scrivener Notaries who are hosting this event, very much within their centre of operations, here in the heart of the City of London. It is fortuitous that we are coinciding with the 650th anniversary of the Company of Scriveners. This is a historic moment indeed.

Guests from overseas may well wonder who or what the Master of the Faculty Office of the Archbishop of Canterbury is and what she is doing here. Most British lawyers would be equally baffled. The short, and perhaps surprising answer, is that I am the statutory regulator of notaries public in England, Wales, the Channel Islands, Gibraltar, New Zealand, Queensland, Norfolk Island and Papua New Guinea.

A fuller – and I hope more interesting – answer requires us to go into a little history, some of which will be familiar to many of you. As we know, the *notarius or tabellio* was an important figure in Roman law; there are frequent references to him and his work in the great legal writings of the Emperor Justinian. When the Empire fell, much Roman law was forgotten but it was rediscovered in around the eleventh century and, in the twelfth century, formed the basis for the development of a system of canon (church) law, focussed on the University of Bologna. As such, the importance of the notary was, once again, recognised, especially as the ecclesiastical courts developed a procedure which largely depended on the reliability of documents, rather than oral evidence. Successive popes and their legates, as well as the Holy Roman Emperor, therefore, granted licences to individuals to act as notaries public. These notaries were particularly associated with the work of the ecclesiastical courts which, at that time, all looked to the

papal court at Rome as the ultimate court of appeal throughout the western church. 'Added value' is not a medieval term, but it is fair to say that notaries were fundamental to the functioning of the western canon legal system at this time. This remains the case in the Roman Catholic Church to this day, since acts of a judicial hearing are null if they have not been signed by the notary[1].

We now need to focus specifically on the situation in England for a few moments. English secular law did not develop in the same way as many of the equivalent jurisdictions on the Continent and, in particular, different methods of verifying documents and receiving evidence in court meant that notaries public did not have the same role as elsewhere. In 1237, the papal legate Otto reported that, in England, 'publicii notarii non existunt'. Things were to change, however, as the 13th century advanced. In 1279, John Pecham was appointed Archbishop of Canterbury and he brought with him an Italian notary public, Johannes quondam Jacobi de Bononia. He was the author of a 'Summa' on notarial practice in the church courts which became very influential.

Archbishop Pecham obtained a faculty – or permission – from the Pope to appoint 3 suitable men to the office of notary public and from then on, faculties continued to be granted for such appointments by papal authority, directly or via the Popes' legates to this country. They became numerous and performed important functions in the ecclesiastical courts and, to some extent, in other walks of life too. In 1320, King Edward II issued a decree banning imperial notaries from working in England, but he simultaneously applied to the Pope for faculties to create more notaries: the issue at this date was temporal, not ecclesiastical, power.

The 16th century Reformation of the English church took a different course from the development of Protestant churches in Germany and other parts of Europe. The English Reformation settlement was of profound constitutional, as well as religious, significance. In the legal sphere, it coincided with important developments in the common law and secular courts. The Reformation Settlement instituted a *'fundamental identification of the Church of England with the State, the monarch being the head of each[2]'*. Because English law no longer recognised the authority of the Pope in England and Wales and the monarch became the Supreme Governor of the Church of England, all courts, including the courts ecclesiastical, became the King's courts presided over by judges appointed, or at least approved by, the monarch. Nevertheless, the Church of England is not a *'department of State[3]'*.

It was necessary to develop a new system for the appointment of notaries. The Ecclesiastical Licences Act 1533 (25 Hen.VIII, c.21 1533) was passed to deal with *'licences, dispensations, faculties, compositions, rescripts, delegacies, instruments and other writings'*. Provision was made for the Archbishop of Canterbury, who is the spiritual leader of the Church of England, to appoint a Master of Faculties to issue dispensations in the same fashion as papal delegates had done before the Reformation. The first recorded Master was Dr Nicholas Wotton, who was appointed in 1538 and there have been 22 subsequent Masters. Since 1874[4], the Master has always been the same person as the senior permanent ecclesiastical judge, the Dean of the Arches. In my case, for the first time, there was a structured recruitment process and I came into office as Dean and Master in June 2020, during the Covid lockdown. I am the second woman to occupy the post.

Before our visitors conclude that the regulation of notaries in this country is hopelessly stuck in the peculiarities of English history, I should complete the picture. In 2007, the Legal Services Act set up the Legal Services Board as a *'super regulator'* of all the providers of relevant legal services in England and Wales.

The LSB describes itself as being *'independent both of government and the profession... While the LSB is part of the public sector, it operates independently of government. This was important as maintenance of the rule of law was thought to depend on the regulation of lawyers being handled independently of government*[5].

The 2007 Act recognizes the Master of the Faculties as a the *'approved regulator'* of, amongst others, notarial activities[6]. As such, I am bound to pursue the statutory regulatory objectives which are:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of legal services;
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties;
- promoting and maintaining adherence to the professional principles.

These objectives underpin my Priorities and the Business Plan which supports them. My office is wholly separate from the representative functions performed on behalf of the profession by the Society of Scrivener Notaries and the Notaries

Society. The regulatory work which the Faculty Office team and I undertake is entirely related to the admission, regulation, discipline and supervision for the purposes of Anti-Money Laundering legislation of notaries, primarily in England and Wales. As such, by ensuring the upholding of professional standards, we assist in ensuring that notarial acts continue to add value, particularly in the sphere of private international relations between citizens and entities. I realise that regulation of the profession by two entities, neither of which is a *'department of State'* and both of which are independent of government, may seem curious to some of our colleagues from overseas. This does not mean that regulation is weak or ineffective, nor that the work of English and Welsh notaries should be valued any the less. It is, in part the product of history, in part an outworking of the largely unwritten British constitution which at once accords a constitutional position to the Church of England as a *'church by law established'* and places a high value on the existence of legal professions independent of government who are, nevertheless, regulated in the public interest.

I and my colleagues from the Faculty Office are greatly looking forward to learning from all the delegates here, especially those from other parts of the world where, doubtless, notarial regulation is organised differently.

---

[1] *Code of Canon Law c.1437 [1]. See also Eamonn G Hall, Reflections of a Common Law Lawyer on the Canon Law, An Irish Quarterly Review, Spring 2013, 81-94, 91-2.*
[2] *N Doe, The Legal Framework of the Church of England (Oxford 1996) , p.9.*
[3] *Marshall v Graham [1907] 2KB 112 at 126, per Phillimore J.*
[4] *Public Worship Regulation Act s.7*
[5] *//legalservicesboard.org.uk/about-us/who-we-are#question-7, accessed 25.9.2023. See also Sir David Clementi's 2004 Report of the Review of the Regulatory Framework for Legal Services in England and Wales, paragraph 60: 'International bodies should welcome a model where the oversight function would come from an Independent Regulator with clear objectives, rather than as at present a model where much of the oversight rests with Government Departments.'*
[6] *Legal Services Act 2007, Sched.4, Part 1(1)*

ORIGINAL LANGUAGE

# Lionel Galliez

## President of the International Union of Notaries (UINL)

This is a great honour to celebrate with you the 650th anniversary of the company, and an equally great pleasure to congratulate you on behalf of the Union. Last week, King Charles III came to Paris where he delivered a speech to the Senate in impeccable French.

This obliges me to humbly imitate the royal example of courtesy.

As President of the Union, all my efforts are geared towards what can strengthen our unity.

And that starts by always looking for what we have in common.

An anniversary like this is an opportunity to look back in history, and if we go 650 years in the past, your company was therefore founded in 1373 under the reign of Edward III.

It is well worth studying the life of this king who ruled for such a long time.

It contains many surprising facts that will serve my purpose.

If we look for the links that unite us, we discover that there is sometimes more than a spiritual filiation between ancient companies of notaries:

In our case, Edward III is in fact the direct descendant of the King of France Louis IX, also known as Saint Louis, who founded the company of notaries of Paris 103 years earlier.

But there is more.

Before becoming a notary in Paris, I practised for fourteen years in Périgord (in the south-west of France, not far from Bordeaux).

When your company was founded, Edward III was also Duke of Aquitaine.

The notaries who preceded me at that time in the notarial office of the little town of Mussidan therefore paid homage to the same lord as the first Scriveners Notaries of London.

I've been told by the way that Edward III was very fond of our beautiful region, where he liked to go on long horse rides.

French was his native language, but the Kingdom of England owes him the decree in 1361 that English should become the official language.

I could go on and on about him and his sons:

- the Black Prince, Edward of Woodstock, whose castle is a few steps away from the law school where I studied in Bordeaux.

- John of Gaunt, Duke of Lancaster, who visited my home town of Brive-la-Gaillarde in Limousin in the very same year 1373.

But that's not the real reason for this deep dive into history.

The true lesson to be learned from your company's longevity is that the notarial profession is a solid and enduring institution, because it is useful to society.

Economists have identified a principle, known as Lindy's Law, according to which the older an institution is, the more likely it is to last.

This brings reassuring and encouraging prospects for more recently established notariats.

As you will have understood, the important point is to be useful to society.

And to return to the work of our conference today, I am firmly convinced that it is a useful effort.

All the ideas that will be presented deal with a fundamental issue: the probative value of our deeds.

And the sharing of experience between common law and continental law countries will enrich our mutual knowledge.

Some will recall that there used to be a common law civil law task force.

This military-style terminology did not strike me as appropriate to the spirit in which we work.

We have chosen to name these encounters "dialogues between legal systems".

Dialogue is the well-known source of philosophical reflection, as the Socratic example teaches us.

Dialogue is also the source of legal knowledge, which most often arises from debate in the courts, in the academic and even in parliament.

I am delighted that the Company of Scriveners Notaries in London has agreed to organise this event, as I believe it has a special role to play in our Union.

A role as interpreter and bridge between two legal worlds to improve our mutual comprehension.

You play this role with warmth and friendship, as we can all see from the way you receive us.

Yesterday, when you invited me to dinner near Shakespeare's Globe Theatre, I thought that I should seek the advice of the great William.

His work is always an endless source of wisdom and wit.

Let's ask him to shed some light on the contract, which is, after all, what we're discussing here.

And we hear Juliet say to Romeo:

“I have no joy of this contract tonight,
It is to rash, too unadvised, too sudden.”

How to say it better, since our duty as notaries is precisely to prevent rash, unadvised, and too sudden contracts.

You need the care of preliminary verification, and therefore a little more patience to ensure greater legal certainty.

Patience is a virtue under threat in today's world where everything moves so fast.

Anything that delays or slows things down is now seen as an attack on liberty. In this quest for balance, let's keep in mind the words in Measure for Measure: "Liberty plucks justice by the nose."

It's up to us to adapt our pace to that of the world, without giving up our values. If we want to stay the course under the pressure of our times, we need to keep a clear focus on what's essential.

That's what a conference like ours today is all about.

This is also the idea behind the project to codify notarial standards that I wanted to put on the programme for this legislature.

I am convinced that we will act more confidently and will provide a better service if we have clearly formulated the criteria that define our profession.

The loss of landmarks and the obliteration of criteria are a threat to every institution, and the road to its demise.

The loss of reference points and the abandonment of values can lead to the worst, as the witches in Macbeth so horribly put it:

“Fair is foul and foul is fair”.

But let's end on a positive note.

An anniversary like this is a solemn moment to wish you and your company long life and prosperity.

And let's conclude with my last Shakespearean quote:
“No day without a deed to crown it”

*(Henry VIII contains a prophecy by Archbishop Cranmer about the baby princess Elizabeth I)*

ORIGINAL LANGUAGE

MODERATOR

# Nigel Ready (ENGLAND)

## Scrivener notary, UINL General Councillor and member of the CCNI

Good morning everybody.

Many of you will have been surprised to learn from the address of the Master of the Faculties about the importance of the School of Bologna in medieval Italy in laying the foundations of the notarial profession in England.

This common heritage is often ignored when we consider the differences that separate common-law notaries from their civil-law sisters and brothers.

The Master mentioned the Italian notary John/Giovanni of Bologna who came to England to impart the teachings of the great maestro Rolandino Passaggeri to the notaries of this country.

It did not take long for John of Bologna to observe – and I quote:

"Italians are prudent men and wish to have a public instrument for nearly every contract they enter into, but the English are the exact opposite, and an instrument is rarely required."

It is perhaps the primacy of the written record in the civil law confronted with the less formalistic traditions of the common-law which has led to the evidentiary status of notarial acts in jurisdictions such as England and Wales differing so widely from the status accorded to the acts of notaries in the civil-law.

The probative or evidentiary value of the notarial act is the focus of our meeting today. We have a distinguished panel of speakers from civil, common law and mixed jurisdictions.

First, however, it is my pleasure to introduce as our first speaker Lord Justice Lindblom, Senior President of Tribunals in England and Wales. The Right Honourable Sir Keith Lindblom was called to the Bar in 1980, appointed Queen's Counsel in 1996 and joined the judiciary in 2009. He was appointed a judge of the High Court in 2010, a judge of the Court of Appeal in 2015 and Senior President of Tribunals in 2020.

We have a saying in England that if you need a job done ask a busy person. Few can be busier than Lord Justice Lindblom.

Sir Keith, we are honoured that you have set aside valuable time to speak to us today.

ORIGINAL LANGUAGE

# Rt Hon Lord Justice Keith Lindblom (ENGLAND)

## Senior President of Tribunals, England and Wales

I am delighted to have this opportunity to make some brief remarks on the subject of your meeting today, "The added value of the notarial act", and its principal theme, "a notary by the law of nations has credit everywhere". I hope they will be of interest to you as notaries and scriveners. Those of you who were present at the meeting of the Society of Notaries at St Margaret's, Westminster in March this year need not fear a reprise of the lecture I gave on that occasion on the rule of law. But I do intend to tie these observations to that theme as well, because I think they are relevant to it and significant for it. I am also conscious that this gathering is part of a wider and longer initiative of UINL, described as a "Dialogue between Legal Systems".

On this occasion, as on the last, I am extremely grateful to my – now former – judicial assistant, Armin Amirsolimani, for the help he has given me in preparing what I am going to say. Once again, however, I must make it clear that these are merely my own thoughts and not those of any of my judicial colleagues.

Those of you who visited the British Museum's recent exhibition "Luxury and Power: Persia to Greece" will have noticed among the exhibits on display a cylindrical stamp some 2,500 years old. On it is embossed the emblem of Darius the Great, the most powerful and influential ruler of ancient Persia. The seal was the product of a simple technology possessed of extraordinary potency, for its presence on a document verified that this was a true order of the emperor and therefore had the force of law, binding all within the far reaches of the empire, and imposing coercive punishments on those who had the temerity to disobey. It was, in this basic sense, an early and important form of evidence. It was a physical fact, to which one could point and say, with total confidence, that this was indeed a true order of the emperor. One could do that because the wax seal was present, visible, and tangible. That such a technology was seen to be necessary,

and regarded as so precious that it should have been retained and preserved for two millennia, reveals a simple and obvious truth – that incontrovertible evidence for the authenticity of legal documents has long been, and remains, a matter of great importance in human society.

It may not be fanciful to say that whichever official in ancient Persia had the task of verifying such a document as an incontestable imperial order, and affixing the seal to attest to that verification, was among history's first notaries. What can be said, at least, is that in the modern world the practice of attesting to the veracity of legal documents is essential to the notary's function. Notaries play an indispensable and unique legal role in transactions, both commercial and personal, in verifying that legal documents are what they purport to be, and their content correct. In so doing, they perform a vital public service in reducing the risk of fraud in dealings between parties, hastening administrative and judicial processes, and helping to reduce cost, effort and delay in national and global commerce.

Notaries achieve all this in several ways: for example, by drawing, attesting, and certifying wills and other testamentary documents; by preparing documents to grant, and witnessing, powers of attorney for use overseas, and for the purposes of immigration and visas; by witnessing international financing agreements and related security instruments, for ships and aircraft; by verifying medical and police reports to be used in the investigation of accidents abroad, and so forth[1]. Inherent in the work of the notary are the application of expert legal training and experience and their well-earned renown for integrity, so that public officials and courts can make their own decisions in the knowledge that the facts on which those decisions are to be based are right. I also have in mind here the notary's "higher duty" to the transaction itself, akin to a barrister's duty to the court.

But this audience is, of course, far more familiar than I am with the work and reputation of the notary. Let me turn then to our two central questions: what does the notary contribute in the modern legal world to the English law of evidence? And how does that endeavour contribute to sustaining and strengthening the rule of law?

A complete answer to these two questions requires a preliminary understanding of the role that evidence plays in legal disputes.

A leading authority defines evidence as "the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute"[2].

Oral evidence is the testimony of witnesses in court, upon which they can be examined and cross-examined. Documentary evidence includes written records of events and transactions. In many proceedings before our courts and tribunals, the oral testimony and examination of witnesses plays a crucial part in the resolution of disputes of fact.

One can see the force, therefore, of the observation made by the editor of "Brooke's Notary" that "[notarial] evidence is... documentary and thus ill-adapted as a means of proof in a system of law that acknowledges the paramountcy of the principle of orality in the presentation of evidence to its courts" [3].

But oral evidence sometimes has its flaws. In *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd.*[4], Mr Justice Leggatt, as he then was, explained the reasons why, in his view, the English courts had not "sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony". He said this:

> "16. ... Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event ... External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else ...".

As this analysis suggests, human memory, the recounting of which largely represents the content of the oral evidence given in many cases, can be, and often is, unreliable. A witness can be sincerely convinced of the record of events which he carries in his mind, even if that record is largely or purely fictitious. And the judge, discerning that misplaced honesty in a witness's testimony, will take

care not to be misled by it, but equally not to regard the witness's evidence as unreliable in its entirety merely because his recollection of salient events is shown to be at fault.

Contemporaneous or later written records of events or circumstances can thus assume, and rightly, a pre-eminence in the whole picture of evidence on the issues in dispute. And it may often be regarded by the judge as having greater probative value than recollections from memory[5], however sincerely held they might be. Oral evidence may sometimes not be available at all, or it may be partial or fragmentary. The relevant documents will then naturally assume a greater significance in the evaluation of the evidence as a whole.

Examples may be found in cases about disputed wills, where conflicting views arise over the deceased's true intentions concerning his estate. Plainly, the deceased himself is no longer there to help resolve the matter by giving oral evidence of his own, and the court must therefore look to such documents as may themselves speak the truth.

In our jurisdiction, the absence of a formally made and witnessed will has the result of the estate being left in intestacy[6].

But that is not so in every other jurisdiction. A recent example in the United States of America is the case of the soul singer, Aretha Franklin's will, which was contested by her children in the Michigan courts[7]. There were two documents that were, it was said, Ms Franklin's will or wills. And they contained conflicting provisions. The document that the court concluded was superior and binding was inscribed on Ms Franklin's writing paper, handwritten by her, and had been found in the cushions on a sofa. No doubt the jury reached the conclusion that this was a genuine and authoritative will in the light of all the evidence before it, which seems to have included testimony that Ms Franklin often conducted important business on that sofa.

I make no comment on the outcome of those proceedings. But it does seem plain that to create, and store, a document of such legal significance with such informality is liable to generate a risk of its author's intentions being overlooked or misunderstood. Even if a court is able, in the end, to ascertain the author's true intention, much expense, time, and potentially much litigation also, may occur before this can be reliably established, especially where the claimed bequest is substantial and there are disagreements over its division.

A case bearing some resemblance to Ms Franklin's from our own courts, *Rainey v Weller*[8], shows how complex and costly such litigation can be. The judge d escribed the three-day trial as concerning "another sad and bitter family dispute concerning wills"[9]. Again, the case involved two so-called "wills". Here, however, it was claimed that the later document was a forgery, fabricated by a disappointed son. Thirteen witnesses of fact were called to help the court decide whether the impugned will's content cohered or clashed with the family dynamics at the time of its drafting. Four expert witnesses were also called to support the allegation of forgery. One was required to assess the hypothetical weight of an envelope, which the son claimed had contained bank cards with the deceased's signature, and comparing that with the weight stated on the envelope's postage.

Another was asked to extract the metadata from a digital photograph that the claimant had taken of the impugned will to determine when it had been taken. Two further experts assessed the handwriting on the wills and came to differing conclusions on whether the signature on the document was truly that of the deceased mother.

That the absence of reliable documentary evidence might give rise to such controversy and complication was seemingly a point well understood 1,500 years ago, during the reign of King Cnut - as this example from C.R. Cheney's book on medieval notaries demonstrates[10]. In the case in question a woman's intention was that her estate would go to her kinswoman. But her son claimed his mother's land as his inheritance. Perhaps rashly, he chose to assert this claim while his mother was still alive. The furious mother set about making her intention clear to anyone who might doubt it after her death. She declared her will in the presence of three thegns, who announced it to the shirecourt of Hereford, and the husband of the kinswoman whom she intended to benefit from her bequest then rode to St Ethelbert's minster and entered the will into a gospel book. Thus she buttressed her bequest with three forms of evidence of its validity. She announced it to notable witnesses; she had it recognised publicly; and she documented it in a public ledger. While her will might have been hard to dispute, a great deal of time and effort was devoted to bolstering it with several layers of evidential support, the need for which would have been avoided by a system for the production of reliable, authenticated, publicly recognised documentary evidence.

In some transactions and disputes, authenticated documentary evidence of the kind a notary can provide may be crucial for ensuring both that the truth is protected and revealed, and that it is enabled to emerge with the least controversy and cost.

Such benefits seem most obviously attainable in civil law jurisdictions, where notarial acts are "regarded as probative – that is to say, a notarial act may be tendered in evidence before any court without further proof being required of its provenance or of the veracity of the statements of fact made in it by the notary"[11].

For much of their history, however, notaries in England and Wales have not been relied upon with such faith by our courts. The authorities on this are antique, and they do not speak with one voice. But it is clear, as the editor of Brooke's Notary concludes, that there was for a long time no settled principle giving special probative value to notarial acts. In many cases, the courts held that the authors of those acts must testify orally to the facts which the notarial act recorded[12].

This has changed with the introduction, in 1998, of rule 32.20 in the Civil Procedure Rules, which states that "[a] notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved". As the explanatory note attached to the amending legislation acknowledges, this rule "gives probative force to notarial acts"[13], and has made it possible for our courts to gain the efficiencies that notarial evidence can offer in litigation. The pragmatism of the rule is underscored by the note in the White Book, which points out that "English civil procedure has to interact with procedures used by foreign legal systems, where the common law does not prevail and where attitudes towards proof of the authenticity of documents differ" and "[the] rebuttable presumption relating to notarial acts and instruments generally, introduced by this rule[,] facilitates proof in various procedural contexts, particularly those with a foreign dimension".

It is sometimes suggested that rules concerning the evidential value of notarial acts are now not greatly different between jurisdictions. Some scholars have argued that even in civil jurisdictions such as France contemporary rules allowing the contestation of notarial acts have become so liberal that the probative value of those acts as evidence is no more than presumptive. The court will accept the notarial act as evidence unless there seems a good reason to doubt it, and that is, in essence, no different from the English approach under CPR 32.20[14].

I do not think it would be right for me to weigh the merits of the differing approaches in civil and common law jurisdictions to the use of notarial acts as evidence. And anyway, this audience is better placed to do that. But what I can say is that the more formal recognition that this jurisdiction has given to the role and reliability of the notary public, through changes to the CPR, and the functions of notaries themselves in authenticating legal documents and preventing

disputes over the facts which the notarial act records, are of great benefit to the rule of law.

As I said when addressing the Society of Notaries earlier this year, the rule of law is not merely a complex and elusive ideal but is concerned with the law being and remaining, in the real world, effective and efficient, and respected in the society whose activities it regulates. It has been described as the "preeminent legitimating political ideal in the world today"[15].

At its heart are two familiar constitutional principles, which are hallmarks of a democratic society[16]: first, that no one is above the law, and second, that no one may be punished except in accordance with the law[17].

The notary's seal promotes these values by assisting judges in separating fact from fiction and giving true effect to disputed legal rights. Without the assurance of the notary's seal, the parties to litigation and also judges themselves are more likely to be mistaken or misled. Estates built up by generations may fall into a pretender's hands. Those with legal rights of various kinds may find those rights overridden or lost.

Just and fair adjudication before a court or tribunal is fundamental to the law's legitimacy. Where legal rights are the subject of disputed facts in proceedings before a court or tribunal, as often they are, the integrity of our legal system depends on reliable evidence of the kind that notaries can be trusted to provide. In many cases the notarial act enhances the resolution of legal disputes fairly, efficiently and predictably, and in many others it enables individuals and businesses to avoid such disputes arising at all.

The importance of a reliable method of determining factual truth in legal disputes is well illustrated by the Old Testament story of the judgment of King Solomon. The King was presented with a difficult case to decide – a case of disputed maternity[18]. The litigants were two women, both of whom claimed to be the mother of a baby boy who had been brought before the King.

One was the child's mother; the other had given birth to a child at the same time, who had died shortly before. But which was which? The King's ruling was swift. Calling for a sword, he said: "Divide the living boy in two; then give half to one, and half to the other". One of the women implored him to change his mind; the other, to affirm his decision. His judgment was simple and plain: "Give the first

woman the living boy; do not kill him. She is his mother". In this way King Solomon upheld the rule of law. He determined, on oral testimony alone, without the kind of advantage that a relevant notarial act might provide, which of the litigants enjoyed the status of the baby's parent. He gave effect to the legal rights of the true mother. And he did so as best he could on the evidence he had.

The story illustrates something else too. It shows that the pursuit of truth is at the very foundation of the rule of law. The law's fairness, legitimacy and integrity all come to rest, ultimately, on its procedures tending towards the truth. Whether the facts are identified by ingenious means or mundane, a legal system that better realises the truth in disputes is one that will better do justice and better command popular respect. That is what the rule of law is about.

In sustaining the rule of law, our society relies upon its judiciary independent and impartial, in courts and tribunals alike - upon its legal professions, and not least upon you, its notaries and scriveners. Notarial acts are not only of intrinsic value for what they are and what they represent. They also add value to the rule of law itself.

---

[1] *See Brooke's Notary, 15th Edition, 2-01*
[2] *Phipson on Evidence, 20th Edition, 1-10*
[3] *Brooke's Notary, 15th edition, 6-02*
[4] *[2013] EWHC 3560 (Comm)*
[5] *Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB), at [96]*
[6] *Section 9 of the Wills Act 1837*
[7] *BBC, "Jury rules document found in Aretha Franklin's couch is valid will", 11 July 2023, https://www.bbc.co.uk/news/world-us-canada-66170679*
[8] *[2021] EWHC 2206 (Ch)*
[9] *Ibid., [1]*
[10] *C.R. Cheney, "Notaries Public in England in the Thirteenth and Fourteenth Centuries", Oxford Clarendon Press, 1972, p.6*
[11] *Brooke's Notary, 15th edition, 6-01*
[12] *Brooke's Notary, 6-05*
[13] *Explanatory note, Civil Procedure (Amendment No.3) Rules 2005*
[14] *Angelo Chianale, "Notarial acts as written evidence: Towards a convergence between civil law and common law systems", Journal of Civil Law Studies, Vol. 10, 2017*
[15] *Brian Tamanaha, "On the Rule of Law" (CUP, 2004)*
[16] *Lord Bingham, "The Rule of Law" (Penguin, 2011), Sir Jack Beatson, "The Rule of Law and the Separation of Powers" (Hart, 2021), and Lord Hodge, "Judicial Independence" (7 November 2016)*
[17] *Dicey, "The Law of the Constitution", edited by J.W.F. Allison (OUP, 2013)*
[18] *Kings 3: 16-28*

ORIGINAL LANGUAGE

# The evidentiary force of the notarial act: A private international law perspective*

## Cyril Nourissat (FRANCE)

Full Professor of Law. Head of the Equipe de droit international, européen et comparé (EDIEC - EA 4185)
Université Jean Moulin. Lyon III

It is a great pleasure and honour to appear before this very distinguished assembly to talk about the subject that has been entrusted to me.

As said before by President of the UINL Lionel Galliez, His Majesty the King spoke last week in French in Paris. It is my turn to speak in English in London. But there are two major differences. I'm not a King but a Law Professor and, as you will hear, my English does not equal his French. I apologize in advance.

The theme of our conference is dialogue between legal systems. And we are speaking about the evidentiary force of the notarial act in an international perspective.

Firstly, a definition. Secondly, a clarification.

The definition is about notarial act, specially about authentic instrument of the notaries. I'm going to use the definition given by EU Law, specially by EU regulations after the ECJ case named Unibank of 1999[1] which can be considered as the only international, or at least regional, common definition of the authentic instrument.

As said for instance in the *EU regulation* on successions in its article 3[2]:
*"authentic instrument means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:*

* *The oral style has been maintained.*

*(i) relates to the signature and the content of the authentic instrument; and*
*(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin."*

That's the definition.

The clarification is about the scope of my contribution.

I am going to examine the way in which the evidentiary force of notarial acts (especially authentic instruments) moves between civil law countries and common law countries. Before, I must mention that, as said for instance in article 1371 of the French Civil Code, the "*acte authentique fait foi jusqu'à inscription de faux de ce que l'officier public dit avoir personnellement accompli ou constaté*" ("An authentic instrument constitutes proof of the act it contains unless an allegation of forgery against the relevant public officer as regards things which he has personally accomplished or has given formal recognition is made").

That means, in the matter of evidentiary force, that the authentic instrument has de highest position in the hierarchy of writings. The evidentiary force of the authentic instrument can only be challenged in the context of a criminal proceeding *(in french : " inscripition de faux ").*

But then a difficulty arises: it is usual to say that the common law system does not recognise or accept the authentic instrument wich is a specificity of Civil Law. Then how to be sure having a dialogue between legal systems?

There are two possible approaches.

The first way is to adopt international instruments of recognition or acceptance of authentic instruments. Actually, it does not exist. For instance, the entry into force on the 1st of September 2023 of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention)[3] is a non-event, not only because UK or USA are not state parties of the convention (US as only signed the convention, not UK) but because the 2019 convention does not apply to authentic instruments.

This may have been the case with the EU regulations and there may have been recognition or acceptance of authentic instruments, for example, between con-

tinental Member States and the UK, but in limited areas and particularly not in matters of succession or matrimonial property regimes. *Brexit* has put an end to this experimentation. It's a pity.

The second way is to go to court. This is the current solution. It's not necessarily the most satisfactory solution, but it is the right one, in fact the only one.

I would like to show, using concrete examples, that this solution can work. But it presupposes the application of a principle that is well known in private international law: the principle of "adaptation" which is a form of pragmatism. This principle is expressly mentioned in the draft code of French private international law presented to the French Minister of Justice in March 2022[4]. It's necessary to understand what it means.

Rather than a theoretical approach, I prefer a practical one.

I will take very simple examples (but may be only in appearance): the will, the "contrat de mariage" (matrimonial property regime) and the power of attorney. These are all authentic instruments that civil law notaries use on a daily basis and that are part of the life of their clients acting in an international context.

And I want to try to show that the judge (whether civil law judge or common law judge) must adapt his or her practice (and maybe his or her law system if possible) to accept these authentic instruments from elsewhere, in other words to recognize or accept their special evidentiary force.

This sometimes works. Sometimes it doesn't.

First example, the "contrat de mariage", sometimes translated as pre-nuptial or ante-nuptial agreement. Must be mentioned the *Granatino v. Radmacher* Case of the Supreme Court in Oct. 20th 2010[5]. The case concerns a french husband and a german wife married in London. They entered into an ante-nuptial agreement before a notary in Germany. The agreement was subject to German law and provided that neither party was to acquire any benefit from the property of the other during the marriage or on its termination, what will be in fact the question. The husband declined the opportunity to take independent advice on the agreement.

What is essential in this case is that it established a framework for the enforcement of prenuptial agreements, emphasizing the importance of parties' autonomy and ensuring that the agreements were fair and freely entered into.

What is more essential is to understand what "*the agreements were fair and freely entered into*" means.

Since then, a practice has developed in many offices which is a sort of "adaptation". It deserves attention. It is important that the "contrat de mariage" or the "convention matrimoniale" is drawn up by a single notary and that the spouses are assisted by specialist legal advisers (lawyers). The deed should mention all the property (assets and liabilities) of each spouse. The spouses and their legal advisers should be given sufficient time to make their comments to the notary concerning the draft. And so on.

If these various conditions are realised in a way of "adaptation" when the authentic instrument is drawn up, we can hope that the common law judge will have full confidence in the notarial act, the authentic instrument and will give it full evidentiary force in the light of the will of the parties, without considering that it conflicts with his international public order (policy).

Unfortunately, I have to mention a recent French case which shows that the French judge himself does not always believe in the evidentiary force of an authentic instrument in an international context. The case concerns a "contrat de mariage" written by a French notary for French and Russian spouses[6]. They chose the French system of "séparation de biens". A few years later, a judgement of Divorce was pronounced by a judge of the Supreme Court of New York. By application of the equitable distribution principle, he divided the joint assets as follows: 75% for Mrs, 25% for Mr., that means refusing to take into account the authentic instrument drawn up by the French notary. By an incredible decision – to my mind –, the French judge decides that the notarial authenticity is not a "principe essentiel" ("essential principle") of the French civil system and in consequence a part of the french international public order. *Exequatur* is therefore granted in France to the American judgment.

How can we blame the common law judge for something that the civil law judge does not do? I only ask the question.

Second example, the authentic power of attorney. A French case concerns a power of attorney established by a public notary in Australia[7]. The facts are simple. When the authentic instrument was signed in France, Mrs X. who lives in Australia, the mortgage guarantor, was represented by her brother by virtue of the powers she had granted him under a power of attorney received by an Aus-

tralian public notary. A few years later, the authenticity of the power of attorney will be discussed in a proceeding in France. And the discussion concerned the Australian notary public's status as a public officer, the knowledge of the English language by the client, the reading of the deed. The solution given by the *Cour de cassation* is clear and should be read because some commentators have misinterpreted the ruling : " *cet acte ne revêtait pas les solennités requises en France pour un acte authentique, dès lors que la forme suivie n'était pas équivalente à celle du droit français quant à la protection de la caution hypothécaire* " (in english: "this deed did not have the solemnities required in France for an authentic instrument, since the form followed was not equivalent to that of French law as regards the protection of the mortgage guarantor"). This does not mean that a power of attorney received by a public notary can never be considered as an authentic instrument by a French judge or notary. However, in order to be considered as an authentic instrument, it must satisfy the conditions required by French law. And I mentioned before these conditions.

One additional comment. As you may be known, a French decree of 20 November 2020 introduced *la procuration notariée à distance* (in English: "remote notarised power of attorney"). It may be an answer to the difficulties of dialogue between civil and common laws and it applies the classical solution of the conflict of laws in this matter: *locus regit actum*, in particular the *lex auctoris*[8]. The key word is that the notary always remains at the heart of the digitalisation process, that he always has complete overall control (identification of the parties, verification of the expression of the parties' wishes, and so on), which is the condition for authentication.

Third and last example, the authentic will. I will speak about the difficulty of the position of the common law judge concerning the authentic copy of the will. The civil law notary cannot separate himself or herself from the authentic instrument, which must remain in his or her office. He or she can only issue an authentic copy which, it should be remembered, has the same qualities as the authentic instrument itself. The common law judge requires the original deed. A change is probably to be hoped for in order to facilitate the life of the citizens.

Then, what practical ang general lessons can be drawn from this brief overview?

To my mind, two lessons.

First, everyone knows the Italian expression "*traduttore traditore*". But "traduire

ce n'est pas toujours trahir" (a translation is not always a treason). This is the whole point of the notion of adaptation. The solution is in the hands of the judge. And he must have trust and confidence in the notarial services and legal security.

Alternatively, the initiative must be taken to draw up an international convention (for example, within the framework of the Hague Conference), the purpose of which will be to organize the recognition or acceptance and enforcement of authentic instruments all around the world.

Secondly, a mutual understanding is absolutely a necessity. That's why if it is true that a notary public in common law should not be confused with a civil law notary; civil notaries, notaries public and judge must work together to develop practical solutions (two of the different cases mentioned above have shown it's possible) that will benefit citizens, guaranteeing and efficient and effective protection to everyone.

The only limit to this joint exercise is therefore very clear: do not call into question the foundations of authentic instruments, of authenticity. Which may mean identifying them carefully as notarial standards.

But that's another question...

---

[1] *ECJ, 17 june 1999, Unibank, C-260/97.*
[2] *OJ L 201, 27.7.2012, p. 107.*
[3] *https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf*
[4] *See C. Nourissat, The draft code of French private international law, Yearbook of Private International Law, Volume 24 (2022/2023), pp. 217-231.*
[5] *Radmacher (formerly Granatino) (Respondent) v Granatino (Appelant) [2010] UKSC 42.*
[6] *Civ. 1ère, 2 déc. 2020, n° 18-20.691.*
[7] *Civ. 1ère, 14 avril 2016, 15-18.157.*
[8] *For an explanation and justification, see C. Nourissat, Acte authentique reçu par un notaire à distance des parties : aspects de droit international privé, Solution Notaire Hebdo, 30/2021, pp. 15-17.*

ORIGINAL LANGUAGE

# United in diversity: rethinking the dialogue between notarial systems in the digital age

## Naivi Chikoc Barreda (QUEBEC)

Notary from Quebec and Professor, University of Ottawa

### INTRODUCTORY REMARKS

Thank you for the invitation to contribute to the necessary dialogue between legal systems, which I will do from the perspective of a hybrid jurisdiction like Quebec and also from a comparative perspective.

The presentation will be divided into two parts: I will be presenting the Quebec particularities as a mixed jurisdiction as regards the notarial profession; and since we are gathered here to promote dialogue between legal systems, I will adopt a comparative viewpoint to critically analyze how the two systems fail to understand each other properly, in order to bring to light a common core on which to build mutual understanding and dialogue. The second part will be devoted to the discussion on what has emerged as a new source of fragmentation that challenges the cross-border circulation of notarial acts and therefore, undermines the idea behind the expression that *"a notary by the law of nations has credit everywhere"*. I will put the spotlight on the internal divisions within the systems in the digital age, as opposed to the classic opposition between civil and common law notaries.

### QUEBEC PANORAMA

As we all know, Canada is a bijural country where two legal traditions coexist: the civil law in the province of Quebec and the common law in the rest of the country. The notarial institution, which has existed in Quebec since 1621, has taken on distinctive characteristics within the civil law system, due to the particular context in which it has evolved, which is a continent dominated by the common law. As a result of being detached from its French roots and influenced by its North American environment, the Quebec system became a sort of mixed jurisdiction,

which means that it is fundamentally a civil law jurisdiction that has integrated several aspects of the common law tradition in its private law institutions and codification. With regard to the notarial profession, Quebec notaries have developed a particular character, showing both the break and the continuity of the civil law tradition in Canada.

## CIVIL NOTARY

According to the *Quebec Notaries Act,* a notary is a public officer. He/she is also a legal adviser and may take part in the administration of justice.

The common features shared by Quebec
and classic civil law notaries are the following:

- They hold the legal monopoly on authenticity: Quebec notaries are the only ones entitled to confer authenticity on the legal acts of private persons.
- They are public officials as well as legal professionals
- They have a series of duties attached to their status: giving impartial legal advice, asserting the capacity, the identity and the free will of the parties, keeping record of the documents they draft, etc.

Regarding the probative value of notarial instruments which is the theme of this conference, there is no departure from the civil law tradition. Authentic documents are given the highest evidentiary value in civil proceedings, only refutable by way of improbation, which is a special procedure in which the party contesting the authenticity of the act must demonstrate the forgery of the document. A notarial act benefits from a presumption of accuracy and validity. It proves against everybody the veracity of the facts and declarations contained therein.

## SINGULARITIES

The Quebec notariat presents some characteristics that might appear surprising to classic civil lawyers:

- Notarial documents in Quebec have traditionally been deprived of enforceability for the obligations contained therein, which is a great advantage enjoyed by civil law instruments. While this remains technically true, only a few days ago a bill was introduced in Parliament to make notarial acts directly enforceable in court, which would be a major breakthrough and a historic achievement for the notarial profession in Quebec.

Other singularities, and these ones are unlikely to change in the future, are the following:

- There is not an organic link between the State and the notaries. Quebec notaries are not appointed by the State but instead they are commissioned by their professional corporation: the Quebec Chamber of notaries. State authorities have no control over the notarial practice.
- The *numerus clausus* rule, which aims to ensure proportionality between notaries and the number of residents in the territory they serve, doesn't exist in Quebec.
- There is no regulation of the notaries' professional fees, which are subject to the law of the market. Any attempt to impose price controls on notarial services may be considered an offence under the *Federal Competition Act*.

## LIBERAL RECOGNITION OF PUBLIC ACTS

It should be noted that one of the particularities of Quebec as a mixed jurisdiction is its liberal approach to the cross-border circulation of notarial acts.

Foreign public documents are characterized as semi-authentic documents, but they are, in practical terms, treated as authentic ones. When it comes to recognizing the cross-border effects of a foreign notarial act, Quebec law makes no difference between civil and common law notaries, because the only condition is that it is issued by a competent public officer. The same applies to powers of attorney certified by notaries public from the common law.

One might think that this is a tailor-made solution designed to accommodate notarial acts from common law jurisdictions, in an attempt to ensure the recognition of notarial acts performed by notaries public from their Canadian sister provinces. In so doing, Quebec law departs from the prevailing orientation in civil law countries which makes recognition dependent on the equivalence between national and foreign public documents, as we can see in the case of Europe, where the concept of authenticity under European law only covers civil law notarial deeds. For a notarial instrument to be regarded as authentic in the EU, authenticity must cover both the signature and the content of the instrument, which is not exactly applicable to common law notarial acts.

## NEED FOR DIALOGUE:
### comparative and international perspectives

Since the notary may be required to authenticate all types of civil and commercial transactions intended to produce their effects across borders, the analysis of the evidentiary value of notarial acts would be incomplete if they were not placed in a global context. The expression *"a notary by the law of nations has credit everywhere"* is essentially international in scope. It evokes a principle aimed at ensuring the circulation of notarial instruments across borders, without distinguishing between civil law, common law and hybrid legal systems.

The question arises whether this statement is merely the expression of an aspiration or an effective legal rule. To address this issue, one must necessarily abandon the limited domestic standpoint and adopt a comparative and international perspective on the subject.

The objective of ensuring the international circulation of notarial acts is first of all challenged by misunderstandings resulting from the absence of dialogue between the two legal systems. Dialogue is therefore essential to avoid false assumptions that prevent notarial acts from producing effects in other States.

## PRECONCEPTIONS AND MISUNDERSTANDINGS
### The common law notary misunderstood

In the civil system, there is certainly a typical image of what it means to be a notary, which sometimes denotes a misleading perception of the common law notary.

It is frequently found in literature and case law a uniform characterization of the common law notary. Perhaps because there is an essential unity in the definition of the Latin notary, it is assumed that its counterpart in the common law world is a homogeneous institution, with the same characteristics and the same functions within the States belonging to that tradition. As a matter of fact, this conception of the common law notary is largely based on the model of the American notary public. As a result, notaries from London, Australia, British Columbia and Singapore, requiring the candidate for notary to be a legal professional, are erroneously placed in the same basket.

Another false assumption is that the notary public could never replace the civil notary, due to the lack of fundamental requirements related to their functions.

Indeed, it is largely ignored that notaries public in many common law jurisdictions are public officials appointed by the State to authenticate acts within a given territory, a characteristic shared by civil law notaries. It is also unknown that they have a duty to act as impartial witnesses to the transaction. The same can be said of other duties such as that of asserting the identity, the capacity and the free will of the person, which may also be present in some common law jurisdictions.

As we can see, the absence of dialogue leads to misconceptions and stereotypes. I do not intend to minimize the differences between notarial systems. This is just about raising awareness of the importance of dialogue beyond diversity, since this results in obstacles to the cross-border circulation of authentic instruments on the international level.

One might ask whether there is a common core shared by both notarial systems that can enhance mutual understanding and dialogue. I believe that the answer is to be found in the process of authentication. The legal power to authenticate facts and legal relations conferred on notaries by the State or by operation of law is the basic principle and the cornerstone of both systems on which a successful dialogue between legal systems can be developed.

## EMERGENCE OF A NEW SOURCE OF DIVISION: REMOTE AUTHENTICATION

If we move the focus from the horizontal comparison between systems to the authentication as the minimum common ground for both systems, we can observe the emergence of a new source of division: the remote authentication shift in the notarial profession.

The understanding of authentication is precisely what has become the new divide in the digital age from which the notary can no longer escape. This emerging division is not between the civil law and the common law conceptions of the notary, but between countries that recognize remote authentication as compatible with the notarial function and countries that do not.

As we all know, remote notarization is a growing trend that is not exclusive to certain countries or legal systems. Both, the common law and the civil law are today confronted with the same problem, and both react to it in a fragmented and inconsistent way.

## COMMON LAW NOTARIES DIVIDED

At common law, remote notarization is allowed in some countries (the USA, the UK, New Zealand, some Canadian provinces like Alberta, Saskatchewan and Ontario, and Singapore) and rejected in others as contravening the principles of authentication.

Just to mention one example, the Society of Notaries of New South Wales (Australia) issued a formal statement with the title *"Remote notarisation – don't do it"* warning against the practice of remote acts during the pandemic. It was the opinion of the Society that it is unacceptable to notarise the signature of a client using electronic video conference facilities (of any kind) because it is inconsistent with the duties legally imposed on notaries, which require the physical presence of the parties and the notary in the same location. An interesting position has been adopted by Louisiana, which, like Quebec, is a mixed jurisdiction. Although remote online notarization is allowed in general, it is not permitted when performing authentic acts (as defined by article 1834 of the Civil Code), which are the most solemn form of documents in Louisiana. This scenario shows a picture of the inferiority of remote acts in the hierarchy of written evidence in that State.

## CIVIL LAW COUNTRIES DIVIDED

On the civil law side, there is also several shades of gray regarding remote authentication.

There are first of all 1- countries that adopt remote authentication in a liberal form, such as Brazil, Portugal, Austria, Estonia, Lithuania, Latvia, Slovenia, the Czech Republic, and the vast majority of countries that have not yet made the move; 2- countries that adopt remote authentication only in a restrictive way or under certain conditions (e.g. Spain, France, Belgium).

In a nutshell, disparities between countries with regard to remote notarisation encompass two fundamental aspects:
1- the acceptance or denial of this particular way of performing notarial services; and 2- the conditions under which remote technological means can be used to meet the high standards of proof attached to notarial acts. These aspects do not depend on the legal systems to which the notary belongs, but on the particular view of a particular State on that matter.

## THE GERMAN CASE:

We can illustrate this assertion with the position of Germany on the recognition of foreign acts drawn up remotely.

### Refusal to recognize a remote notarial act from Austria.

The German Notarial Institute (DNotI) has issued a legal opinion denying the authenticity of a notarial act performed by an Austrian notary, on the grounds that the remote notarial procedure in Austria does not meet the high standards of security that apply in Germany, namely during the identification process and the videoconferencing software used.

### Refusal to recognize a remote notarial acknowledgement of signature from a London scrivener.

Before that case, the same adverse outcome was reached regarding the recognition of a power of attorney attested by a London scrivener via a video-link. The signer was an English resident who was co-owner of an immovable in Germany that was to be sold in that country. The reason for refusal set out in the report was not the fact that the certification came from a common law notary (notarizations of signatures before English notaries have already been admitted in Germany as equivalent to German notarial acknowledgements), but because they were authenticated remotely, in breach of the requirement of the physical presence before the notary. This is an argument that can be opposed to any remote act issued by civil law notaries.

## CONCLUSION

I hope that with these examples, I have demonstrated that internal diversity, that is, diversity within one legal system, breaches the paradigm of the division and allows convergence between the common law and the civil law traditions. Indeed, the two systems are closer than ever in the age of online notarization. That could be a starting point in our efforts to facilitate dialogue, and thereby, the international recognition of notarial acts despite diversity, to effectively protect the rights of citizens and companies in the global economy.

ORIGINAL LANGUAGE

# Melissa Goh (SINGAPORE)

Director, Singapore Academy of Law

Mr Chairman, Mr President, Master of the Faculties, Mr Nigel Ready, Distinguished Speakers, Esteemed Colleagues and Friends from around the world; a very good afternoon. I am privileged to be invited to address you this afternoon at the UINL Dialogue Between Legal Systems organised jointly by the International Union of Notaries (UINL) and the Society of Scrivener Notaries. It is indeed a great honour.

I start by acknowledging the wisdom of the organisers to establish a dialogue, in particular between civil and common-law traditions with the aim of fostering greater understanding between notaries practising within various legal systems. I will address the topic of today's session in three parts. First, I will speak briefly of the history of notarial practice in Singapore. Second, provide an overview of how local legislation and case law regard the evidentiary status of notarial acts. And third, I provide an update on the impact of the covid pandemic on notarial practice and the recent enactment of laws enabling remote notarisation.

## HISTORY

Singapore was established as an entrepôt trading post of the British Empire in 1819 and was a Crown colony until 1959 when Singapore gained self-governance. Prior to 1959, the notaries in Singapore, were English notaries public, appointed by the Master of the Court of Faculties of the Archbishop of Canterbury in London. Such English notaries public would be allowed to carry on their powers and functions in Singapore.

In 1959, with the attainment of self-government by Singapore, it was felt that the appointment of notaries public by the Master of Faculties was not in keeping with the new status of our State. So, after Singapore's independence, notaries were appointed by the Attorney-General of Singapore. And the Chief Justice was the appointing authority for commissioners for oaths.

## APPOINTING BODY

In 1995, the appointing authority for both commissioners for oaths and notaries public was changed to the Senate of the Singapore Academy of Law (SAL). The Board of Commissioners for Oaths and Notaries Public was appointed by the SAL Senate to look into.

---

(a) The appointment of commissioners for oaths and notaries public

---

(b) to inquire into complaints against persons alleged to have acted in breach of the conditions of their appointments as commissioners for oaths or notaries public and where appropriate to revoke or suspend their appointments;

---

(c) to make recommendations for the enactment of new legislation or the amendment of existing legislation in relation to all matters concerning commissioners for oaths and notaries public.

---

As the appointing authority, SAL also authenticates the signatures of notaries public on documents for use overseas.

Coming back to notarial practice today; notwithstanding the changes in appointing authority, Singapore notaries continue (until today) to have and exercise within Singapore all the powers and functions which are ordinarily exercised by notaries public in England. The Notaries Public Act (Cap 208) also expressly provides that in the absence of any contrary legislation or judgment, what is ordinary notarial practice in England shall be ordinary notarial practice in Singapore.

As with common law jurisdictions, local legislation has accorded a certain weight to notarial acts.

## EVIDENCE ACT

**Section 59(1) of the Evidence Act** states expressly that the court is to take judicial notice of (amongst other facts) the seals of notaries public, in which case it would not need to be proved.

However, it is worthy to note that s 59(2) and s 59(3) states that in all these cases, the court may resort for its aid to appropriate books or documents of reference and parties may produce such reference material before the court. This makes it

clear that there is considerable discretion vested in the court to decide whether or not to take judicial notice and to decide exactly what fact judicial notice should be taken of.

The **Evidence Act, section 80** has a category of self-proving documents which include original copies or certified copies of foreign public documents that have been notarised.

Section 80 (1) (g) of the Evidence Act requires a public document in a foreign country be proved:"by the original or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Singapore that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country."

**Section 87 of the Evidence Act** provides that a power of attorney executed before and authenticated by a Notary Public carries a rebuttable presumption that it was properly executed.

## RULES OF COURT

Likewise under our Rules of Court[1], the seal or signature of a commissioner for oaths in an affidavit affirmed in or outside Singapore must be accepted as valid unless the contrary is shown; and the "commissioner for oaths" includes any person authorised to administer oaths and affirmations in or outside Singapore, which extends this to a notary.

## CASE LAW

However, the courts have demonstrated that they are quite ready to go behind the notarial act to investigate the veracity of a transaction.

In a case before the Singapore High Court in 2017 *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8, parties alleged that the signatures contained in notarised documents which include a sale and purchase agreement, a transfer deed, the statutory declarations, etc signed in Indonesia before Indonesian notaries public were either forgeries or obtained by deceit.

In this case, the solicitors in Singapore never actually met their clients who

instructed them as they were based in Indonesia. Communications between them was mainly via email correspondence and phone messages. The documents were conveyed to their clients for their signatures and were allegedly signed before Indonesian notaries public. The solicitors also did not take any steps to verify the identities of the notaries who witnessed their clients' execution of documents. The solicitors tried to rely on provisions in the Rules of Court and the Evidence Act that a party producing and relying on a notarised document does not have to prove that the seal in fact belongs to the notary public in question.

The court was of the view that while Singapore can and does take judicial notice of the seal of a notary public and that in the absence of convincing contrary evidence, it is presumed that a document which on its face appears to have been regularly notarised, has in fact been properly notarised. The key question before the court, however, was whether a solicitor can always rely on the fact that the document in question appears to have been signed by the client before a notary public, whose name, seal and signature appears on the face of the document, as being sufficient to fulfil his obligation to take due care to his client; and what steps would a reasonably competent solicitor be expected to take to verify his instructions from his clients, on the particular facts and circumstances before him.

In this case, the High Court found that the solicitors were negligent in failing to take adequate and reasonable measures to identify their clients and to confirm their instructions in a reliable manner. The court noted that counsel also did not take any steps to verify the identity of the notary public who witnessed the execution of their clients' documents. In the specific circumstances of the case the court was of the view that, the solicitor could not rely on the notarised documents as sufficient to discharge his duty to establish the identity of his client and his instructions to act.

On appeal *Wibowo Boediono v Cristian Priwisata Yacob* [2018] SGCA 38, the Court of Appeal affirmed the proposition that notarised documents enjoy a presumption of validity but are not conclusive.

The court by way of *obiter dicta* said that a solicitor was entitled to presume, in the absence of evidence to the contrary, that a document which on its face appears to have been regularly notarised has, in fact, been properly notarised. However, this presumption of notarisation did not hold when either the face of the document or the circumstances of the notarisation would raise a red flag in the mind of a reasonable solicitor. Where such a red flag popped up, the solicitor

would have to take adequate steps to verify the identity and instructions of the client and the identity of the notary public. The solicitor would only be able to rely on the notarised document to discharge his duty of care if he had taken adequate steps. However, relying on the notarised document would not inevitably mean that the solicitor could discharge his duty of care.

The court considered at length the relevance of notarised documents to a solicitor's duty of care; and set out the following guiding principles:

(a) The presence of a notarised document does not always mean that a solicitor has discharged his duty of care. But nor is the solicitor always required to verify the source and contents of the notarised document.

(b) whether a solicitor needs to go behind the notarised document depends on the particular facts and circumstances; whether there are any red flags or suspicious indications in the notarised document or the transaction it relates to that put him on notice, thereby preventing him from relying on the notarised document alone in discharging his duty of care.

(c) Solicitors should consider the following factors:

> (i) Whether the notarised documents appear, on their face, to have been regularly notarised.
> (ii) The particular circumstances of the notarisation, including:
>
> 1. whether the notarisation was previously discussed and agreed upon between the solicitor and the client;
> 2. how the notarisation was actually implemented, eg, if the notarisation was done overseas, how the relevant documents were transported there and back, if the notary public was specifically chosen, by whom and for what reason; and
> 3. whether the client subsequently confirmed that he participated in the notarisation process.

The position taken in the *Cristian Priwisata Yacob* is generally consistent with how the local courts have dealt with notarial acts in the past. They turn on the facts of each case and while a notarised document does enjoy a presumption of validity but it's an easily rebuttable one.

I will refer to three other occasions when the Singapore court was called upon to rule on the status of notarial evidence:

(a) *Wong Kai Woon v Wong Kong Hom* [2000] SGHC 176, the claimant tendered his member registration form from China and a number of notarial certificates to prove his legitimacy.

(i) The court held that the effect of these documents clearly renders untenable any contention of mistaken identity, impersonation or lack of permanent union or relationship.

(b) *In Lim Weipin v Lim Boh Chuan* [2010] SGHC 99, in an estate claim, the plaintiffs tendered in evidence a notarial certificate issued by China Nan'an Notary Public Office, and a family ancestral book, amongst other things. The court held that there was no evidence of the authenticity of the notarial certificate and that the notarial certificate was not in the prescribed form required by Chinese law.

(c) *In Pang Tee Giam v Chui Ah Mui* [2009] SGDC 400, the plaintiff husband filed for divorce from his second wife, who defended the action on the basis that their marriage was not valid because the husband was still married to his first wife.

(i) The husband relied on a notarial certificate issued in 2008 in China in support of his claim that his first marriage was validly dissolved in 1951 in China. the District Judge held that "It is one thing to certify the authenticity of a document, that is, that is a true copy of the original and to certify the truth of the contents of the documents." And that "There was no evidence (before me) to prove that the Notary Public indeed investigated the truth of the contents of the Farm Certificate."

(ii) The district judge found that there was no divorce in 1951, that the Plaintiff was still validly married to his first wife when he purportedly "married" the Defendant and that consequently, he did not have the capacity to contract a valid marriage with the Defendant.

## THE PANDEMIC AND REMOTE NOTARISATION

I now go on to the final part on the impact of the Covid pandemic on notarial practice in Singapore.

When the covid pandemic began, we received many queries about the use of electronic notarisation.

Singapore's Attorney-General's Chambers took the view that the existing wording of the Oaths and Declarations Act requires the client to appear physically in-person for the taking of a statutory declaration, and for non oaths of office.

The Board of Commissioners for Oaths and Notaries Public took the position that remote notarisation in Singapore should be supported by enabling legislation to ensure that there is no legal impediment to remote execution under the law.

While Board of Commissioners for Oaths and Notaries Public worked with the Ministry of Law to design a legislative framework on a proposed process, the Board advised notaries to continue to notarise in person.

In coming up with the legislative framework on remote notarisation:

(a) The Board considered UK's position and that of other jurisdictions around the world.

(b) We noted the "Guidance on Remote Notarisation" issued by the UK Faculty Office, the first one in May 2020 and a second Guidance published in January this year.

(c) We referred to *Brooke's Notary* which was vital reference for all notaries in Singapore.

(d) We also consulted Mr Nigel Ready, author of *Brooke's Notary* and who very graciously provided guidance on how remote notarisation can be conducted in Singapore.

(e) Several closed consultation sessions were held to receive Notaries' feedback.

Finally, this year, the Oaths, Declarations and Notarisations (Remote Methods) Act 2023 (ODN Act) was passed by Parliament on 2 August 2023 to enable statutory declarations and certain oaths and affirmations to be taken, and certain powers or functions of a notary public to be exercised, remotely through live video link, live television link or other electronic means of communication.

The ODN Act introduced several key amendments to the Notaries Public Act.

A **new section 4A(1)** which allows the deponent to appear before the notary pub-

lic through a live video or television link. The live video or television link must allow the notary to:

- communicate with the relevant person, and any witness or interpreter present, throughout the process;
- confirm the identity of the relevant person, and any witness or interpreter present; and
- verify by inspection any document to be signed, or sworn and signed, by the relevant person.

Section 4A(2) and (3) enables the notary to perform a visual comparison of documents and/or verify documents by inspection through a live video or television link.

Section 4A also makes it clear that the notary public must be satisfied that he or she is able to discharge his or her duty to exercise due care, skill and diligence in remote notarisation as with in person notarisation.

Section 4A(7) and (8) states that the notary, all persons who appear before the notary as well as documents that the notary needs to verify by way of visual comparison or inspection must in Singapore before they can rely on the electronic framework that is set out under the Act. This is consistent with the position under existing law.

For parties who are not in Singapore, there is an existing framework providing various options for overseas Singaporeans who need to make a statutory declaration, or who need a document to be notarised. For instance, they may approach a notary public in that country, or seek assistance from a Singapore Overseas Mission.

We are aware overseas Singaporeans sometimes face difficulties obtaining notarial services and are studying possible ways to address such difficulties with the Ministry of Law and Ministry of Foreign Affairs.

A new section 4B provides that statutory declarations made or notarial acts carried out via live video link or live television link prior to the amendments coming into force are valid. Many SDs and notarial acts may have been remotely taken or carried out before the amendments particularly during the pandemic. And understandably so. In particular, movement restriction measures imposed during the COVID-19 had raised significant impediments to in-person witnessing.

Given the lack of clarity in the current law on whether these processes can be conducted remotely, the ODN 2023 makes clear that no statutory declaration or notarial act made or carried out prior to these amendments will be invalidated solely because video conferencing was used. This should address concerns around the validity of statutory declarations or notarial acts made in a process involving remote witnessing before this Act.

The validation clauses under the Oaths, Declarations and Notarisations (Remote Methods) Act apply only to those statutory declarations and notarial acts that were done using a live video or live television link. So, for example, a statutory declaration or notarial act that was done only by telephone will not be validated.

The validation clauses also do not affect a person's right to challenge the validity of a statutory declaration or notarial act on the basis that some other legal requirement, apart from the in-person witnessing requirement, was not met.

## CONCLUSION

In conclusion, the ODN Act is one step closer towards enabling a fully virtual end-to-end process for public document legalisation – this encompasses both notarised documents and documents issued by public agencies. We plan to do this in two phases – in the first phase, to cover only electronic documents issued by public agencies, and in the second phase to include notarised private documents.

Singapore is working towards digitalising the entire legalisation process to enhance the security and integrity of the system and Singapore Legalised documents bound overseas. Looking ahead, as a contracting party under the Hague Apostille Convention, Singapore is on-track to begin issuing e-Apostilles next year, in addition to paper Apostilles, as the number of public documents issued only in electronic form grows.

Thank you very much.

ORIGINAL LANGUAGE

# Larissa Oebel (GERMANY)

Candidate notary, Bundesnotarkammer

First of all, I would like to thank you very much for inviting me to the first UINL Dialogue between legal systems.
It is a true honour for me to be part of this roundtable on the evidentiary force of the notarial acts in common law, civil law and hybrid jurisdictions.

## Introduction

Being a German candidate notary as well as a legal advisor at Bundesnotarkammer, the German Federal Chamber of Notaries, I am going to present the German model today.

## General remarks

In this context, I would like to quickly say a few words about

- German civil proceedings in general and
- the applicable rules of evidence.

Civil Proceedings in Germany are governed by the German Code of Civil Procedure the "Zivilprozessordnung" or "ZPO".
In terms of evidence, they are conducted on the basis of the so-called "Beibringungsgrundsatz", which could be translated to principle of production of evidence.
According to this principle, each party has the burden of proof for allegations they make.
So, if I assert anything, I need to be able to proof this assertion as well.
It should also be noted that, in general, the court is free in its consideration and evaluation of evidence.

## Types of evidence

As regards specific types of evidence, the ZPO provides for strict rules (we call this "Strengbeweis"): This means that there is

- a numerus clauses of means of evidence as well as
- a strict procedure for the gathering of evidence.

Parties and courts are bound by these formalities which means that they cannot rely on evidence which is not provided for by the ZPO.
Specifically, there are five means of evidence in German civil proceedings:

1) Witness Testimony ("Zeugenbeweis")
2) Documentary Evidence ("Urkundenbeweis")
3) Expert Opinions ("Sachverständigenbeweis")
4) Inspections ("Augenschein")
5) Interrogation of a party ("Parteivernehmung")

## Documentary Evidence

One of the most common and most important means of evidence in German civil proceedings is documentary evidence (Urkundenbeweis). In this regard, we generally distinguish between

- public documents and
- private documents.

The ZPO provides for specific rules as regards

- their respective evidentiary value and
- whether or not they are presumed to be authentic.

## Public documents

Let me start with public documents. Public documents are documents that are issued by a public authority or public commissioner of oaths.
The ZPO provides for specific rules of evidence for public documents.
The two most important rules are as follows:

## Evidentiary value of public documents

- The first rule relates to the evidentiary force of public documents.

It establishes that public documents have formal probative force which we call "formelle Beweiskraft".
According to this rule, a public document provides full proof that the events and statements contained therein took place and/or were made as recorded.
While the opposing party can generally contest the contents of a public document, they will have to provide full proof that the events and statements were recorded incorrectly.
This may be quite difficult in practice.
The evidentiary value does, however, not relate to the truth of the recorded events.
It does not have substantial probative force, which we call "materielle Beweiskraft".
Let me give you an example:

If I have a public document stating

- that Person A, let's call her Sophie,
- received an amount of €50,00 from Person B, let's call her Claire,

this public document provides full proof that Sophie stated at a specific point in time that she received the money from Claire.

It does not, however, relate to the fact whether or not this is actually true, so whether or not Sophie in fact received the money from Claire.

## Authenticity of public documents

- The second rule establishes that the public document enjoys the assumption of authenticity.

This assumption relates to the origin of the document.
It is therefore presumed that the document with its current content originates from the claimed issuer.
If someone wants to challenge this assumption, they have to proof that the document is in fact not authentic.

## Private documents

Private documents, on the other hand, are documents that were not issued by a public authority or public commissioner of oaths.
They have a special probative value, only if

- they are signed or
- have a notarized hand sign, and
- the original is presented.

They establish proof that the declarations contained in the documents were made by the parties.
They do not, however, establish proof regarding

- any events recorded in the document,
- the time and place of the statements, and
- whether the declaring party intended for the circulation of the document.

As it is the case with public documents, private documents only have formal probative value.
Contrary to public documents, there is no simple presumption of authenticity.
Instead, the authenticity of the signature needs to be proven in court proceedings.
Once this is established, the authenticity of the accompanying text is presumed.

## Comparison

So, we see that the evidentiary force of public documents goes beyond the evidentiary force of private documents.

## Notarial acts

Coming now to notarial acts as a means of evidence.
Under German law, notarial acts are considered public documents.
They fulfil the requirements of being issued by an official commissioner of oaths because they are issued by German notaries which are public officials.
In Germany, notaries are

- appointed by an official act of government and
- exercise administrative tasks by virtue of power delegated by the state.

They are also entrusted with extensive authentication competences.

## Example: real estate purchase agreement

If we take a real estate purchase agreement as an example, the notarial act provides full proof

- of the identities of the parties to the contractual agreement
- of the date and the place of the signing
- as well as of the events and statements recorded in the notarial act, e.g.
    - the fact that the parties agreed to the commitments and undertakings contained in the agreements, and
    - the respective statements they made in this regard.

In court proceedings, the authenticity of the purchase agreement as a notarial act and public document would be assumed.
If one party wanted to challenge the evidentiary force of such notarial act, they would have to provide full proof that the events/statements were recorded incorrectly.
If they wanted to challenge the authenticity of the notarial act, they would have to provide proof that the notarial act does not originate from the notary indicated in the act.

## Notarial diligence

Of course, the high evidentiary force and assumption of authenticity of notarial acts makes it all the more important that notaries perform their tasks thoroughly and diligently.

In Germany, we ensure this by the fact that notaries are public officials who

- are legally obliged to act impartial,
- have to include all relevant facts in the notarial act,
- must adhere to the highest professional standards, and
- are subject to strict state supervision.

## Digital notarial acts

Because we live in a time of digitalization, I would like to also say a few words about digital notarial acts and their probative force.

## Remote authentication procedure

In 2022, an online authentication procedure was introduced in Germany.
Since then, companies and citizens are able to incorporate a German GmbH online before a German notary.
In terms of procedure, the German legislator chose to retain and transfer the proven principles of the notarial (face-to-face) authentication procedure to the digital world.
The cornerstones of the online authentication procedure are:

- a videoconference with the notary,
- a secure digital 2-step identification and
- an electronic signature by means of a qualified electronic signature.

The result of this online authentication procedure, of course, is a digital (electronic) notarial act, which is an electronic public document according to the ZPO.
In addition, German notaries are able to issue electronic certified copies of notarial acts as well as other documents.
These electronic certified copies, too, are electronic public documents.

## Evidentiary value

As for the evidentiary value of such electronic public documents, the German legislator made sure that they have the same probative force as regular/analogue public documents.
Of course, this also means that electronic notarial acts have the same probative force as regular notarial acts.
So, the same principles apply.
The same is the case for the presumption of authenticity.
If an electronic public document has a qualified electronic signature of the issuing authority, it is presumed to be authentic.

Of course, all this is important if we truly want to pave the way for a more digital world, also in the legal sphere.

## Conclusion

In summary, I think it is safe to say that

- analogue as well as digital notarial acts enjoy a strong probative force in Germany.

Against this background, they provide for a

- well-established,
- easily accessible,
- low cost, and
- effective means of evidence in German civil proceedings.

In summary, I think it is safe to say that

- Against this background, a high evidentiary force is one of the many added-values of notarial acts in Germany.
- By establishing that paper-based and electronic notarial acts are equal in terms of their probative force and assumption of authenticity, the German legislator made sure that our system is apt for the future.

I hope that I was able to provide you with a broad overview of the probative value of notarial acts in Germany.

Thank you for your attention!

ORIGINAL LANGUAGE

# A perspective of the evidentiary force of the notarial act in common law, civil law and hybrid jurisdictions: the view from Scotland

## Michael Clancy OBE WS (SCOTLAND)

Director, Law Reform, Law Society of Scotland

Rene David, professeur de droit compareé à Lyon a dit "le droit Ecossais est très différent du droit Anglais". This was la première règle de jurisprudence comparée dans les îsles britanniques when he wrote that sentence, but things have changed since then.

Scots law from the earliest manifestation of a kingdom of Scots was oriented towards continental Europe. For example the Auld Alliance (l'accord Franco-Ecossais) formed in 1295 between **John Balliol** of Scotland and Philip IV of France created a strong bond between Scotland and France. And was useful when both parties saw England as a dangerous neighbour.

The Scottish Universities taught some law but before the Reformation most law students from Scotland studied in Europe prior in Paris where there was a "natio scotorum", in Salamanca and Bologna. After the Reformation they studied in Leyden and Utrecht in Holland. The law they learned was Civil or Roman Law not English Common Law. Accordingly for centuries the Civil or Roman Law was part of the common European heritage of many European jurisdictions and of Scotland.

The Scottish legal system was preserved by provisions in the Treaty of **Union with England in 1707: Union with England Act 1707 (legislation.gov.uk)**. Scots law, the courts (the Court of Session for civil law matters (founded in 1532) and the High Court of Justiciary for criminal law (founded in 1672) and the legal professions remained distinct from the legal system England. The law was how-

ever changed through statute law passed by the UK Parliament and the decisions of the courts to such an extent that Scotland can be called a hybrid or mixed legal system today.

The Notarial profession is not mentioned in the Treaty, but it existed in Scotland from at least the 12th Century and the profession in Scotland remains separate from its English counterpart. An Act of 1563 by Mary Queen of Scots regulated the profession and despite convergence with the solicitor profession in the 19th Century the system Queen Mary established remained in place until the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 brought the profession within the regulatory ambit of the Law Society of Scotland, the regulatory and representative body for Scotland's solicitors. Today there are 9292 Scottish notaries who are also solicitors.

Turning to the theme of the day: ***"A notary by the law of nations has credit everywhere" -*** **A perspective of the evidentiary force of the notarial act in common-law, civil-law and hybrid jurisdictions.**

I would like to approach this theme as follows: 1. What is the Scots law concerning the evidentiary force of the Notarial act? and 2. How does Scotland deal with enforcement by document?

## 1. What is the Scots law concerning the evidentiary force of the Notarial act?

The Civil Jurisdiction and Judgments Act 1982 **Civil Jurisdiction and Judgments Act 1982 (legislation.gov.uk)** ensured that the UK implemented the Brussels Conventions and the Lugano Convention. In pursuance of that legislation an Act of Sederunt (what we in Scotland call court rules) was made entitled (Enforcement of Judgments under the Civil Jurisdiction and Judgments Act 1982) (Authentic Instruments and Court Settlements) 1993 which provided for the registration of authentic instruments under the Act: Act of Sederunt (Enforcement of Judgments under the Civil Jurisdiction and Judgments **Act 1982) (Authentic Instruments and Court Settlements) 1993 (legislation.gov.uk).**

Amending legislation, the Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001, was passed following the Brussels regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of December 2000 coming into force on 1 March

2002: **The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 (legislation.gov.uk).** This order applies the Civil Jurisdiction and Judgments Order 2001 to authentic instruments which in terms of the Regulation are enforceable in the same manner as judgments.

The Act of Sederunt provided procedures for the enforcement of authentic instruments in the same manner as court judgments. The case of *Baden-Wurttembergische Bank AG [2009] CSIH 47* concerned an order for registration of an authentic instrument under section 4 of the Civil Jurisdiction and Judgments Act 1982. The opinion of the Inner House of the Court of Session delivered by Lord Reed, (now President of the UK Supreme Court) considered the requirements of the European Convention on Human Rights, Article 6 on the right to a fair trial but, interpreting the public policy exemption strictly upheld the registration of an authentic instrument: **BADEN-WURTTEMBERGISCHE BANK AG FOR AN ORDER UNDER SECTION 4 OF THE CIVIL JURISDICTION AND JUDGEMENTS ACT 1982 (scotcourts.gov.uk).**

Authentic instruments were enforceable under the law of Scotland until the revocation of that law by **The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (legislation.gov.uk)** which came into effect on completion of the Implementation Period on 31 December 2020 when the transition period following the UK's exit from the European Union ended.

The Law Society of Scotland had argued during the Brexit process that post Brexit civil judicial cooperation was an essential element to be agreed between the UK and the EU to uphold the rule of law and to advance the proper admin-istration of justice. Unfortunately, although the Withdrawal Agreement does protect some citizen's rights the final Trade and Cooperation Agreement does not, perhaps this is an issue which the UK and EU will go back to when the TCA is reviewed in 2025: **UK/EU and EAEC: Trade and Cooperation Agree-ment [TS No.8/2021] - GOV.UK (www.gov.uk).**

At the end of the transition period the UK was no longer a party to the Lugano Convention on which the Brussels Convention and Regulation was based.

The UK applied to join the Lugano Convention in April 2020. The Lugano Convention would have provided for enforceability of authentic acts. Lugano, therefore, would for the purposes of the discussion today have been an attractive post-Brexit alternative.

Acceding to the Lugano Convention requires unanimous consent from all parties, including the EU. States party to the Convention must give their consent within one year of the application. The EFTA member states supported the UK's application. However, on 4 May 2021 the European Commission announced in a **Communication to the European Parliament and Council** that it was opposed to the UK's accession. On 28 June 2021, the European Commission sent a **Communication to the Swiss Federal Council as Depositary of the Lugano Convention,** blocking the UK's accession for the reason that the "Hague Conventions should provide the framework for future cooperation between the European Union and the United Kingdom in the field of civil judicial cooperation".

Now we look forward to the implementation of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters which establishes an international framework for the recognition and enforcement of judgments. This convention does not provide for the recognition of authentic instruments.

Scots law does not have a category of authentic acts in its repertoire of documents. The Scottish Law Commission, the body officially charged with reforming Scots law noted "In relation to traditional documents, Scots law recognises three modes of signature: in descending order of onerousness:

1. probative signatures;
2. signatures conferring formal validity where the law requires the use of writing;
3. other signatures.

I will focus on probative documents which are "self-proving" that is they are presumed to have been signed by the granter. It is also presumed that any alterations which are duly executed formed part of the document at the point of subscription. These presumptions can be challenged, but the onus is on the challenger to show that, on balance, the document is not what it bears to be.

How is probativity achieved? Essentially, the document requires to be witnessed by one witness – there is no need for notarisation. The signature of a witness to the granter's subscription is required, the granter having either signed in the presence of the witness or acknowledged as his or her signature to the witness in what is overall a continuous process. A notarial affidavit can be used in court procedure but "should be the evidence of the witness and should cover only those matters to which he can properly speak.": **Guidance on use signed witness statements or affidavits (scotcourts.gov.uk)**

## 2. How does Scotland deal with enforcement by document

The Scottish Law Commission highlights that "The main benefit of a probative document is that, if it contains an appropriate consent clause, it may be registered for preservation and/or execution (in the sense of enforcement) in the Books of Council and Session. Wills are an example of documents made probative so that they can be preserved in this way against the risk of loss or destruction of the initial document. Again, should a debt due under a contract not be paid in time, registration (which can be carried out at any time after the execution of the document) enables the creditor to move to enforcement by way of summary diligence without any prior need to raise a court action and obtain decree against the debtor.": **RoS_Consultation_-_formal_response.docx (live.com).**

This process is known as registration for preservation and execution where a document is registered in Register of Deeds and Probative Writs in the Books of Council and Session: https://www.ros.gov.uk/our-registers/register-of-deeds. Its origins lie in the mid-1500s. If a deed contains a clause where the parties consent to 'registration for preservation and execution', the document extracted from the register will contain a warrant that grants authority for lawful execution. This extract will be equivalent to a judgment from the Court of Session and can be used as the basis for summary diligence. If the parties to the document do not agree a Court action will be required.

Summary diligence is the legal term for enforcement procedures based on a document of debt rather than a court decree. It can be a "fast track" procedure for the recovery of the debt which may be advantageous to creditors. Instead of a court decree, authority to proceed is acquired by registering the document of debt in the Books of Council & Session and obtaining an extract of it with a warrant, or authorisation, to execute all competent diligence. The deed containing the warrant is used in the same way as a court decree and sheriff officers can be instructed immediately to serve a charge for payment on the debtors for all outstanding sums. An example of a document which might be suitable for summary diligence is a lease: **Debt recovery in Scotland (pinsentmasons.com)**.

## Conclusion

When Lord Eldon declared "A Notary by the law of nations has credit everywhere." in Hutcheon v Mannington in 1802 the world was perhaps a simpler if more brutal place.

Then, International relations were conducted globally by relatively few powerful States organised on an imperial model. Revolutionary ideas such as human dignity, equality and freedom — basic human rights were not universally recognised. Global economics and prosperity rested on the forced labour of millions of slaves. And communications were, by comparison to today, slower than the slowest snail.

Nevertheless, the laws of the jurisdictions represented here in this Dialogue were concerned then as they are today, with governing the status of persons, regulating the holding of property and the conduct of commerce and engaging in litigation. In doing so they relied on legal principles which stretched back in time, in England to the origins of the Common law and in Europe to the ancient Civil or Roman law (national codifications were not yet fashionable in 1802).

We find also when examining these centuries of legal development some constant characters, the client, the judge, the lawyer and the notary. Lord Eldon's dictum describes what he saw as a truth about the notary — the widely accepted international role. 221 years later I think we can agree with him that notaries are recognised everywhere even if universal recognition of their authentic instruments remains a work in progress.

ORIGINAL LANGUAGE

# Introducing the Scriveners Company and the speaker Dr. Jens Bormann


# Jonathan P. Coutts (LONDON)

## Honorary Secretary of the Society of Scrivener Notaries
## Notarial Deputy of the Worshipful Company of Scriveners


## Livery companies

Livery companies have their roots in the medieval trades and crafts. They support, and in some cases still regulate, their trades. They help to educate and train people in various professions.

The livery companies are integral to the governance of City of London. Each year liverymen elect the Sheriffs of the City of London, participate in the election of the Lord Mayor and play a prominent part in major events.

Individual companies vary significantly in their age, beginnings, size, wealth, and approach to the modern world. Some are still active in their original trades, others less so or not at all. Some are wealthy, most are not. Within these differences, livery companies are bound together by an ethos, which has, at its core, fellowship, welfare, education, supporting trade and at all times working in the best interests of the communities in which they operate.

## The Worshipful Company of Scriveners of the City of London

Company of Scriveners is forty-fourth in order of precedence of the Livery Companies of the City of London. It is the livery company for those notaries who have qualified as scrivener notaries, although most of the Company's two hundred members are not scrivener notaries.

The Company is administered by a **Court of Assistants**, of whom there are 27. Appointment to the Court is with regard to professional experience, the object being to promote and protect the best interests of the Company and of its individual members, whether such members be Scrivener Notaries or members of other professions.

The Master of the Company is elected by the Court of Assistants. At the same time the Court elects two senior members to serve as Wardens, who assist the Master in the fulfilment of his or her duties.

The Company is governed by a royal Charter and Ordinances granted by the City of London.

### Privileges

The Committee shall have the responsibility for advising the Court on the expenditure of the Company, on its investments and on the preparation of budgets for income and expenditure and the annual accounts.

### The Selection Committee

The Scriveners Company is affiliated to various units of His Majesty's Armed Forces: including the navy, army and air force.

### Charitable Fund:

The Company operates a Charitable Fund and encourages its members to contribute. The Fund makes grants to schools, colleges and other organisations for the advancement of education and contributes to bursaries being awarded by such schools, colleges and other organisations, particularly but not limited to those involved in trades and crafts associated with the Worshipful Company of Scriveners;

It supports the advancement of culture and heritage in the trades and crafts associated with the Worshipful Company of Scriveners;
To support the charitable work of the Lord Mayor of the City of London;

### The Notarial Committee

There are two parts to qualification as a scrivener notary. The first is the entering into of a training agreement or supervision arrangement with a practising scrivener notary. The second is the sitting of examinations in:

- Advanced notarial practice
- The legal system of a foreign country
- Two modern languages other than English (translation and drafting)

The Company ensures that examinations are set and marked at the appropriate times in accordance with regulations. Arrangements for examinations require two individuals to set and mark each examination paper. They must be independent of the candidate. Such tasks are usually undertaken by practising scrivener notaries with external consultation where this is appropriate.

With an eye to the future, we are pleased this evening that we have among us candidates for the profession who have successfully sat these exams, or indeed completed them. We congratulate them on their success so far and wish them well.

## Dr. Jens Bormann, LL.M. (Harvard)

Jens Bormann studied law in Constance and Geneva. He completed legal training in Freiburg and Paris. He subsequently held the position of research fellow at the Albert-Ludwigs-Universität Freiburg. In 2002 he pursued his postgraduate studies at Harvard Law School with a Master of law degree (LL.M.) and was awarded a doctorate (Dr. iur.) in Freiburg. From 2006 to 2011, Dr. Bormann was secretary general of Bundesnotarkammer. He has also served as editor of Deutsche Notar-Zeitschrift (DNotZ) – the journal of the German notariat. In 2011 he took over the Notarial Chambers in Ratingen. In 2015 he became President of the Bundesnotarkammer in Berlin – the German Federal Chamber of Civil Law Notaries. In 2016 he was apponted Vizepräsident der Rheinischen Notarkammer.

In 2017 he was appointed Honorary Professor at Leibniz University Hannover. During his term of office as President of Bundesnotarkammer, Dr. Bormann has been involved in many legislative reforms and digitalization projects that connect the notarial profession, the judiciary and administrative authorities.

Since 2023, he is Vice-President for Europe of the International Union of Notaries. Herr Prasident, es ist uns eine große Ehre, dass Sie unserer Einladung gefolgt sind.

ORIGINAL LANGUAGE

# Notaries and the Scriveners Company
# A brief history of the last 650 years

## Iain Ostrowski-Rogers (ENGLAND)

Scrivener notary

## How was the Scriveners Company formed and what did scriveners do?

Scriveners were practising their craft in the City of London before the grant of ordinances to the Company in 1373. The first entry in the principal record of the history of the Scriveners Company, the "Common Paper", is from 1357 noting an order made by Henry Pycard, Mayor of London, and the Aldermen, that the "writers of court and text letter" (that is to say "scriveners") should not be summoned to court except for matters of great importance.

But what is the significance of the grant of ordinances? Let us look at what the scriveners asked for in 1373:

The "reputable men, the Common Writers of the Court Letter of the City (just one of the names by which scriveners have been known over time) delivered the following petition to the Lord Mayor and Aldermen:

*To the honourable lords, the Mayor and Aldermen of the City of London, the Writers of the Court Letter of the said City pray that whereas their craft [mestier] is much in request in the same City and it is especially requisite that it should be lawfully and wisely ruled and followed and that by persons instructed therein. And seeing that, for want of good rule, many mischiefs and defaults are, and have often been, committed in the said craft by those who resort to the said City from divers countries, as well chaplains and others, who have no knowledge of the customs, franchises and usages of the said City, and who call themselves scriveners [escryveyns] and undertake to make wills, charters and all other things touching the said craft; the fact being that they are foreigners and unknown, and*

*also less skilled than the scriveners who are free of the said City and who for a long time have been versed in their craft and have largely given of their means for their instruction and freedom therein, to the great damage and disherison [desheriteson'] of many persons, as well of the said City as of many countries of the realm, and to the damage and offence [desclanndre] of all the good and lawful men of the said craft. Therefore, the good scriveners pray that it may please your honourable and discreet lordships to grant and establish for the common profit of the said City and of many other countries and for the well-being and amendment of their condition, that they and their successors for all time may be ruled and enjoy their franchise, in their degree, according to the following points–*

***First,*** *that no one may be suffered to keep shop [de tenir shope] of the said craft in the said City, or in the suburb thereof, if he is not free of the City and also made free of the craft by men of it.*

***Item,*** *that no one shall be admitted to the said freedom if he be not first examined and found able by those of the same craft who shall, for the time being, by you and your successors, be assigned and deputed in this business and be Wardens of the said craft.*

***Item,*** *that every scrivener of the said City, and of the suburb thereof, shall put his name to the deeds which he makes so that it is known who has made the same.*

***Item,*** *that everyone who shall act against this ordinance and institution [establisement] shall pay to the Chamber 40d. the first time, half a mark the second time, and 10s. the third time*[1].

***Item,*** *that these articles shall be enrolled in the said Chamber as being firm and established for ever. Which petition being read and heard, and advice thereupon had by the Mayor and Aldermen, it was agreed between them and granted that the said articles shall be henceforth observed and that offenders thereof shall be punished in the penalty in the form written above.*

Three key requirements were thus stated in the petition:

1. Only a freeman of the Scriveners Company may "set up shop" as a scrivener in the city of London or its suburbs.
2. No one shall be admitted to the Scriveners Company without being examined and found to be competent.

[1] *An English penny was abbreviated to "d." (from "denarius"). A "mark" was originally 100 pennies (there being 240 pennies in the pound at this point in time), and subsequently 160 pennies, but here it must be the original 100 pennies that is intended, as the first fine is* ***40 pennies****, the second* ***50 pennies*** *(half of 100 pennies) and the third* ***60 pennies*** *(ten shillings, a shilling being 6 pence).*

3. Every scrivener must put his name to the deeds that are made.

The Company duly received its first ordinances and was thus recognised as a corporate body whose members were governed and protected, that is to say that standards were imposed and maintained and members who upheld those standards were protected from those who might seek to take their hard-earned business away from them.

Notaries are not mentioned in the petition of 1373 or the ordinances that were issued, but they appear in the records of the Company from 1392 onwards. Also in 1392, new ordinances were issued for governance of the Scriveners Company and these included an oath that was to be taken by every new member. The oath is substantially unchanged to this day, and the key points from the oath may be summarised as follows:

*I, N., of my own proper will, swear upon the holy evangelists to be true in my office and craft, and to be diligent that all the feats that I shall make to be sealed shall be well and lawfully made after my understanding and knowledge. And especially I shall not write, nor suffer to be written by none of mine to my power and knowing, any manner of deed or writing to be sealed bearing a date a long time before the making of the same, nor a long time after, nor a blank charter, nor other deed sealed before the writing thereof, nor closed letters of a date far distant, nor of long time where through any falsehood may be perceived in my conscience, nor no copy of a deed but well examined word by word. And neither for haste nor for covetousness I shall take it upon me to make any deed touching inheritance or other deed of great charge whereof I have no cunning [sachaunt] without good advice and information of counsel. So help me God and all the saints.*

There are clearly recognisable principles of notarial practice here in the work of scriveners, and by 1392 there is clear evidence from literature that the functions of notaries were well known in England, as Geoffrey Chaucer warned notaries against giving false testimony in the Parson's Tale, one of the famous Canterbury Tales. Chaucer also wrote a short poem to "Adam Scrivener" and it has been theorised that this is Adam Pinkhurst who was a member of the Scriveners Company at that time. Defining a "scrivener" is actually rather difficult, but we do have records of the work carried out by scriveners and if we jump ahead a couple of centuries we can read in the records of one Robert Glover, a scrivener by profession, covering the years 1612 to 1617 that he wrote letters, petitions, wills, and contracts (including a remarkable contract between a cook and a leather-seller under the terms of which if the cook became employed in the kitchens of the Prince of Wales, the leather-seller would have the right to purchase the skins of

the lambs that were cooked there), but the most common request to a scrivener was the writing of a money bond. This function appears in Shakespeare's The Merchant of Venice when Shylock commands Antonio to "Go with me to a notary, seal me there your single bond".

## What did notaries do in the early years of the Scriveners Company?

An important function of a notary was to act as the registrar of England's civil-law courts. It may come as a surprise to learn that England, the original "common law" jurisdiction, had courts that applied the civil law. Those courts existed from the 13th century to the 19th century, although their jurisdiction was restricted during of the 19th century before being almost entirely abolished by the Judicature Acts of the 1870s.

The civil-law courts in England were the church courts, the court of admiralty and the court of chivalry. They existed alongside the courts of common law and the courts of equity, sometimes with clearly defined and distinct jurisdiction and sometime with concurrent and contested jurisdiction.

The Church courts had concurrent jurisdiction with the common-law courts over defamation. If someone was said to have committed a "spiritual" crime, such as simony, sorcery or adultery, the defamation action would be heard in an ecclesiastical court, whereas imputations of "secular" crimes such as murder and theft were heard by the common law courts. If someone was called "a thief and a whore", there would be a dispute over which court had jurisdiction.

The Church courts also had jurisdiction over marriage and divorce, testaments and probate to the extent that these related to personalty, tithes, and certain crimes committed on church property.

The Court of Admiralty dealt with matters relating to ships and cargos.

The Court of Chivalry dealt with disputes over coats of arms and various other matters of honour. In the early years of the Court of Chivalry, trial by battle was a permitted method of dispute resolution and the notary, acting as registrar of the court, was indicate that battle was to commence by dropping a silk glove between the combatants.

The ecclesiastical and admiralty courts, and the lawyers (known as "advocates

and doctors of law") who practised in those courts, were housed from 1572 in a place known as "Doctors Commons". Charles Dickens wrote a description of Doctors Commons in 1836:

*It's a little out-of-the-way place, where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete old monsters of acts of Parliament, which three-fourths of the world know nothing about, and the other fourth supposes to have been dug up, in a fossil state, in the days of the Edwards. It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats."*

The registrar of these courts was a notary. Within the jurisdiction of the Scriveners Company, only a scrivener who was a notary could perform that function. The correct recording on the acts of those courts was an important function.

Having mentioned Charles Dickens, it may be of interest that the only notary to play a significant role in a major work of English literature is Mr Witherden in the Old Curiosity Shop. Dickens was normally harsh in his treatment of lawyers; but Witherden is an entirely pleasant and positive character. It is not mentioned in the novel, but the story is set in the City of London so Witherden the Notary would have been a member of the Scriveners Company.

Notaries were also involved in Royal business. Henry VIII certainly knew the value of a notarial act. When his marriage to Anne of Cleves was annulled, for example, her consent to the annulment was signed in the presence of a notary and he had four notaries attest the decree of annulment. When Henry transferred the powers of the Pope to the Archbishop of Canterbury in 1533, he would have known and valued the fact that one of those powers was to appoint notaries.

The next king of significance to the Scriveners Company and scrivener notaries is James I of England (James VI of Scotland) who granted a royal charter to the Company in 1617. This was of great significance as it expanded the Company's jurisdiction to three miles from the City of London, where it stayed until it was abolished in 1999. It also enhanced the powers of at the Master and Wardens of the Company to tax its members.

## Notaries and the Scriveners Company from the 18th century to the present day

By this time British trade was expanding rapidly across the globe. The function of the notary in London was becoming ever more commercial and the require-

ments for notaries practising in London in 1747 can be judged by an advertisement in The London Tradesman:

*He is employed in matters relating to bills of exchange, in protesting such bills as are not accepted, or not duly honoured when accepted. He must know the course of exchange in all the chief trading cities, the usage of payments, and all the other circumstances that relate to that nice affair. He is employed in settling accounts between factors and their employers, matters of ships, supercargoes, and their owners, in drawing and engrossing indentures, articles of co-partnership of trade, charter parties, and expediting policies of insurance, and generally in all deeds and writings relating to traffic. For these reasons he must be acquainted with almost all the European tongues, but especially the trading languages, such as French, Dutch, Spanish, Italian, and Portuguese. He must likewise be fully master of figures and merchants' accounts, and have a general idea of everything relating to the Trading World.*

It is instructive to see the combination of commercial awareness, legal drafting skills, and competence in foreign languages, very much the hallmarks of scrivener notaries today.

Moving on to the beginning of the 19th century, the Scriveners Company was involved in promoting the Public Notaries Act 1801, which confirmed the exclusive jurisdiction of the court of faculties to appoint notaries, confirmed the exclusive jurisdiction of the Scriveners Company to regulate notarial work in the City of London and surrounding area, and imposed a seven-year apprenticeship on all persons wishing to be admitted as notaries (that was reduced to five years for scrivener notaries during the 20th century).

The monopoly of the Scriveners Company over notarial work in London had existed since the 14th century, but the idea of a "monopoly" (from Greek mónos, 'alone', and poleîn, 'to sell'), in effect an "absence of competition", became increasingly unfashionable and unpopular towards the end of the 20th century.

Challenges to the monopoly became more and more persistent, and in time the government took action. Section 53 of the Access to Justice Act 1999 ended the monopoly of scrivener notaries over notarial work in or within three miles of the City of London on the 1st of December 1999.

Since that time, scrivener notaries have continued to apply the highest standards to notarial work in London and across the country. We work together with our friends at the Faculty Office and at the Notaries Society to ensure that standards are imposed and maintained, and that notaries who work hard to maintain those

standards are protected, just as was done in the 14th century, but now throughout the jurisdiction of England and Wales. Scrivener Notaries continue to distinguish themselves by requiring notaries who wish to obtain this additional qualification to pass examinations in two foreign languages and a foreign legal system, and to complete a period of practical training or supervised practice.

Finally, I would like to return to the role of notaries in the civil law courts of England. The jurisdiction of these courts was eroded over time and in the 19th century faded away almost entirely. One of the intentions behind the Judicature Acts of the 1870s was to dissolve the civil-law courts and subsume their functions within the new Supreme Court of Judicature. And yet, one of the civil-law courts was forgotten. The Court of Chivalry had not been convened for many years and the legislators were either unaware of its existence or had assumed that it was defunct. In 1954 the Court of Chivalry sat again to hear the case of the Lord Mayor, Aldermen and Citizens of the City of Manchester versus the Manchester Palace of Varieties Ltd. It was held in the High Court of Chivalry (sitting for the first time in over 200 years) at the Royal Courts of Justice (the actual Court of Chivalry at the College of Arms (which still exists) was considered to be too small). It was a case about the law of arms, a question of heraldry and the right to display a coat of arms in public. The Manchester Palace of Varieties had displayed the coat of Arms of the City of Manchester on their theatre curtain for upwards of twenty years, and on their common seal for upwards of sixty years and denied that Manchester's permission was necessary for such display. The plaintiffs sought the equivalent of an injunction to restrain the defendants in their uses of the City's arms. The case was decided in favour of the City of Manchester, but the point of interest for us today, was that one of the joint registrars of the court in 1954 was one Wilfred Phillips, scrivener notary, honorary secretary of the Society of Scrivener Notaries (then known as the Society of Public Notaries of the City of London) and past master of the Scriveners Company who wore the livery of the Scriveners Company in court.

ORIGINAL LANGUAGE

# Prof. Dr. Jens Bormann (GERMANY)

## UINL Vice-President for Europe and President of Bundesnotarkammer

Thank you very much for inviting me to the first UINL Dialogue between legal systems. I am honoured to speak to you today about the added value of the notarial act and its probative force in particular.

### Introduction

Today's event has been filled with interesting interventions and enriching discussions. The dialogue between legal systems gets easily overlooked. However, it is worth engaging in.

Sometimes, we tend to focus on what divides our various legal systems. And, of course, there are many differences, especially when we compare common and civil law legal systems.

At the same time, we also have a lot in common. For example, we all aim to provide high-quality advice and ensure legal certainty.

Therefore, I highly welcome the efforts made today

- to bring experts from all over the world together and
- have them share their views and experiences.

As UINL Vice President for Europe, it is a special honour that our first dialogue meeting takes places here. However, I would like to especially thank all of you who took on a long journey to be here today.

### Added value of notarial act

Today's first session of our dialogue focused on the added-value of notarial acts, and their evidentiary value in particular.

Notarial acts play a vital role in the legal systems of many countries around

the world. This is because notarial acts provide a wide variety of added values. Let me quickly point out a few of them:

## Authentication

One of the primary functions of notarial acts is to authenticate documents and transactions. In this process, notaries provide legal certainty by

- verifying the identities of the parties involved,
- helping them understand the contents and implications of their agreements,
- and ensuring that the document is signed voluntarily and without coercion.

## Confidence and trust

Notarial acts also foster confidence and trust.
As public officials, notaries are legally obliged to

- act impartially and ethically, as well as
- to ensure the legality and effectiveness of transactions.

This trust is particularly important in complex or high-value transactions. It also makes it less likely that the transaction will face challenges in the future.

## Notarial acts and their evidentiary value

Another added-value – and this brings me to today's topic – is the evidentiary value of notarial acts. Such evidentiary value is beneficial to both society as a whole as well as the parties directly concerned by a notarial act. In my view, this is for two reasons in particular:

- First, it establishes a status quo between the parties to an agreement that cannot be easily rebutted.

This way, it gives a special weight to the agreement and ultimately ensures legal certainty.

- The second reason is that it provides for a low-threshold but nonetheless effective means of evidence in civil proceedings.

As a result, it can

- streamline court proceedings and
- safe costs for expensive and lengthy gathering of evidence through other means.

What exactly evidentiary value entails may vary from jurisdiction to jurisdiction.

In Germany, for example, it means that the notarial act establishes full proof of all statements and events recorded by the notary in the notarial act.

This includes the fact that the parties to an agreement have accepted the commitments undertaken in the agreement with the content stated therein. But Germany is not the only country where the notarial act has a high probative force.

In fact, many legal systems adhere a strong evidentiary value to notarial acts. For Europe, this includes countries like France, Belgium, Spain and Italy, to only name a few.

However, one may wonder why this is the case. What makes legislators decide to endow notarial acts with public faith and a strong evidentiary value?

## International acquis

On the international level, we see that – in general – civil law legal systems tend to adhere a high evidentiary value to notarial acts. This is especially the case when compared to the probative value of the notarial act in some common law countries. There, the attitude towards notarial acts as evidence in civil proceedings is more ambiguous.

- One reason for this is that
    - common law jurisdictions put a strong emphasis on oral evidence
    - while civil proceedings in civil law jurisdictions are, to a large extent, conducted on the basis of written evidence.

If we take a look at the different civil law legal systems, we see that, while the specifics of these legal systems may vary, the main rationality behind endowing a strong evidentiary value upon notarial acts can generally be attributed to three aspects in particular:

## Status as public officials

The first aspect is the notaries' status as public officials.
It is one of the key pillars of many notarial systems throughout the world.

## Status as public officials as a prerequisite for probative value

Our status as public officials is essential to ensure the credibility, reliability and integrity of notarial acts and the legal system as a whole.

## Impartiality

First, it ensures that notaries can be impartial. As public officials, we are bound by a code of ethics obliging us to act impartially and without bias.

Our allegiance is to the law and the public interest instead of the one-sided interests of any individual party. This helps ensure the fairness and integrity of the notarial process.

## State supervision

Second, as public officials, notaries are subject to supervision by government authorities. This supervisory control

- helps maintain high professional standards and
- ensures that notaries adhere to ethical guidelines and legal requirements.

It also provides recourse for individuals in case of notarial misconduct.

## Public interests

As I mentioned, the notary's status as public official also serves a variety of public interests:

- We contribute to a secure and stable national tax revenue by complying with our reporting obligations;
- By taking over essential due diligence and reporting obligations, we
    - play a key role in the fight against money laundering and terrorist financing, and
    - are partners of the state in the enforcement of sanctions;
    - both of which are more important than ever in view of the war in Ukraine.

As gate keepers, we contribute to reliable land and commercial registers;
And we reduce the work load of register courts.

## Highest quality

Another aspect which contributes to notarial acts having high evidentiary value is their compliance with highest quality. If notarial acts enjoy a strong evidentiary value, they need to be reliable.

In order for this to be the case, they need to comply with all relevant legal requirements, even and especially in complex cases.

One way of ensuring that notarial acts serve as a guarantee for the effectiveness and legality is to rigorously select only the best candidates to become notaries. Notaries are entrusted with significant legal and ethical responsibilities, including

- verifying identities,
- preventing fraud,
- and upholding the law.

As such, it is essential to select candidates who have a strong understanding of legal principles, ethics, and the ability to exercise sound judgment.

## Competences

The third factor is in fact quite simple: It does not relate to the probative force of a notarial act being particularly strong but to there being an evidentiary value in the first place. It is notarial competences. For notarial acts to have any degree of probative value in a specific legal field, notaries need to have competences in this area of the law.

## Key role in real estate and company law

Against this background, Notaries play a key role in real estate and company law in many legal systems where notarial acts have a strong probative value.

## Reliable registers

In many of these systems, notaries are gate keepers to land and/or commercial registers. Such registers are a key characteristic of Continental-European-type legal and economic systems. They disclose all important legal relations at literally one quick glance. Of course, registers are only useful and valuable, if the public can rely on them. This is the case if those registers are afforded with public faith.

## Notaries as gate keepers

But, of course, the registers need to be in fact reliable in order enjoy public faith. This is why many legal systems provide for and continuously strengthen the principle of public input control. In this context, many legislators – for example the European legislator with its new digitalisation package – turn to notaries.

They

- recognize the many added-values of notarial acts and
- rely on notaries for ensuring a high-quality public input control for registers.

## Public trust

Because notaries are public officials, their input control amounts to public input control:

- Appointed by an official act of government, they exercise administrative tasks by virtue of power delegated by the state.

And because notarial acts fulfil the requirements to be endowed with a strong probative value, everyone can rely on the facts and statements contained therein. This includes land and commercial registers.

## Verification

Being gate keepers for registers, notaries ensure the correctness of the information contained in land and commercial registers: By checking

- the contents of land and commercial registers as well as
- the identity and capacity of parties, notaries ensure that only authorized persons take part in transactions.

And because notaries guarantee the legality of each transaction, they ensure that changes to the registers are only made on the basis of valid legal transactions.

## Public faith

Because notaries perform such high-quality public input controls and notarial acts enjoy public trust, the state can endow the registers with public faith.

## Dialogue between systems

Coming back to the topic of today's meeting: the dialogue between the legal systems. I strongly believe that notarial acts can have a strong probative value both in civil law as well as in common law legal systems.
Let us take Germany and the UK as an example.

## Example: civil law - Germany

In Germany, notarial acts are endowed with a high evidentiary value.
Let me briefly say a few words about the German system:
German civil proceedings allow for a variety of means of evidence. Documentary evidence is one of them.
In general, there are two kinds of means of documentary evidence:

- Private documents and
- Public documents

Private documents may establish proof that the declarations contained in the documents were made by the parties.
The evidentiary value of public documents, however, goes much further.
They establish full proof for the declarations and events recorded in the document. This is why notarial acts are well established as an efficient means of evidence in civil proceedings. Let us take a look at why German notarial acts enjoy such strong evidentiary value and keep in mind the reasons I just mentioned.

## Status as public officials

First, there is the notaries' status as public officials. This requirement is enshrined in German procedural law.

For a document to be considered a public document, German law requires for the document to be issued by an authority or commissioner of oaths. Because German notaries are public officials they fall within this category.

## Status as public officials

The second reason was the ensuring of highest legal quality.
In Germany, notaries are selected and appointed by the State Minister of Justice according to a merit-based system.
Admission to the notarial profession is highly competitive as there is a strict selection of only the best applicants.
Before becoming a civil law notary in Germany, the selected candidates generally have to serve at least three years of practical training as "notarial candidates" under the supervision of an experienced notary.
This way, our system makes sure that our notarial acts adhere to the highest quality possible.

## Third factor - competences

As a third factor, I mentioned competences: German notaries have competences in a wide variety of legal fields, including property transactions and commercial law.

## Example: common law - UK

If we now look at the UK as an example for a common law legal system, on the other hand, the status quo is slightly different. As I mentioned before, many common law legal systems strongly rely on oral evidence. In the UK, the system of giving evidence in civil proceedings is traditionally shaped by two principles:

- the principle of orality, and
- the rule against hearsay.

In general, these principles pose somewhat of a challenge as regards the recognition of documentary proof in general and notarial acts in particular in court proceedings. This is because notarial acts strictly qualify as written hearsay evidence. At the same time, there also are exceptions to these rules:

- For example, written witness statements or affidavits are admissible.
- The same applies to public or ancient documents.
- It should be noted, however, that – unlike in Germany – notarial acts are not considered public documents in the UK because
  - they often times do not relate to public matters, and
  - they are not available for public inspection.

Nonetheless, the evidentiary value of notarial acts in the UK has increased over the last few decades.

## Civil Evidence Act of 1995

The first cornerstone for increasing the probative value of notarial acts in the UK was the Civil Evidence Act of 1995. Back then, it was established that, at least in civil proceedings, evidence should not be excluded on the grounds that it is hearsay. This meant that, going forward, notarial acts could be presented as evidence in court. However, this was under the condition that notice was given to the other party.

## Rule r.32.20 of the Civil Procedure Rules 1998

A second and very important step towards a strong evidentiary value of notarial acts in the UK was taken in April 2021 with the introduction of rule r.32.20 into the Civil Procedure Rules of 1998. It constitutes the rebuttable presumption of authenticity for notarial acts.

## Potential for further strengthening of probative value

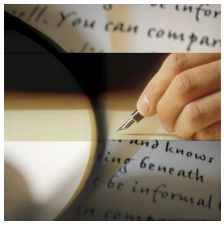
Of course, the evidentiary value of notarial acts in the UK could – and in my view should – be further strengthened. The past developments show, however, that the role and importance of notarial acts as regards the production of evidence in civil proceedings is steadily increasing. It will be upon the legislator to decide on where they want to go from here. In view of the many added-values of notarial acts having a high probative force, I can only encourage them to continue on their way of further strengthening the role of notarial act. At the same time, it continues to be our job to work on improving our public services and highlighting the many added-values we provide.

## Conclusion

In conclusion, it is safe to say that the degree of evidentiary value adhered to notarial acts varies in the different jurisdictions around the world. And there are even more reasons for this being the case. But if we look again at our commonalities instead of our differences, we see that in all our legal systems, notarial acts enjoy some degree of probative value. And if we come together to share our knowledge and experience – like we did today – we can learn from each other and possibly even find ways to further improve the notarial act.

Thank you for engaging is such fruitful discussions today and for your attention!

INSTITUCIÓN EDITORA | ONPI
RIN Nº 131 - EDICIÓN ESPECIAL
CIUDAD AUTÓNOMA DE BUENOS AIRES - BUENOS AIRES - ARGENTINA



**ONPI**
Institución Editora

**Sede Permanente**
Av. Las Heras 1833 Piso 4° CP (1024)

**Dirección y Redacción**
Av. Las Heras 1833 Piso 4° CP (1024)
Ciudad Autónoma de Buenos Aires
República Argentina
Tels.: (0054) 11 4809-7161
onpiuinl@onpi.org.ar
www.onpi.org.ar

**Internet**
www.uinl.org
onpiuinl@onpi.org.ar



**Diseño y Diagramación**
María Cecilia Alcoba

RIN Nº 131