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THE PUBLIC DEED

The intrinsic legal instrument of the Latin-type notarial system is the notarial document known as the public deed.

The public deed is a true reproduction of the will expressed by one or more parties before a notary, and has substantial characteristics that make it the legal instrument par excellence of the written and codified legal system for its high level of legal certainty.

THE FOLLOWING ARE ITS ESSENTIAL CHARACTERISTICS:

- **LEGALITY:** Its legality is controlled and secured by the notary.
- **EFFICACY:** It has evidentiary value supported by the presumption of accuracy of the elements verified, affirmed and certified by the notary.
- **SECURITY:** The notary is a highly qualified jurist who prepares its contents; gathers in different ways the manifestation of consent of the parties and, in this manner, draws up an effective document legally enforceable against the parties.
- **TRANSPARENCY:** The notary provides information to the State by carefully verifying the identity of the parties involved and complying with rules against money laundering.
- **DURATION:** The public deed becomes the memory of events, since its preservation is guaranteed by the notary.

The notarial document is, therefore, an instrument of peace and preventive justice that prevails over any other document issued under the Common Law.

EDITORIAL



This year, Latin America celebrates its 200 years of freedom.

In this especially important year, four countries of the continent, Argentina, Colombia, Mexico and Chile, celebrate the bicentennial of the first movements towards independence. The first bicentennial anniversary was on May 25th, in Argentina, a date that commemorates the first patriotic government in Rio de la Plata.

From a historical viewpoint, we should admire the common challenges overcome with great sacrifice. It is the story of a heterogeneous group of societies brought together by shared values, “the acknowledgement of the people’s sovereignty and individual freedom,” and a common goal, “the pursuit of man’s dignity and freedom.”



On the verge of the XXVI International Congress of Notaries to be held for the first time in Africa, the Directorate of the International Notarial Review is pleased to extend its cordial and warm greetings to the African Notariat, particularly the Moroccan Notariat, and to the Organizing Committee that is working with great enthusiasm and capacity for purposes of this transcendent meeting.

The topics to be discussed will be certainly of great interest, since they are current and relate to the financial crisis suffered this last year.

We should emphasize the international work done, as well as the teachings of the preceding Congresses, which have been the most powerful stimulation to improve the legal-notarial institutions of the member states.

Today, once again, Morocco will be the place of fraternization of the notaries of the world. To the African Notariat... Many thanks.

DIRECTOR

**LETTER OF THE UINL PRESIDENT, NOTARY EDUARDO GALLINO,
ON THE DEATH OF THE HONORARY PRESIDENT, NOTARY UMBERTO CAPRARA.**

The International Union of Notaries informs with deep sorrow the death of its Honorary President, our colleague and friend, Notary Umberto Caprara, a notary for Vicenza, Italy.

Notary Caprara, a distinguished representative of the international notariat, has served for many years as European Permanent Secretary and, successively, as President of the U.I.N.L.

His presidency of the Union since 1986 to 1989, marked by the opening of and amendment to the Bylaws, ended with the great expansion of the Latin-type notariat model across the world.

His significant merits, both personally and professionally, as well as his willingness to serve with enthusiasm and capacity the notariat, our Union and its ideals, set an enduring example for all of us.

In my name and on behalf of our International Union of Notaries, I express my deepest condolences to his family and the Italian notariat.

Notary Eduardo Gallino
PRESIDENT



IN MEMORIAM

With great sorrow the RIN hereby communicates the death of Notary Hugo Pérez Montero, who served as President for the International Union of Notaries, and pays homage to his memory.



CHAPTER 1



26th INTERNATIONAL CONGRESS OF NOTARIES,

MARRAKECH, MOROCCO, OCTOBER 3 – 6, 2010

The 26th INTERNATIONAL CONGRESS OF NOTARIES will be held by the International Union of Notaries (UINL), on October 3-6, 2010. The venue will be the city of Marrakech, Morocco.



INTRODUCTION

WORDS OF THE UINL PRESIDENT,
Notary Eduardo Gallino

THE XXVI INTERNATIONAL CONGRESS OF NOTARIES
WILL BE HELD IN MOROCCO IN OCTOBER 2010

The XXVI International Congress of Notaries will be held by the International Union of Notaries (UINL) in Marrakech, in October 2010.

THE FOLLOWING TOPICS WILL BE DISCUSSED:

- 1) Notary's Collaboration with the State in Facing New Challenges of Society: Transparency of Financial Markets, Money Laundering, Urbanism, Environment.
- 2) The Use of a Notarial Document to Secure Investments. In Particular, its Reliability for Publicity of Official Registries and its Executory Authority.

The International Congresses of Notaries are the most important professional and legal events worldwide, considering that they are attended by over 76 member notariats, as well as other notariats that

are applying for admission to the Union and several international organizations with which the UINL is associated.

It is the most auspicious occasion to discuss scientific and current professional matters.

There is no other event in the world that may be compared to this one from a legal viewpoint, with a work and debate continuity that serves as a sort of link between topics that cover, in particular, the relationship between private individuals and the State, constituting the basis of the economy of most countries around the world.

The first International Congress of Notaries was held in 1948 in Buenos Aires.

The world was just emerging from a bloody war and the International Union of Latin Notaries was, undoubtedly, one of the first international organizations created after the war.

The first sign of fraternity after the world war came from the Notariat, as a declaration of peace, justice, equilibrium, equity and judicial use for legal and economic certainty. Peace and justice, an indissoluble union leading to the meaning of Notariat.

It is not casual that the opening of every International Congress of Notaries is entrusted to the Chief of State of each organizing country, because Notaries, as public officials and professionals of law, essential for the legality and economy control of each country, and due to their role in tax matters, are the pillar of the state organization.

The XXVI International Congress of Notaries is the first congress to be held in 2010 in Africa, given that all others will be held in America and Europe.

In my capacity as UINL President, I must confess that, in my opinion, the fact that the Congress will be first held under my presidency in Northwestern Africa, that is Morocco, is an extraordinary opportunity and chance.

We can benefit from the experience and wisdom of African notaries and, through the World Congress, the notaries of the entire world will gather and meet in the wonderful and welcoming land of Morocco. They will be able to discover the wonders and treasures of its magnificent culture, as well as the beauty and fraternity of the host country.

However, it will be also a great opportunity for our colleagues specialized in the law of Morocco and the entire Africa –not only Notaries- to learn about our organization and establish fraternal bonds between members. We will be honored to introduce the Notariat to the Moroccan authorities, first of all to His Majesty, King Mohammed VI.

We will attempt to show the Moroccan public –we know there are excellent professionals of law in Morocco- the reasons why the Notary's involvement in the most important relationships under private law is essential. And not just that because, in my capacity as President of the Union, I will explain that, if the Notariat's role had been increased, it would have helped to avoid the world crisis in the aftermath of the US mortgage loan problem, which mortgage loans were executed without the participation of authentic notaries.

There are more than enough reasons for African people, and especially Moroccan people, to be extremely interested in the topics of our Congress and for attendees to enjoy the endless wonders of Morocco. However, in the meantime, while we are waiting for the Congress to begin, I want to express my deep gratitude to the great African notarial people and, in particular, to the Moroccan people.

EDUARDO GALLINO
PRESIDENT

NOTARIATS OF AFRICA THAT ARE MEMBERS OF THE UINL

(IN THE ORDER OF THEIR ADMISSION)

							
IVORY COAST 1983	MOROCCO 1986	BENIN 1989	MALI	SENEGAL	CAMEROUN 1992	CONGO	GABON
							
CENTRAL AFRICA	TOGO	NIGER	BURKINA FASSO 1995	GUINEA	CHAD 2001	ALGERIA 2006	

COUNTRIES APPLYING FOR ADMISSION TO THE UINL

		
TUNISIA	LIBIA	MAURITANIA

TOPICS:

TOPIC I

"Notary's Collaboration with the State in Facing New Challenges of Society: Transparency of Financial Markets, Money Laundering, Urbanism, Environment."

International Coordinator

Notary Bernardo Pérez Fernández del Castillo (Mexico)

SUBTOPIC:

"TRANSPARENCY OF FINANCIAL MARKETS."

President of the Commission of Topics and Congresses

Notary Juan Ignacio Gomeza Villa (Spain)

TOPIC II

"The Use of a Notarial Document to Secure Investments. In Particular, its Reliability for Publicity of Official Registries and its Executory Authority."

FORUM "Preventing Crises: Rules, Control, Transparency."

ORGANIZING COMMITTEE:

Houcine SEFRIOUI, President, Casablanca
 Ratiba SEKKAT, First Vice President, Rabat
 Abdelmajid BENGELLOUN-ZAHR, Second Vice President, Casablanca
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 Mohamed MALIKI, General Treasurer, Casablanca
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 Hassane RAHMOUNE, Councilor, Sale
 Abdelmajid BARGACH, Councilor, Rabat
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 Mustapha AMGHAR, Councilor, Agadir
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 Councilor, Supreme Court, Hay Riad Supreme Court in Rabat.
 Yahia EL HASSAN,
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Farid EL BACHA,

Full Professor of Private Law of the School of Legal, Economic and Social Sciences. Mohamed V University (Rabat Agdal).

Noureddine SKOUKED, Notary.

Saad LAHRICHI, Notary.

Chakib GHIATI, Notary.

Taoufik AZZOUZI, Notary.

Linda OUMEMA BEN ALI, Notary.



INSTITUTIONAL EVENTS

2

CHAPTER

JANUARY

1) TAX UPDATE COURSE BY THE NATIONAL NOTARY ASSOCIATION OF MEXICO

The Tax Update Course was given by the National Notary Association of Mexico on January 23-24, in the Federal District (DF), Mexico.

2) I SOUTH REGIONAL MEETING ON ELECTRONIC SIGNATURE AND LEGAL CERTAINTY

The First South Regional Meeting on Electronic Signature and Legal Certainty was held on January 23-24, in Ica, Peru.

FEBRUARY

3) II BINATIONAL MEETING OF NOTARIES OF ECUADOR-PERU, CHICLAYO, LAMBAYEQUE, PERU

The II Binational Meeting of Notaries was held on February 5-6.



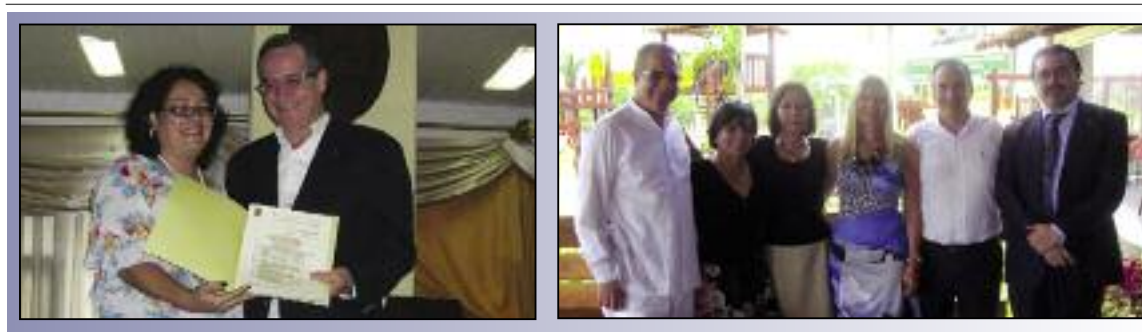
4) I INTERNATIONAL SESSION ON NOTARY LAW 2010 SANTA CRUZ, BOLIVIA

Organized by the National Notary Association of Bolivia and the Notary Association of Santa Cruz de la Sierra, and sponsored by the Commission of American Affairs of the UINL, the I International Session on Notary Law 2010 was held on February 11-12 of this year.

This important meeting of the Bolivian notariat was attended by 130 notaries of the nine departments of the country. The following are the topics and speakers of the session: The Notarial Document, by Notary María Luisa Lozada (Bolivia); the International Union of Notaries, by Notary Silvia Farina (Argentina); The Notariat in the Fight Against Money Laundering, by Notary Ignacio González Álvarez (Spain); Challenges of the Notariat in the XXI Century, by Alfonso Zermeño Infante (Mexico); Basis of the Efficacy of a Notarial Public Instrument, by Notary Alfonso Cavalle Cruz (Spain); Mercosur-European Union Relation, by Notary Luc Weys (Belgium); Legal Certainty in Property Entitlement, Notarial Document and Registration System, by Notary Norka Rocha (Bolivia); and the last conference: Analysis of the Legislative Bill for Bolivian Notariat Organization, by Notary Eleonora Casabé (Argentina).

During the two intense days of the Session, there were many moments of camaraderie and we were welcomed by the Bolivian notariat with the hospitality that characterizes each and every one of its members. The speakers were recognized as “DISTINGUISHED VISITORS” by the Honorable Municipal Council. In a simple but moving ceremony, a diploma noting such distinction was presented to them by its President, Mrs. Carol G. Viscarra Guillen.

The Session ended with a closing barbecue, traditional music and dances. The speakers were also presented with a plaque as a souvenir of the Bolivian notariat. The president of the Bolivian notariat, Notary Gladys Ayala de Terceros, expressed words of gratitude, as well as the president of the Organizing Committee, Notary María Luisa Lozada, and the president of the Commission of American Affairs, Mr. Alfonso Zermeno Infante, which were followed by a toast to the approval of the Notarial Organization Law, all in an atmosphere of cordiality and affection.



1 - "The Honorable President of the Municipal Council of Santa Cruz de la Sierra delivered to the President of the CAA, Ontario Zermeno Infante Alfonso, the ordinance proclaims" Distinguished Visitor.

2 - Working Lunch speakers. From left. to right.: Mr. Alfonso Zermeno, Dr. Maria Luisa Lozada Bravo Not. Silvia Farina, Not. Eleonora Casabe, Not. Cavalle Cruz Alfonso and Not. Ignacio Gonzalez Alvarez.

5) GRAND VIENNESE BALL OF JURISTS - “JURISTENBALL”

The traditional Grand Viennese Ball of Jurists – Juristenball- was held on February 13, at the Hofburg Imperial Palace, in Vienna, Austria.

6) MEETING OF THE UINL MANAGEMENT BOARD, BARILOCHE, REPÚBLICA DE ARGENTINA

The first annual meeting of the MANAGEMENT BOARD of the UINL was held on February 18-19 of this year, in the city of San Carlos de Bariloche, Argentina.

The venue was the LLAO LLAO HOTEL, 20 km away from such city, surrounded by mountains and on the shore of the Nahuel Huapi Lake.

Presided by Notary Eduardo GALLINO, the board gathered to debate different matters and circumstances that are important to the world notariat.

The issues raised in the four continents by the presidents of the Continental Commissions and the vice presidents for each continent were discussed and the corresponding guidelines were set.

The applications of new notariats willing to be admitted as members of this international organization were assessed, such as Bosnia, Montenegro and Tunisia, among others. Such task was entrusted to the Commission of International Notarial Collaboration (CNNI), the main purpose of which is to visit the interested notariats and assess their organization to verify their compliance with the essential characteristics of the Latin-type notariat.

The activities to be performed by the UINL representatives before the International Organizations were scheduled.

The activity to be performed by the Commission of Asian Affairs in its respective continent was planned.

The situation of the notariats in Central American and the Caribbean was studied.

The different publications of the UNION, especially the issue of the “Notarius International” magazine, were reviewed.

The work of some commissions was evaluated in order to suggest new goals in their tasks.

The President, as well as the other members of the Management Board, reported on their respective activities. Their proposals were analyzed and the comments made thereon were deemed appropriate.

The economic situation was analyzed, proposals were reviewed, and solutions were provided to the problems raised by some notariats in that regard.

As a conclusion, we may state that, as always, the main purpose of this organization is to struggle for the constant improvement and betterment of our profession, in all respects, which is always the permanent goal of its members.

The meeting ended on Saturday 20th, after sailing the Nahuel Huapi, visiting the famous Bosque de Arrayanes and having lunch in a typical cabin. Thereafter, the attendees visited Villa La Angostura, returning to the hotel late in the afternoon after a nice camaraderie trip.



1 - Bureau of Labor. Notary New Argentine president, Gustavo ROSSO, welcomed the foreign participants.

2 - Partial view of the desk: Vice UINL for North America, Francisco Xavier Arredondo GALVAN, President of the CAA, Alfonso ZERMENO INFANTE, President of the CAAF. Sefrioui Houcine and Not. Silvia Farina.



The Presidents Eduardo Gallino, and ex-presidents and Schwatzen Fessler.



Group Directors with President Eduardo Gallino.



GENEVA,
SWITZERLAND

7) MEETING OF THE COMMISSION OF HUMAN RIGHTS AND COLLOQUIUM ON INTERNATIONAL SUCCESSIONS, GENEVA, SWITZERLAND

On March 1-2, 2010, the meeting of the UINL Commission of Human Rights was held in Palais des Nations, Geneva, Switzerland. In addition, on Tuesday, March 2, at 2:30 pm, a colloquium on “Human Rights and International Successions” was held by the UINL and the Sergio Vieira de Mello Foundation, in Palais des Nations (room XI). The meeting was attended by notaries from France, Argentina, Morocco, Romania, Luxembourg, Greece and Switzerland, as well as by an American lawyer.

COLLOQUIUM-CONCLUSIONS: See Chapter 4: Legal Notarial Issues.



8) I INTERNATIONAL CONGRESS ON REGISTRATION LAW

MEXICO DF, MEXICO, MARCH 24-26, 2010

The I International Congress on Registration Law was held on March 24-26, 2010, simultaneously in five venues of the Federal District of the City of Mexico.

The event was held in the following places: INSTITUTE OF LEGAL RESEARCH, SCHOOL OF HIGHER STUDIES OF ACATLAN, SCHOOL OF HIGHER STUDIES OF ARAGON, GRADUATE DEPARTMENT OF THE SCHOOL OF LAW OF UNAM, AND SCHOOL OF LAW OF THE ANAHUAC UNIVERSITY.

The speakers were experts from Mexico, Colombia, Costa Rica, Ecuador, Spain, France, Italy, Argentina, Nicaragua, Paraguay, Panama and Portugal.



9) SESSIONS ON NOTARIAL PRIVATE INTERNATIONAL LAW (ONPI)

APRIL 12-16, 2010, ASUNCION, PARAGUAY

The “Sessions on Notarial Private International Law – ONPI” were held by ONPI in the city of Asuncion, Paraguay, on occasion of the 50th Anniversary of Universidad Católica “Nuestra Señora de la Asunción”.

The event was held on April 12-16, 2010, to discuss the performance of the Latin Notariat and its benefits. The following activities were performed: first, ONPI and its website were presented and an informative video of its activities was shown. It was followed by the following presentations:

- “Common Law and Civil Law. Performance of the Latin Notariat. Benefits of the Latin-type Notariat.”
Speaker: Notary León HIRSCH, President of ONPI.

- “Notary Law. Connotations and Principles of the Latin Notariat.”
Speaker: Notary Ángel CERA VOLO.

- “Registration Law.” Speaker: Notary Horacio VACARELLI.

- “Private International Law. Matrimonial Property Regime in Community Property.”
Speaker: Mariel MOLINA DE JUAN.

- “International Powers-of-Attorney. Documentary Formalities.”
Speaker: Notary Santos BELANDRO (Uruguay.)

The Minister of the Supreme Court of Justice of Paraguay, Miguel Oscar Bajac, was in charge of opening the event. He put emphasis on its importance, given that it was a valuable exchange of experiences for the progress and improvement of legal instruments towards the modernization of procedures and codes of conduct. The meeting was held in an atmosphere of sincere camaraderie among the attending notaries.

10) XXII CONFERENCE OF EUROPEAN NOTARIES

SALZBURG, AUSTRIA, APRIL 22-23, 2010

The XII Conference of European Notaries was held on April 22-23, 2010, in Salzburg, Austria.



11) 29th ARGENTINE NOTARIAL SESSION

MAR DEL PLATA, ARGENTINA, MAY 5-8, 2010

The 29th Argentine Notarial Session was held in Mar del Plata, Argentina, on May 5-8, 2010. The following topics were discussed, which were received with great interest by the attendees:

TOPIC I – REGISTRATION INACCURACIES. REGISTRATION QUALIFICATION.

1. The principles of registration qualification and “public trust”
2. The so-called extrinsic forms;
3. Invalidity and inefficacy. Absolute or relative, total or partial, express or hidden nullity and voidability;
4. Difference between good title and registrable title;
5. The registrar and the public instrument evidencing the parties’ act: a) manifestly valid; b) manifestly and absolutely null; c) manifestly and relatively null.

TOPIC II – DONATION

1. Offer and acceptance through separate acts. Plurality of donors and donees. Acceptance by some of them. Accretions rights. Conditions and fees. Cases of reversion. Revocation.

TOPIC III – TRUST AS A TOOL FOR THE DEVELOPMENT OF REAL ESTATE UNDERTAKINGS

1. Pre-contractual stages
2. Characteristics and requirements of different trust agreements
3. Different roles of concepts not contemplated by the law but present in undertakings
4. Registration characteristics and problems in trust ownership
5. Tax consequences: different treatments in different jurisdictions. Resolutions of the Tax Authorities (AFIP) on income tax.
6. Relationship between matrimonial property regime and trust. Contract possibility between spouses with title ownership or property in trust. Trustee's death and injunction. Termination of trust.

TOPIC IV – CORPORATE MATTER

1. The company in its incorporating process. Legal nature and recognition of its existence. Admitted, prohibited and insufficient acts during the incorporating period. Minimum capital. Relationship between capital and corporate purpose. Thin capitalization: effects. Correct interpretation of Section 165 of the Business Companies Law in the execution of the articles of incorporation of a corporation. The public deed for validity purposes. Amendment.
2. Contribution of registrable assets in the company's incorporating process. Section 38 of the Business Companies Law. Provisional registration of the contribution. Legal nature. Registration treatment in different jurisdictions. Cases of non-registration or withdrawal of the incorporation application of a company: effects.
3. Acquisition of property rights in companies, tax treatment and registration:
 1. During the incorporating period. Doctrine of sections 183 and 184 of the Business Companies Law. Business management. Requirements. Lack of acceptance. Contribution of real estate on account of future subscription of capital. Contribution in capital increases.
 2. During the term of duration of the company. Acts notoriously alien to the corporate purpose. Donation, sale of registered office, etc.
 3. Treatment in case of corporate reorganizations, regularization and during the winding-up period.
 4. Case of a foreign company. Isolated act. Habitual practice. Branch. Requirements for representatives of foreign companies registered in the country to purchase and dispose of real estate.
 5. Minutes of business companies. Concept and contents. Its legal nature. Misplacement, loss or lack of books. Books of minutes with pages in blank, crossed out or corrected without mentioning such fact and lacking signatures. Minutes and the notary's involvement.



12) MEETING OF THE COMMISSION OF EUROPEAN AFFAIRS (CAE)

ST. PETERSBURG, RUSSIA, MAY 20-22, 2010

The fifth plenary meeting of the UINL Commission of European Affairs of the 2008-2010 Legislature was held in the beautiful city of St. Petersburg, Russia, on May 20, 21 and 22, 2010. The venue of the meeting was the Astoria Hotel.



13) FIRST PLENARY MEETING OF THE UINL COMMISSION OF AMERICAN AFFAIRS

PUNTA CANA, DOMINICAN REPUBLIC, MAY 31-JUNE 2, 2010

A Plenary Meeting of the members of the Commission of American Affairs (CAA) of the UINL was held on May 31-June 2, 2010, in Punta Cana, Dominican Republic. The venue of the meeting was the Hotel Meliá Caribe Tropical, Playa Bavaro.

The following topics were discussed by the Committees:

MAY 31:

INTEGRATION STUDY AREA.

- REGIONAL TREATIES AND AGREEMENTS:

NAFTA/FTAA

ANDEAN COMMUNITY

PUEBLA-PANAMA PLAN

MEXICAN GULF ECONOMIC AGREEMENTS

MERCOSUR

- AMERICAN NOTARIAL ACADEMY

- RELATIONSHIPS WITH AMERICAN ANGLO-SAXON NOTARIES.

- TECHNOLOGY INFORMATION AND LEGAL CERTAINTY.

- ACCESS TO THE NOTARIAL FUNCTION.

- FINANCING AND COMMUNICATION.

- COMMON LAW/ CIVIL LAW

- BICENTENNIAL CELEBRATION TEAM.

- MASSIVE PROPERTY ENTITLEMENT WORK TEAM.

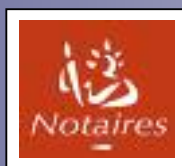
JUNE 1

THE FIRST PLENARY MEETING OF THE COMMISSION OF AMERICAN AFFAIRS FOR 2010 WAS HELD.

The President of the Dominican Notary Association, Notary Luis R. Vilchez Marranzini, the President of the CAA, Notary Alfonso Zermeño, and the President of the UINL, Notary Eduardo Gallino, were in charge of delivering the welcome speech and formally opened the meeting. Thereafter, the items of the agenda were discussed.

JUNE 2:

THE PLENARY MEETING CONTINUED WITH ITS WORK, WHICH CONCLUDED WITH THE CLOSING CEREMONY.



14) 106th CONGRESS OF FRENCH NOTARIES

BORDEAUX, FRANCE, MAY 30-31, 2010

The 106th Congress of French Notaries was held on May 30-31, in Bordeaux, France. The topic of the Congress was: “Couples, Property: Challenges of Two People Living Together.” The venue was the Parc des Expositions of Bordeaux Lac.

JUNE



15) “LAW AND WINE” COLLOQUIUM OF THE IRENE FOUNDATION, IN COLLABORATION WITH THE HOUSE OF EUROPE

BORDEAUX, FRANCE, JUNE 3, 2010

Organized by the I.R.E.N.E. Foundation, together with the University of Bordeaux, France, and the House of Europe, BORDEAUX-AQUITAINE, the “Law and Wine” Colloquium was held at the Chamber of Notaries of Bordeaux, France. The event was sponsored by the President of the UINL, Notary Eduardo Gallino, the UINL Vice President for Europe, Rafael Gómez Sapina, the President of the UINL Commission of European Affairs and Honorary President of the I.R.E.N.E. Foundation, Mario Miccoli, and the National School of Agricultural Engineers and Techniques of Bordeaux. The following notaries were present: Jérôme CHEVRIER, Notary for Paris, Alfonso RENTERIA AROCE-NA, Notary and Registrar for Bilbao, who acted as moderators, Michael Becker, Notary for Dresden (Germany), Aude Paternoster, Notary for Châtelet, Chatelineau (Belgium), Sofia Mouratidou, Notary for Thessalonica (Greece), Nico Schaeffer, Honorary President of Luxembourg (Luxembourg), Maarten Meijer, Notary for Amsterdam (The Netherlands), Michal Grajner, Notary for Katowice, and Tomasz Kot, Notary for Cracovia (Poland), Igor Medvedev, Notary for Yekaterinburg, Professor Vladimir Yarkov, Notary for Yekaterinburg, Vice President of the Federal Chamber of Notaries of Russia (Russia), and Laurent Besso, Notary for Lausanne (Switzerland).

THE FOLLOWING TOPICS WERE DISCUSSED:

“Real Estate Mutations in Vineyards,”

“Right to Labels and Appeal Controls,”

“Overview of the Right to Sell Wines” and

“The Legal Personal Protection of the Wine Entrepreneur in France and Europe.”



16) XIV LATIN AMERICAN NOTARIAL SESSION

PUNTA CANA, DOMINICAN REPUBLIC, JUNE 3-6, 2010

The XIV Latin American Notarial Session was held in Punta Cana, Dominican Republic, on June 3-6. The following topics were discussed:

I: "Legal Certainty in Transactions Involving Goods and Rights, with Special Emphasis on Legality Control and the Use of New Technologies in the Notarial Field";

II: "The Notary as Guarantor of Personal Rights. Thoughts on the Benefits of the Notarial Activity for Persons as Holders of Rights and Obligations;" and

III: "The Scope of the Notarial Activity in Non-Contentious Matters. Experiences in Latin America."

Conclusions: See Chapter 4: Legal Notarial Issues.

17) THIRD CONVENTION OF MEDITERRANEAN JURISTS, CONTINENTAL LAW FOUNDATION

ROME, ITALY, JUNE 7-9, 2010

The professionals of law of over 25 countries met in Rome, Italy, from June 7 through 9. The topic discussed was: "Small and Medium Sized Enterprises in the Euro-Mediterranean Area. A Secured Environment for Investments and Payments."

18) THIRD COLLOQUIUM OF EURO-MEDITERRANEAN NOTARIES

ALGERIA, JUNE 20-23, 2010

The Third Colloquium of Euro-Mediterranean Notaries was held in Algeria on June 20 through 23.

The following topics were discussed:

I: "Real Estate Activity;"

II: "Security and Mortgage Loan;"

III: "Alternatives for Conflict Resolution (Mediation);"

IV: "Civil Liability, Insurance and Collective Guarantee."

JULY

19) XI NATIONAL CONGRESS OF PERUVIAN NOTARIES

TARAPOTO, SAN MARTIN, PERU

The XI National Congress of Peruvian Notaries was held on July 24-28 in Tarapoto, San Martin, Peru.

AUGUST / SEPTEMBER

20) MEETINGS OF COMMISSIONS AND PLENARY MEETING OF THE COMMISSION OF AMERICAN AFFAIRS (CAA) OF THE UINL

GUANAJUATO, MEXICO, AUGUST 30-31 AND SEPTEMBER 1, 2010

The meetings of the Commissions and the Plenary Meeting of the CAA were held in the city of Guanajuato, Mexico, on August 30 and 31 and September 1, 2010, respectively.



21) CELEBRATION BY THE AMERICAN NOTARIATS OF THE BICENTENNIAL OF THE INDEPENDENCE,

ORGANIZED BY THE UINL COMMISSION OF AMERICAN AFFAIRS ON
OCCASION OF THE BICENTENNIAL OF THE INDEPENDENCE OF THE COUNTRIES
GUANAJUATO, MEXICO, SEPTEMBER 2-4, 2010

In commemoration of the “BICENTENNIAL OF THE INDEPENDENCE OF MEXICO”, the CELEBRATION BY THE AMERICAN NOTARIATS took place in the State of Guanajuato, on September 2-4, 2010, with the attendance of renowned specialists. The purpose of the event was to strengthen bonds among independent nations, exchange experiences and enjoy the celebration. The event was addressed to notaries, lawyers, governmental agencies and the public in general.

The representatives of Argentina, Bolivia, Ecuador, Mexico, Paraguay, Venezuela, Chile, Colombia and El Salvador coordinated political, economic, social and cultural activities related to the Bicentennial, which involved the participation of their provinces. The member states of the International Union of Notaries were invited to the event.

THE GENERAL PROGRAMME WAS AS FOLLOWS:

WEDNESDAY, SEPTEMBER 1

Welcome reception. Orientation and registration desks.

Welcome toast.

THURSDAY, SEPTEMBER 2

Opening ceremony by the Constitutional Governor of the State of Guanajuato, Mr. Juan Manuel Oliva Ramírez

MASTER CONFERENCE

Speakers:

Ms. Guadalupe Jiménez Codinach,

Mr. Rafael Estrada Michel,

Father Manuel Olimón and

Ms. Alicia Mayer.

Moderator: Carlos Silva.

Topic: “Sources in History and Notarial Archives in the Independence Process.”

Lunch

Guided Tour to the Guanajuato Bicentennial Fair

Delivery of recognition plaques from the Presidents of the Notary Associations to the Presidents of the Union, the Commission of American Affairs and the host notariat.

Ball and Show. Tasting of Mexican dishes.

FRIDAY, SEPTEMBER 3**MASTER CONFERENCE**

Speaker: Josefina Zoraida Vázquez

Topic: “Independence in Mexico and International Context.”

INTERNATIONAL NOTARIAL PANEL

Speakers: Notary Ana Manuela González Ramos (Paraguay); Notary Daniel Oscar Ruiz (Argentina); Notary Dennis Martínez Colón (Puerto Rico) ; Ms. María Elena Chico de Borja (Mexico)

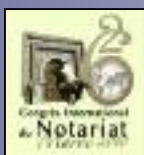
Moderator: Notary Bernardo Pérez Fernández del

MASTER CONFERENCE

Speaker: Jean Meyer

Topic: “People’s Involvement in the Insurgent Movement of Father Hidalgo.”

Formal Closing of the academic event by the Constitutional Governor of the State of Guanajuato, Juan Manuel Oliva Ramírez.

DINNER**22) MEETINGS OF THE UINL COMMISSIONS**

MARRAKECH, MOROCCO, SEPTEMBER 29-30 AND OCTOBER 1-3, 2010

The different Commissions of the UINL (Consulting, International Notarial Cooperation, Strategy and the Supervisory Financial Council) will meet on September 29, 2010, while the Management Board and the Commissions of Deontology, Topics and Congresses, Human Rights and Notarial Social Security will meet on September 30th. The meeting of the General Council will be held on October 1st and, finally, the Assembly of Member Notariats will gather on October 2-3.

Legislature 2008-2010

**23) INSTITUTIONAL ACTIVITY OF THE 2008-2010 LEGISLATURE.**

PRESIDENCY OF NOTARY EDUARDO GALLINO

Below is a brief summary of some of the multiple and remarkable institutional activities of the UINL performed during the 2008-2010 Legislature:

MEETING OF THE MANAGEMENT BOARD

IT WAS HELD ON MARCH 7, 2008, IN BUENOS AIRES, ARGENTINA

THE FOLLOWING TOOK PLACE AT SUCH MEETING:

- A proposed Amendment to the UINL General Regulations on Languages – Election;
- Notary Mario Miccoli was designated head of the Administrative Secretary (SA) of the UINL;
- The composition of the ONPI, CAAf, CAA, CAE, CNNI, CC, CSSN, CD and CDH was approved.

- The following Work Teams were created:

WORLD BANK: To handle scientific activities at the World Bank regarding several issues, such as property entitlement and property – colloquium on mortgage loans;

BASES OF MAIN PRINCIPLES: A detail of the main principles of the notariat supporting the UINL's position before political and judicial authorities.

STRATEGY: This team will analyze the future of the profession and the strategies to be adopted in the short and medium terms by the international notariat and the UINL.

PRESS SERVICE: Under the responsibility of the Presidency.

MONEY LAUNDERING AND FIGHT AGAINST TERRORISM FINANCING: It will also be in charge of the Financial Action Group. It is formed by field experts (one per continent), a Spanish notary and a French notary. Purposes: to gather the applicable legislation of each country, determine the level of responsibility of a notary, participate of the Consulting Forum of the FATF (Financial Action Task Force), provide advice to the Management Board and the UINL on related proceedings.

ACCESS TO THE PROFESSION: It somehow replaces the Commission of Young Notaries.

UINL FINANCING: Its purpose is to encourage the different Commissions, especially the Continental ones, to find new sources of funds to finance the costs of meetings, conferences, seminars, etc.

- A study on the concepts of liberalization and regulation – certainty and trust-, was commissioned.
- The proposal of Notary Rzadkowski (Poland) on self-verification and self-managing control to achieve a universal application of the criteria of self-verification of control systems of member notariats, in order to improve the notariat's image, was reviewed. In June 2008, at the Bucharest meeting, the Polish notariat's initiative to send a questionnaire to member notariats regarding their control and discipline was approved. At the suggestion of Decorps, a "scale of proposed sanctions in case of noncompliance detected at an inspection" was added.
- A Liaison Agreement between the UINL and the Council of Notariats of the European Union (CNUE), within the Management Board, was executed.
- Admission criteria for emerging countries: the Management Board suggested to soften the UINL's position regarding the creation of official notaries together with notaries public (in some countries, there is the need to have notaries divided by zones and it is not possible to appoint notaries public in remote and non-profitable regions). THE OPINION WAS RATIFIED IN BUCHAREST (JUNE 2008).
- Role of the CCNI in troubled countries that were recently admitted: the Management Board agreed to send control missions to follow up conditioned admissions, as well as to intervene in troubled countries. If necessary, it was agreed to add other UINL institutions. MANAGEMENT BOARD AGREEMENT, BUCHAREST (JUNE 2008).

MEETING OF THE MANAGEMENT BOARD

IT WAS HELD IN BUCHAREST, ROMANIA, ON JUNE 12, 2008

- The amendments to the Regulation proposed by the Management Board in Buenos Aires and Bucharest were approved.
- Activity of the CAAF-CAA and CAE and relation with other legal professions. Getting closer to other international legal associations (Magistrates, Lawyers, Huissiers (legal officers), Court Clerks, Land Surveyors) as a common strategy in view of economists' attacks. The Honorary President Laurini will be in charge of reestablishing contact with such organizations.

- The creation process of a Commission of Asian Affairs was resolved: it was suggested to create a commission formed by Asian countries and some neighboring notariats interested in providing assistance (France, Canada). The Management Board commissioned the CCNI to hold a FORUM of Asian countries.
- The CCNI was authorized by the UINL President to arrange a support mission in Armenia, consisting of one or two representatives of the CCNI, Honorary President Fessler and a CAE representative.
- International Institute of Notarial Services (INSI) and World Notaries Network: The INSI's proposal consisting of the following documents was approved: Background; Supporting Report; Draft of Bylaws; World Notaries Network (RMN); Procedures Guidelines; Civil and Tax Regime of the INSI Foundation in Spain. The opinion of the CC and COE on the convenience of adopting and supporting the proposal for its presentation at the meetings of the General Council and the Assembly of Member Notariats in Quebec 2008 was requested.
- The GT was requested to submit the final draft of the text "Basis of the Latin-type Notariat's Principles" for its approval in Quebec.

REPORT ON MATTERS OF THE CNUE'S CONCERN:

ZERP REPORT; NATIONALITY REQUIREMENT; EUROPEAN AUTHENTIC ACT: the General Assembly of the CNUE, at the initiative of the French government, adopted a draft of Regulation on the mutual recognition of authentic acts; AUTHENTIC ACT BID: The CNUE answered the invitation (limited bid) of the European Parliament regarding an external comparative study on authentic acts.

MEETING OF THE GENERAL COUNCIL

IT WAS HELD IN BUCHAREST, ROMANIA, ON JUNE 13, 2008

- The UINL President attended the 104th Congress of French Notaries. The topic discussed was "Sustainable Development."
- The UINL member notariats were invited to celebrate the 60th anniversary of the organization with special events on scientific, cultural and political matters, with media coverage from the respective countries.
- The following congresses were held: XX Congress of African Notaries, University of Cameroon; XXVI UINL Congress in Morocco.
- A forum of Asian countries will be held by the CCNI to set the basis for the creation of an Asian Continental Commission and determine its conditions.
- UINL GENERAL REGULATION: The General Council agreed to the amendments proposed to the text of the General Regulation, based on the decisions made by the Management Board at the meetings held in Buenos Aires and Bucharest (text submitted to the consideration of the Assembly of Member Notariats, Quebec, November 2008).

MEETING OF THE MANAGEMENT BOARD

IT WAS HELD IN QUEBEC, CANADA, ON NOVEMBER 5-8, 2008

- INSI's Creation Project: The creation of a limited work team was proposed to draft an economic and financial feasibility study. World Notaries Network: The initiative to create a World Notaries Network was approved.

MEETING OF THE GENERAL COUNCIL

IT WAS HELD IN QUEBEC, CANADA, ON NOVEMBER 6, 2008

- The website of the AMERICAN NOTARIAL ACADEMY was presented, a virtual site including articles of general interest.

MEETING OF THE ASSEMBLY OF MEMBER NOTARIATS

IT WAS HELD IN QUEBEC, CANADA, ON NOVEMBER 7-8, 2008

MEETING OF THE MANAGEMENT BOARD

BRUGES, BELGIUM, FEBRUARY 6, 2009

- Resolution of the European Parliament on the European public document; enforcement and perspective both in Europe and internationally. Result: immediate regulation of the circulation of public documents throughout the European legal space.

WORLD NOTARIES NETWORK

RESOLUTION:

- To create a World Notaries Network consisting of designated representatives of each Notariat.
- To have its activities supervised by the Administrative Secretary.
- Network's Scope of Activity:
 - a) Assistance in connecting notaries of member states;
 - b) search for notaries fluent in a certain language;
 - c) general information useful for the notarial activity;
 - d) information on acts requiring notarial certification;
 - e) posting of legal texts and other provisions.
- To provide that the Network will not give legal advice and that, in any event, any information provided is not the responsibility of the member notariats, the Union or any person or entity reporting to them.
- The technical supervision of the Network shall be entrusted to the Administrative Secretary, which shall receive a copy of all messages until more advanced technological tools are defined, depending on the available resources.

MEETING OF THE MANAGEMENT BOARD

LONDON, GREAT BRITAIN, JUNE 11-13, 2009

MEETING OF THE GENERAL COUNCIL

LONDON, GREAT BRITAIN, JUNE 12, 2009

MEETING OF THE MANAGEMENT BOARD

PARIS, FRANCE, NOVEMBER 11, 2009

RESOLUTION**NOTARIAT OF MAURITIUS: ADMISSION OF THE NOTARIAT OF MAURITIUS**

The Management Board unanimously issued a favorable opinion for the admission of the Notariat of Mauritius.

MEETING OF THE GENERAL COUNCIL

PARIS, FRANCE, NOVEMBER 12, 2009

SECOND ORDINARY MEETING OF THE ASSEMBLY OF MEMBER NOTARIATS

PARIS, FRANCE, NOVEMBER 13-14, 2009

- Resolution of the European Parliament recommending the EC to create, as soon as possible, a Regulation on the Mutual Recognition and Enforcement of Authentic Acts in Europe.
- In March of 2009, the CNUE adopted the following definition of authentic act regarding community property. “Authentic act is a document that has been formally drawn up or registered as an authentic instrument, and the authenticity of which relates to the signature and content of the instrument and has been established by a public authority or other authority empowered for that purpose by the member State in which it originates.”
- The World Notaries Network is successfully operating and will be added to the European Judicial Network.
- RESOLUTION: The Assembly of Member Notaries of the Union, gathered in Paris on November 13, 2009, unanimously recognizes the Chamber of Notaries of Mauritius as the official entity representing the notariat of the Republic of Mauritius, and admits it as a member of the International Union of Notaries, with all rights and privileges associated with its capacity as a member. The official admission ceremony will be held by the Assembly of Member Notariats in Marrakech, Morocco, in October 2010.

NOTE: The above activities are just some of the multiple and beneficial tasks performed during the 2008-2010 Legislature.



CURRENT EVENTS

3

CHAPTER

3.1. REVISED EUROPEAN CODE OF NOTARIAL DEONTOLOGY

On December 11, 2009, the Assembly of the Council of Notariats of the European Union (CNUE) approved its Revised Code of Notarial Deontology. The Honorary President of the National Chamber of Notaries of Belgium, Alain Deliège, was responsible for the work team in charge of drafting such document.

The sections of the previous Code were restructured by the work team to adjust the moral rules to the practice of the profession in Europe and further increase the value of the services rendered by the notaries in the community domestic market.

The European Code of Deontology is articulated around nine principles common to all member notariats of the Union, from which the duties that all Notariats are expected to carry out consequently derive.

It is specially recommended that the cooperation among the notariats of the different member States be strengthened in order to improve the circulation of authentic instruments, as well as the start up of the European Notarial Network.

The new Code specifically refers to cross-border transactions.

In addition, the new Code stresses its loyalty to the State and its compliance with the laws, assuming the commitment, participation and collaboration in the fight against money laundering.

SOURCE: Revista Escritura Pública, January-February 2010

3.2. REVISED EUROPEAN CODE OF NOTARIAL DEONTOLOGY

PREAMBLE

The European legal and judicial space, the free movement of persons and the free circulation of capital and goods in the member States of the European Union generate a constant increase of exchanges and transactions and, in general, of legal transactions with a foreign element.

The notary, as a public official and delegatee of the public authority, who practices a liberal profession, is subject to the applicable legislative and regulatory rules of the State in which he or she has been appointed. The notary is an independent, impartial and objective advisor to all parties involved in a transaction, analyzes the parties' intentions, draws up the contracts and instruments required for the intended transaction, and verifies that the contractual clauses fully comply with the law.

The notary also verifies the intellectual and legal capacity of the parties to enter into an agreement, ensuring that they have perfectly understood the legal consequences of their commitment.

The geographic distribution of notary's offices in each state allows citizens to have easy access to a notary. The notary must comply with the deontological rules applicable to the profession in the State in which he or she has been appointed.

European notaries have decided, based on a comparative study of all deontological rules governing the profession in the different member States of the European Union, to have a common set of deontological principles.

The purpose of this code is not to replace national deontological rules, but to affirm the common characteristics of the profession, regardless of the country involved, and set directives for cross-border transactions.

The European Code of Notarial Deontology is a testimony of the profession's will to guaranty citizens and companies the same protection, legal certainty and effectiveness, both in cross-border and national transactions.

The diversity of legal transactions and the constantly increasing frequency of foreign elements in the instruments led European notaries to review the terms of their collaboration to secure citizens and companies the assistance and advice required in cross-border transactions.

European notaries understand the advantage of using new technologies to improve their service, always complying with deontological principles.

1. DEFINITIONS

The European definition of “**notary**” derives from the common core of the respective national concepts, generally defined by the law of the member States, and was established in a resolution unanimously adopted by the member Notariats of the Council of Notariats of the European Union (CNUE) on March 22 and 23, 1990, in Madrid:

*“A notary is a **public official** whose **authority has been delegated by the State** to provide **authenticity** to instruments drawn up by them, the **preservation, evidentiary value and enforceability** of which he or she secures.*

*For their activity to have the necessary independence, a notary practices the same as a **liberal profession**, including all **non-contentious** legal activities.*

*Both for the **advice impartially but actively given to the parties** and the drafting of the resulting authentic instrument, the notary's involvement provides the holder of the right with the **legal certainty** required by them.*

*This legal certainty is assured because the notary is a **specialist of law with an important university qualification**, who practices the profession after several exams, internships and selection processes by examination, pursuant to strict **disciplinary rules** under the permanent control of the public authority and thanks to a **geographic distribution** that allows access to notarial services across the national territory.*

*Finally, the notary's involvement, **which prevents any possible litigation**, is an essential mechanism for the administration of good justice.”*

2. COMMON PRINCIPLES

2.1. PREVENTIVE JUSTICE

To prevent conflicts, the notary is in favor of clear and fair agreements for which he or she has obtained the informed consent of the parties.

The notary has always been a factor of social peace. In case of disagreement between the parties, the notary always tries to reconcile them. He is required to inform them about the existence, characteristics and advantages of some forms of solution known as alternative dispute resolution processes, mainly mediation.

2.2. LEGAL CERTAINTY

The notary ensures the legal certainty of transactions, mainly by accurately defining the rights and obligations of each contracting party. The notary certifies that the agreements in instruments drawn by him or her are fair, and controls their legality.

2.3. LOYALTY TO THE STATE

The notary has a duty of loyalty to the State from which he or she received the delegation of public authority. The notary acts every time he or she is legally required to do so, under the law of their State. He or she participates in the fight against money laundering, by collaborating and providing the necessary information to the competent authorities, pursuant to the law of their State. The notary shall abstain from performing any act contrary to the dignity of his or her mission as public official.

2.4. SERVICE TO THE PUBLIC

The notary exercises his or her functions with honesty, availability and diligence.

The notary has the duty to inform the parties about the contents and effects of the instruments in which they are involved, and to give full advice. He or she will use the most appropriate resources to obtain the results sought by the parties, in compliance with the applicable law.

The notary verifies the identity, capacity and quality of the consents of the parties, and controls the legality of their agreements. He or she will be personally involved in drawing up the instrument.

2.5. IMPARTIALITY AND INDEPENDENCE

The notary has the obligation to advise and act with full impartiality and independence. The notary's role is that of a trusted third party for the parties. The notary cannot draw up instruments including provisions that are directly or indirectly favorable to him or her.

2.6. CONFIDENTIALITY AND PROFESSIONAL SECRECY

The notary is required to keep the professional secrecy and has a confidentiality obligation, especially in his or her correspondence and regarding the conservation of files and instruments, either digitally or on paper, as provided in the rules applicable to their country.

These obligations are not only applicable to the notary, but also to his or her partners and collaborators, as provided in the provisions applicable to each country.

2.7. LIABILITY

The notary shall be liable for all damages attributable to him or her in the exercise of their functions and insures this liability.

The deposit of funds held by the notary on behalf of his or her clients is subject to the law of his or her State.

2.8. CONTINUOUS EDUCATION

The notary is required to update his or her knowledge, both legally and technically, as well as to control and promote his or her collaborators' improvement.

Each member notariat of the CNUE makes available to its members continuous professional training instruments, especially as regards the application of new technologies in the notarial activity.

2.9. BROTHERHOOD

The notary shall be an example of brotherhood with other notaries.

Notaries will assist each other in the exercise of their functions and avoid any kind of unfair competition. When several notaries work on the same case, they must jointly find a common solution to secure the interests of all parties, as well as the respect for legislative and regulatory provisions in force.

3. CROSS-BORDER TRANSACTIONS

Since the drawing up of authentic instruments, as in the case of judicial decisions, represents an exercise of public authority, notaries, like judges, only exercise such function within the borders of the State from which they received a delegation of the public power. However, this does not prevent notaries from collaborating beyond borders for citizens to rapidly and easily receive the legal advice and assistance they need.

In this chapter, the terms used below have the following meaning:

“cross-border transaction”: a transaction including a foreign element; for example, the location of the property subject matter of the intended transaction, the nationality, domicile or habitual residence of the parties, or the place of execution of the instrument.

“notary from the receiving country or national notary”: a notary with territorial jurisdiction to authentic instruments under the national law of each member State.

“notary of the country of origin or foreign notary” (or non-national notary): a notary of a member State other than that where the instrument is executed.

3.1. GENERAL RULES

3.1.1. RESPECT FOR DEONTOLOGICAL PRINCIPLES

For cross-border transactions, the notary will comply with the law of the receiving country, the law of his or her country of origin and the provisions of this code of deontology.

3.1.2. JURISDICTION

The notary or notaries with territorial jurisdiction will be in charge of the file and are the only authorized to issue the instrument.

3.1.3. FREEDOM TO CHOOSE A NOTARY

Any natural or legal person is entitled to consult a notary of their choice, request his or her advice and ask such notary to assist the notary with territorial jurisdiction, with the liability inherent in their respective functions.

3.1.4. INFORMATION TO THE CLIENT

The foreign notary collaborating with the notary with territorial jurisdiction is required to inform his or her client, from the beginning, about the extent of his or her services, as well as the resulting amount of expenses and fees pursuant to the applicable regulations.

The client must always pay the notary's fees, regardless of other bilateral agreements.

3.1.5. COLLABORATION BETWEEN NOTARIES

The notary assisting his or her client abroad must notify the notary with territorial jurisdiction, as soon as possible, about his or her involvement and agree with such notary on the terms of their collaboration.

The national notary will timely deliver to the foreign notary all elements required to give advice.

The notary will treat his or her colleague with due respect.

3.1.6. ADVERTISING

The notary has the right to inform his or her clients and the public of the legal services rendered by him or her, to the extent allowed both in the country of origin and in the receiving country. In any communications to the public, the notary will omit information that may affect his or her independence, impartiality and capacity as public official.

The notary may not accept any third party's advertising in his or her favor.

Any member notariat of the CNEU and CNUE itself may provide joint information for the specific purpose of providing citizens and companies with an easy source of information.

3.1.7. CONFLICTS BETWEEN NOTARIES

In case of any professional conflict between notaries of different member notariats of the CNUE, each notary will refrain from taking legal actions before making an attempt at reconciliation.

3.2. MEANS

3.2.1. COOPERATION BETWEEN NOTARIATS

To continuously improve the quality of the notarial service provided to European citizens and companies, the member notariats of the CNUE will cooperate and share their experiences.

3.2.2. EUROPEAN NOTARIAL NETWORK

In any cross-border transactions where it is necessary, the notary will get in touch with the contact of the European Notarial Network of his or her country.

The European Notarial Network, whose purpose is to assist notaries facing pragmatic issues involving cross-border aspects, will be subject to the guidelines adopted by the General Assembly of the CNUE.

3.2.3. INFORMATION AND COMMUNICATION TECHNOLOGIES

The notary uses information and communication technologies to improve the quality of the notarial service, as well as to comply with the applicable law and this code of deontology.

The notary uses information technology tools made available by the notariat of which such notary is a member and by the CNUE.

The notary will be liable for his or her electronic signature, the use of which is strictly personal.

4. FINAL PROVISIONS

4.1. ARBITRATION

All issues related to the interpretation or application of this European Code of Notarial Deontology, as well as all cases not contemplated herein, shall be submitted to the decision of the President of the CNUE, after review by the member notariat of the CNUE of which the notary who has raised the issue is a member.

4.2. TERM

The European Code of Deontology and its amendments will become effective as from their approval by the General Assembly of the CNUE.

Reform adopted by the General Assembly of the CNUE on December 11, 2009.

3.3. MAURITIUS – SUPERIOR COUNCIL OF THE FRENCH NOTARIAT (CSN): SIGNING OF COOPERATION PROTOCOL

The National Chamber of Notaries of Mauritius and the Superior Council of the French Notariat signed a cooperation protocol on December 4, 2009. Pursuant to such protocol, both notariats will work, mainly, on the drafting of a deontology code, the creation of a guaranty fund, the execution of a joint agreement of professional liability and the implementation of inspections. In addition, such protocol will regulate the organization of professional training meetings that, at first, will deal with deontology, the practice organization and real estate sales, as well as with assistance in the digitalization of studies as a way to facilitate the installation of offices to provide notarial services.

The Parliament of Mauritius adopted its notary law on May 8, 2008.

Source: Notaires Vie Professionnelle, January-February 2010 –No. 279.

3.4. CNUE (COUNCIL OF NOTARIATS OF THE EUROPEAN UNION)

In a ceremony held on January 14, 2010, Roberto BARONE, an Italian notary, assumed as President of the Council of Notariats of the European Union (CNUE), which represents all European notaries and institutions. He succeeded the previous president, French notary Bernard Reynis. Before this position, Notary Barone served as President of the Italian National Council and, as a Councilor, was in charge of international relations.

Notary Barone's priority during his term of office will be to strengthen cooperation with European institutions and offer them the CNUE's experience.

The European notaries, in turn, in order to provide the European citizens with a space of justice, safety and freedom without internal borders, will focus their attention and work in 2010 on the following areas of interest:

- The work of the Stockholm Programme;
- The circulation of authentic instruments in Europe;
- The adoption of the European certificate of succession;
- The provision of conflict of law rules in family law;
- The access to law regarding cross-border transactions, particularly by the development of the e-justice and the European Notarial Network.

The CNUE was organized in 1993, and consists of twenty one notarial organizations of Europe, and approximately 40,000 notaries from Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia, Spain and Hungary. Croatia has observing member status only.

3.5. LITUANIA: ACUERDO DE COOPERACIÓN EN CIENCIA LEGAL

The Chamber of Notaries of Lithuania and the School of Law of the University of Vytautas have agreed to cooperate in the areas of legal sciences and education.

The agreement was signed by the President of the Chamber of Notaries of Lithuania, Notary Marius Strackaitis, and the Associate Professor and President of the School of Law, Mr. Julija Kirsienė. Both the notary association and the University agreed to offer conferences, seminars and sessions to exchange their experience and practice. The students of the School of Law will be able to work as interns at notary's offices.

The Chamber of Notaries of Lithuania has obtained great results from similar cooperation agreements respectively signed in 2001 and 2003 with the Schools of Law of two of the most important Universities of Lithuania: the University of Vilnius and the Mykolas Romeris University.

Source: www.notarai.lt

3.6. BULGARIA: CENTRAL REGISTRY OF WILLS

Since October 17, 2009, there is a Central Registry of Wills in Bulgaria. Since then, notaries are authorized to file wills-related information directly with the registry and make searches. In this way, Bulgarian notaries will be able to register both holographic wills and those drawn up as authentic acts and attested by and deposited with a notary public. This is a great achievement for the Bulgarian notariat, since its notaries may offer a better service to their clients. Searches in this Registry will be electronically made from the Chamber of Notaries or the notary's offices, benefiting citizens with a speed procedure.

Registration will be mandatory.

The following data must be filed with the Registry:

- First and last names of the testator;
- Date and place of birth;
- Type of will;
- Date of the will;
- Registration date of the will;
- Name and domicile of the depositary notary;
- Date of the testator's death.

Each testator will be identified with an official identification number.

Amendments or reforms, as well as revocations, will be permitted.

Questions to or searches in the Registry will only be mandatory at the request of heirs. Foreign nationals will be allowed to file their wills with this Registry, which shall comply with any requirements made by foreign registries. This last circumstance opens the possibility to a future link with the European Registry of Wills, a project of European Notaries.

SOURCE: CNUE Newsletter

3.7. CONCLUSIONS OF THE XIV LATIN AMERICAN NOTARIAL SESSION, PUNTA CANA, DOMINICAN REPUBLIC – JUNE 2-6, 2010.

TOPIC I

LEGAL CERTAINTY IN TRANSACTIONS INVOLVING GOODS AND RIGHTS, WITH SPECIAL EMPHASIS ON LEGALITY CONTROL AND THE USE OF NEW TECHNOLOGIES

In the commission that discussed topic I, the following PRESENTATIONS were made:

From the Notariat of MEXICO

Authors:

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DAVID FIGUEROA MÁRQUEZ

CARLOS A. DURÁN LOERA

From the Notariat of SPAIN

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Individual Presentation: Notary Federico Jorge Panero from Argentina.

PARTICIPANTS OF THE DEBATE

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Marco Antonio Jiménez- Costa Rica

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NARRATOR

María T. ACQUARONE

An old Dutch proverb says: “You cannot stop the wind but may build windmills.”

We cannot avoid financial crises, but we may use means of preventive legal certainty where the notary and the document drawn up by him or her have a significant role.

PRESENTATION**CONSIDERING**

That international insecurity events have caused deep social, cultural and legal changes that led governments, countries and entire regions to reconsider social and economic policies, which directly affect and will affect the property and rights of millions of inhabitants across the world.

That questioning institutions and core principles that are the basis of democratic life, peace and social justice affects, in an increasingly evident and general manner, transactions involving property and rights that must be protected by the legal order.

The Topic I Commission of the XIV LATIN AMERICAN Notarial Session has arrived at the following CONCLUSIONS:

I- Legal certainty means a person's certainty and knowledge of the applicable rules, the consequences derived therefrom and, upon failure to comply with them, the manner and speed in which the power of the state will address this subject to restore the broken law or conventions.

II- It also means certainty of the holder of an acquired right that he or she will not be disturbed in the exercise of such right and that the legal transaction will be enforceable erga omnes.

III- The notariat has an essential role in securing this certainty, since it provides assistance in the activities under its scope, complements the required legal advice and creates legal certainty in transactions involving goods and rights, with an irreplaceable contribution to the legality control of the documents required to such end.

This is because the Latin-type notarial system, which is stronger, renewed and amenable to the application of new technologies, is prepared, both professionally and academically, to contribute its practice and legal advice to transactions involving other professionals.

IV- Legal certainty is only possible with documentary certainty. Without qualities deterring the falsification or forgery of public deeds in paper form, all requirements, controls and security measures imposed by the legal order will be affected.

V- When verifying and qualifying a registrable document, Real Estate Registries must act within the scope provided by law. If they act within their field of expertise but outside such scope, they will commit an irregular act that may be qualified as ineffective.

VI- Preventive legal certainty, which prevents legal actions, ends and is completed with the notarial act and authorization, in such a manner that legality control is exercised by the notary simultaneously with the execution of the legal transaction. Hence the difference between public registers: some have erga omnes effectiveness when notarial, judicial and administrative documents are filed therewith; other

registers exercise no legality control at the time of conducting the legal transaction, but request a title insurance system.

VII- The legal certainty that the State is required to ensure to society will be seriously affected if a registration system is proposed that delegates more powers to registrars in excess of the extrinsic control of formalities, in which case they would become mere filers of documents formalized on pre-printed forms, deprived of advice, interpretation and adjustment of the law to the will of the parties, with the consequences that such actions may have.

The notary's absence in the making and execution of a transaction secures the failure of any Roman legal system.

VIII- The coordination between the Real Estate Survey and the Real Estate Registry in countries or jurisdictions where such entities are not harmonized is urgent.

IX- New technological tools do not relieve notaries from the notarial activity currently performed by them according to tradition; instead, they represent a new type of contract that does not affect the notarial activity but, on the contrary, revalues the same, by not only giving more emphasis and importance to the notary's involvement in the entire process, but also revitalizing his or her role as an impartial interpreter of the parties' will, as well as a guide, custodian and guarantor of the absence of legal defects in consent, which circumstance cannot be solved by the mere utilization of technology. This leads us to conclude that the notarial activity, through the application of the principles of the Latin notariat, becomes an essential element for the application of new technologies.

X- Under private law, an electronic document without notarial certification is not a public instrument.

XI- Regardless of the position adopted to analyze the nature of the notary's activity, our conclusion is that the performance of a title search as a practice will contribute to provide legal certainty to transactions.

XII- The notary has a significant role in the stock transfer of a corporation, because he or she is a professional qualified to draw up the instrument that will contain the contract. As a professional of law, the notary's presence is indispensable in the team of professionals involved in the drafting of the contract, given his or her possibility of analyzing and developing some aspects of the transaction that no other professional knows better.

XIII- The crisis in the United States of America that resulted in the largest financial bailout in its history was due, among others, to the following causes:

- a) The extension of mortgage loans by Banks, Stock Markets and Companies already heavily in debt;
- b) The overvaluation of real estate so as to encumber them with mortgages that were successively discounted without any documentary control;
- c) The acceptance by registries of documents for registration purposes with no legality control at the time of executing the legal transaction;
- d) The documentation of transactions where the debtor and debt were not duly identified;
- e) The extension of mortgage loans to buyers with scarce possibility of repayment;
- f) The execution of real estate and loan transactions without the involvement of a professional of law, an impartial third party, who could be in turn an official qualified to file a legitimate document with the registry.

All such causes originate under the Anglo-Saxon law system, which does not provide for the involvement of professionals with knowledge in law and an independent Public Official who, to be designated as such, must have an impeccable reputation.

XIV- The notary's collaboration with the administration, as a public official, is essential to avoid tax fraud and money laundering.

TOPIC II

THE NOTARY AS GUARANTOR OF PERSONAL RIGHTS. THOUGHTS ON THE BENEFITS OF THE NOTARIAL ACTIVITY FOR PERSONS AS HOLDERS OF RIGHTS AND OBLIGATIONS.

CONCLUSIONS

CONSIDERING:

That, since its inception, the Latin Notariat has been at the forefront of the defense of human rights, continuously adjusting to the new needs and challenges derived from social evolution.

The result is that, today, such challenges are focused on the protection of socially less privileged or vulnerable persons, the environment, bioethics and the fight against organized crime. To such end, advantage should be taken of new technologies.

VERIFYING:

That, in order to efficiently guaranty human rights, the traditional principles of the Latin Notariat, repeatedly adopted by the UINL, must be reaffirmed.

STRESSING:

That the notarial function ensures high values such as liberty, equality, justice, safety, truth and social peace, which are an inseparable part of the human rights.

That the value and effects of the public instrument are based on certain formalities (immediacy, advice, legality control, writing, document preservation, collaboration with the administration) that, once complied with, will ensure that human rights are upheld.

That, to effectively ensure human rights, formalities such as immediacy, advice and legality control must exist prior to or simultaneously with the issuance of the instrument, at which point the grantors' will must be definitely set and informed and not capable of being modified by subsequent information or qualifications of other officers or operators.

That the Notary's legality control is very important because it is, for people, guarantee of their rights and, for the Administration and society, guarantee of compliance with the legal order.

REAFFIRMING:

That peace and judicial protection are human rights, that the notarial function contributes to the development of social peace, with an important anti-contentious effect, that it alleviates the courts' workload and, if required, that a fundamental service is provided for justice administration, since it complements and supports the judicial activity in furtherance of the same goal.

That the notarial function contributes to enforce rights such as the freedom of commerce, in such a manner that the notary's involvement provides guaranties and trust, both for the individuals exercising their rights and for society, which demands that relationships be developed within a context of transparency and safety.

ACKNOWLEDGING:

- a) That the protection of human rights, especially of vulnerable people, is an obligation and a responsibility of the Latin notariat, as well as of the institutions that represent it on a provincial, national and international level;
- b) That the domestic legislation of the countries should be reformed to adjust them to new international rules, particularly on the issue of the people's capacity and independence to exercise their rights;
- c) That the notary, as a immediate interpreter of legislative reforms, must adjust the actions of the requiring parties to such reforms, fostering through his or her acts the people's participation in matters of their interest, in which case his or her judgment shall be required for the specific instrument to be issued;
- d) That the continuing education and update of the notariat is necessary in order to reaffirm the ethical values of the profession;
- e) That the benefits of mediation for conflict resolution and the notary's training in its mechanisms and tools must be made known within the notarial community and society in general;
- f) That the Latin Notariat is qualified to successfully participate in non-contentious matters in several countries of America and in Spain;
- g) That self-protection acts, regardless of the name given to them, are suitable tools to ensure human dignity and protect vulnerable people;
- h) That the Notary's involvement in entitlement regularization plans and social title deed registrations facilitates the exercise of the right to a decent house for low-income people in marginal areas;
- i) That the Notary's collaboration with other government organizations in the defense of human and society rights and the prevention of and fight against organized crime, money laundering or tax fraud becomes more effective with the application of new technologies in the treatment of information included in notarial records;
- g) That the confidentiality of the notarial document ensures the people's right to privacy but must be in harmony with other rights; therefore, it is consistent with the notary's collaboration with other public authorities during the performance of his or her activities, in cases contemplated by the law where the rights of third parties are guaranteed.

THE FOLLOWING IS PROPOSED

1. Notarial institutions should promote:

- a) Continuing education;
- b) The securing of professional ethics;
- c) The strengthening of social responsibility, especially with respect to the rights of persons in vulnerable situations;
- d) The duration in the position, thus avoiding temporary designations;
- e) The study of new legal tools and professional powers;
- f) The reaffirmation of the social role of the Latin notariat and the diffusion in the community of the benefits of its work, making it an efficient guarantor of the rights of all people.

2. The CAA Integration Committee should include, among the subject matters being studied, mediation, self-protection statements and guardianship foundations, so that, based on the experience of countries that have successfully ventured into these subject matters, it will be possible to promote such activity in other countries where no laws have been passed to such effect.

3. The impact of the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child upon the domestic legislation of each country and its notarial activity should be analyzed by local, national and international notarial institutions. In addition, the participation of such institutions in the drafting of law bills should be promoted in order to adjust the domestic legislation to

related international instruments, considering the system of legal capacity of persons, self-protection rights and guardianship foundations, including the creation of centralized registers of private nature and restricted advertising, trusts and credits for life.

4. The following should be promoted in the same sectors, with specific and effective actions, in order to obtain the highest standards in the notarial activity and its institutional reputation:

- a. A permanent update of notarial-legal education, facilitating the access of notaries of different regions of each country, deepening the study of new legal tools and professional powers, especially those oriented to the protection of rights of persons in vulnerable situations.
- b. Securing technical and moral independence, as well as legal and ethical responsibilities in the performance of the notarial activity, by means of professional superintendence organizations of Judicial Powers or Notarial Associations.
- c. The strengthening of the social role of the Latin Notariat and the diffusion in the community of the benefits of its work, making it an efficient guarantor of the rights of all people and a sensible agent in the combination of individual and collective interests.

5. In countries where the legitimate portion of inheritance represents an excessively high percentage of the inheritance, the possibility of reducing it should be reviewed for the testator to be more at liberty to distribute the same, especially for the protection of heirs in vulnerable situations.

6. Notaries should incorporate new technologies to assist them in their activity and serve as tools for a better performance of their function.

7. The notarial activity coupled with legality control efficiently collaborates in the protection of the environment.

8. The notariat, together with State organizations and intermediate sectors of society, must collaborate with citizens in securing decent houses. Thus, the notarial activity contributes to social and economic progress, the revalorization of the country's real estate property and, consequently, the increase of national wealth and the welfare of its citizens.

TOPIC III

THE SCOPE OF THE NOTARIAL ACTIVITY IN NON-CONTENTIOUS MATTERS (EXPERIENCE IN AMERICA).

THE FOLLOWING WRITTEN PRESENTATIONS WERE MADE
BY SEVERAL NOTARIATS OF AMERICA AND SPAIN:

1. FOR ARGENTINA:

A) SPEAKER: NOTARY CAROLINA ORMAECHEA; and

B) SPEAKERS: NOTARIES LEANDRO POSTERARO SANCHEZ, SELENE POSTERARO SÁNCHEZ, JULIETA GLARIA, GRACIELA CURUCHELAR, LORENA AMELIA BERUTI, VALERIA GOLDMAN, LEANDRO LENZA, EMILIO PABLO SOLARI, MARTÍN JAIME GIRALT FONT, GASTÓN AUGUSTO ZAVALA, MARÍA MARTA L. HERRERA, SANTIAGO JOAQUÍN ENRIQUE PANO, SEBASTIÁN JUSTO COSOLA, ROSANA F. GIMENO AND FEDERICO WALTER RISSO.

2. FOR URUGUAY:

A) SPEAKER: NOTARY ANA BRUNO POLLERO; and

B) SPEAKERS: NOTARIES STELLA BALLETO, MÓNICA CASAVIEJA AND LESLIE FALCA.

3. FOR PERÚ:

A) SPEAKER: NOTARY GERMÁN PALOMINO NÚÑEZ.

4. FOR MÉXICO:

A) SPEAKER: NOTARY NARCISO LOMELÍ ENRÍQUEZ.

5. FOR ESPAÑA:

A) SPEAKER: NOTARY MIGUEL ÁNGEL CAMPO GÜERRI.

PARTICIPANTS OF THE DEBATE:

JESÚS SALAS LIZAU (MEXICO)
CRISTINA ARMELLA (ARGENTINA)
DELEGATE OF PUERTO RICO
DELEGATE OF PARAGUAY
DELEGATES OF COSTA RICA
DELEGATES OF DOMINICAN REPUBLIC
DELEGATES OF PERU

DRAFTING COMMISSION:

MIGUEL ÁNGEL CAMPO GÜERRI
CRISTINA ARMELLA
CAROLINA ORMAECHEA
FRANCISCO XAVIER ARREDONDO GALVÁN

NARRATOR:

FRANCISCO XAVIER ARREDONDO GALVÁN

CONSIDERING:

That the title of this topic refers to two fundamental notions: on the one hand, the Notariat's permanent claim that the capacity to perform activities traditionally included under the Non-Contentious Jurisdiction should be acknowledged; and, on the other hand, the extraordinary complexity of this issue that is even revealed by its own name.

This notarial claim is supported by numerous international and national congresses and sessions of the Notariat, among others: the IV Congress of Spanish Notaries held in Madrid in 1991 and the International Congresses of Mexico in 1965 (VIII) and in 1992 in Cartagena of the Indies (XX), as well as the previous Latin American Notarial Session (XIII) held in Asuncion in June 2008.

However, no criticism (sometimes also internally) is spared to this constant ambition to have a scope of activity in non-contentious matters, when it is sustained that such activity is inconsistent with the notarial function. Actually, many of such opinions are the result of dogmatic mistrust or old habits derived from ignoring our function, let alone the incapacity to determine the limits of the activity.

We want to stress as a fundamental idea one of the conclusions of the XX International Congress of Cartagena of the Indies in 1992, where it was verified "that, actually, the 'Voluntary or Non-Contentious Jurisdiction' is not a real jurisdiction, in a strict and proper sense, because it lacks the indispensable element of the contentious nature or conflict or the *res judicata* effect." We believe that, if this certainty is accepted without prejudices, many of the obstacles affecting its removal from the judicial system will be overcome.

Though the debate on the name also proves to be quite fruitless, it should be acknowledged that this is

an issue of constant concern. Consequently, at the VIII International Congress of Mexico in 1965, it was stated that “the term non-contentious jurisdiction is not satisfactory because it is equivocal, so a specific term should be applied to those acts currently within the general concept of non-contentious jurisdiction that, for their nature, fall under the notary’s scope of activity.” At the IV Latin American Notarial Session held in the city of Mexico in 1988, it was suggested the term “non-contentious procedures or proceedings by a notary.” However, it was at the XX International Congress of 1992 where today’s most accepted term was established, which is the term adopted by this XIV Session: “Scope of notarial activity in non-contentious matters.”

With this term, the adequate purpose of avoiding the term “jurisdiction” is achieved, because, though such term is neutral from a strictly grammatically perspective, in the legal jargon it refers to the activity of judges and magistrates.

However, the solution proposed by the 1992 Congress is not devoid of criticism, as accurately stated by NIETO SÁNCHEZ when he sustains that such term has the inconvenience of not being specific, since all issues included within the notary’s scope of activity are non-contentious. This author concurs in the opinion that the term “administration” should be used, reserving the term “non-contentious jurisdiction” for those issues that, always in a non-contentious manner, continue to be attributed to judges, and to use “voluntary administration” for those attributed to other officials and, in the case of notaries, “notarial voluntary administration.”

Other authors, such as FERNANDEZ DE BUJAN, believe it is advisable to keep the term “non-contentious jurisdiction” as an expression used to pay respect to the tradition of the legal-procedural jargon.

The efforts to determine the terminology may have an instrumental utility for purposes of claiming, by excluding all contentious connotations, the scope of notarial activity. However, in this respect, what really matters is not the term but the description, that is, after determining the jurisdictional and notarial activities, to imply that the specific issue falls within the latter.

We believe that we should reasonably justify the possible scope of notarial activity in each and every non-contentious matter currently under non-contentious jurisdiction.

Due to the foregoing, we will also avoid pretending to distinguish between matters within the typical scope of notarial activity and those that, though not specifically a part thereof, may be included therein. This is due to two reasons.

First, because we are unable to make a clear distinction that would allow us to refer to the existence of a homogenous group of proceedings included in the typical notarial activity beyond which we may only refer to atypical or additional activities. On the contrary, the Notariat performs an activity to which the legal order, because of the Notariat’s historical and present significance, assigns several functions of quite different nature to satisfy the diverse needs of our social system. In addition, neither the former are homogenous nor the latter are always the same. The great variety of forms in which a notary may act is evident, as it is also the variety of needs attended to by him or her and their evolution in time.

Second, because, as regards the issue under analysis, we believe it is hardly useful to try to reveal the existence of such determination, as well as dangerous and strategically senseless the concept of additional activities.

What really matters is to know how to determine in this respect the scope of activity of the Notariat, that is, the constitutional principles and those specifically inherent in the notarial function, without prejudice of weighing the timing reasons for the assignment of each such activity of Non-Contentious Jurisdiction to the Notariat, assessing the benefit that each specific case may bring to society.

There are many other issues that are subject to debate within the non-contentious jurisdiction. The relationship between issues that are or not inherent in the same is being discussed, as well as the issues that must be or not removed from the judicial system, the officials upon whom they may be delegated, and the activities that are already performed by notaries or must continue to be claimed.

A special mention should be made to the problem of the effects of a potential opposition: if it distorts or not the institution. This issue is extremely important not only from a theoretical perspective but also as regards the practical approach of whoever “administers the file”

Finally, also by proposing a legal mechanism to regulate the assignment of activities to the Notariat, there are two options: either to work on a certain list of assignable matters specifying the laws to be amended, or claim a general and comprehensive regulation through a single law.

Both possibilities cause serious inconveniences. In particular, while the first option is challenged by the doctrinal difficulty of compiling such list in light of the very different opinions mentioned above, the second option must overcome the obstacle of achieving a resolute political disposition.

Despite all that, there certainly is a point on which authors and institutions are unanimous: the urgent need to unburden the workload of Courts and Tribunals, allowing them to focus on jurisdictional matters. There is a double demand.

On the one hand, it is essential to unburden the workload, since in the last decades the initiation of legal actions for all types of conflicts has increased so considerably that it has congested, or even paralyzed, justice administration, resulting in unjustifiable delays at present. Today it is an unavoidable social need to have issues and conflicts heard and resolved by jurisdictional bodies without more delays than those derived from the respect for the principle of legal certainty and the procedural due process.

The Constitution, when referring to the effective judicial protection, demands a process without unjustified delays.

On the other hand, their focus should be on strictly jurisdictional matters. Not only for the above reasons, but also due to a requirement derived from the constitutional principle of separation of powers. SÁNCHEZ BARRILAO, quoted by Nieto Sánchez, refers to the fact that adding non-jurisdictional activities to judges and magistrates can only increase their already high workload, which results in ignoring the exercise of the jurisdictional power, in addition to increasing their power in matters corresponding to other powers. To add up, such assignment, if not coupled with sufficient human and material resources, could even be considered unconstitutional, insofar as it hinders the exercise of the actual jurisdictional function.

Therefore, legislative measures that, on the one hand, are aimed at improving the structure and operation of judicial bodies and, on the other, are focused on limiting their involvement in strictly jurisdictional activities, thus delegating the remaining activities to other governmental officials and bodies, are essential.

Due to the foregoing, we may predict that the Notariat’s objective that its scope of activity in non-contentious matters, currently attributed to the Non-Contentious Jurisdiction, be recognized will not be soon achieved on a general basis. The constant struggle to obtain such recognition will continue case by case, activity by activity.

The Commission in charge of drafting the conclusions of Topic III of the XIV LATIN AMERICAN Notarial Session, after hearing the presentations by the different speakers and the opinions expressed in the debate, has arrived at the following **CONCLUSIONS**:

FIRST: The State has to provide and secure legal certainty through the notary public who, as a professional of law, has a public role for which he is invested with authority.

SECOND: A practicing notary serves, for purposes of the law, to prevent litigation and is further recognized as an active collaborator in the administration of justice.

THIRD: The jurisdictional purpose consists in judging and enforcing judgments, and exclusively falls upon the judicial power of each state.

FOURTH: The need to unburden the workload of judicial bodies and expedite the administration of justice makes it advisable to expand the scope of the notarial activity to include non-contentious matters.

FIFTH: In countries where the scope of the notarial activity in non-contentious matters has been acknowledged, the experience has been successful, especially in terms of property, family, domestic partnerships, celebration and dissolution of marriages, testate and intestate successions, among other matters.

SIXTH: States are advised to include or amend, if applicable, their legislation to reflect the notarial activity in non-contentious matters.

SEVENTH: For reasons that are historical and inherent in the notarial activity, the notary should be empowered to act in matters of testate or intestate, mortis causa successions, without any other legal assistance.



LEGAL NOTARIAL ISSUES

CHAPTER 4



4.1. INFORMATION TECHNOLOGY CHALLENGES FACED BY NOTARIES

BY FRANCISCO XAVIER ARREDONDO GALVÁN²

S U M M A R Y

- 1.- The notary: an obsolete legal occupation?;
- 2.- The notary currently tied to paper documents in support of his or her activity;
- 3.- The traditional way of authenticating documents: handwritten signature and official seal;
- 4.- The main challenges of information technology faced by notaries;
- 5.- E-commerce and electronic contracts;
- 6.- Electronic signature, digital signature and certifying agents;
- 7.- Two types of digital documents:
 - a) in paper form; and
 - b) in electronic form;
- 8.- Information technology challenges faced by notaries:
 - a) with respect to e-commerce;
 - b) with respect to digital signature;
 - c) with respect to electronic contracts; and
 - d) with respect to digital documents.

Final conclusions. Bibliography.

1. THE NOTARY: AN OBSOLETE LEGAL OCCUPATION?

Some foretellers and futurologists affirm that the notarial activity is a dated legal occupation incapable of adapting to the requirements of the present time and, therefore, doomed to disappear in the face of new adjustable mechanisms and instruments, which are simple and inexpensive.

OBSOLETE?

Obsolete means: old fashioned, dated, surpassed by new technologies or fashion. The question we honestly make today is: Do you believe that fashion or new information technologies make a Notary obsolete? As to any question, some people affirm that the notary is an occupation on the verge of extinction, a decadent activity with no future or place considering the accuracy, speed and efficacy of Information Technology, Cryptography and Telematics; but there are others, like me, who believe the Notary is an occupation that will remain intertwined with future social life, since it naturally derives from society and, in time, will adjust to the signs of time, as it has always done, knowing how to use new information technologies as power tools that will improve his or her performance, utility and effective continuation in the market.

The notarial function is not and will not be obsolete; what appears to become obsolete is the manner in which the notarial service is

provided, on the basis of the traditional document only in paper format. Today, the notary needs to wake up and adjust to the demands and transformations of current life, as discussed below.

THE NOTARIAL SERVICE IS USEFUL AND DYNAMIC

The notarial public service is useful and dynamic in society, because it was not born from the creative talent of man or by governmental decree, or in an artificial manner from capricious moods of fashion. Instead, such legal activity is the result of a natural claim by the Community for more legal certainty in legal transactions. The involvement of the notary in the Latin world is essential to maintain harmony in businesses and social peace among citizens.

WHO IS THE NOTARY?

In simple words, the notary is a professional of law to whom the State delegates the power of public trust, who is in charge of receiving, interpreting, drafting and providing formality and legal certainty to the will of the persons consulting him or her for the execution or certification of legal acts through the issuance of authentic instruments. However, a definition is not enough to picture the complex actions of a notary. Such activity must be described.

WHAT DOES A NOTARY DO?

Often, people tend to identify the notarial function as the typical main activity of the notary, which is wrong, because the notary provides legal certainty through the performance of several activities, among which the following eight are worth mentioning:

- **ADVICE:** The notary offers legal advice to any requiring person, institution or company, within the framework of an institutional mandatory service to citizens;
- **WILL INTERPRETATION:** The notary receives and interprets the will of the people requesting from him or her a specific notarial service;
- **FORMALITY, LEGALIZATION AND AUTHENTICATION:** The notary provides the formality required by law, that is, he or she gives full legal validity to certain legal acts and transactions that must be mandatorily certified by a notary, and further guarantees that his or her product, that is, the authentic instrument, complies with the law and has been granted by whoever has the right and capacity to do it;
- **PUBLIC TRUST:** The notary provides authenticity and legal certainty to certain legal acts and transactions, by entering the same in the Book of Notarial Records, thus investing them with full evidentiary value enforceable against third parties;
- **AUTHENTIC INSTRUMENTS:** The notary is the author of the notarial public instruments that circulate with full evidentiary value and are enforceable against third parties. The notary keeps issued and authorized original documents in the Book of Notarial Records and issues an authentic and enforceable first certified copy and, at the request of the interested parties, makes unlimited authentic copies thereof;
- **AUXILIARY OF THE PUBLIC ADMINISTRATION AND JUDICIAL POWER:** The notary acts as an auxiliary of the local and federal public administration, providing reports and communications, and serves as an efficient collector of federal and local taxes, with the capacity as auxiliary in the administration of justice of the Judicial Power;
- **NEW ROLE AS INTERNATIONAL ADVISOR:** This new role vested by law allows the notary to act as an expert in National Law, which will enable him or her to issue legal opinions and express his or her view as a national jurist in international trade; and

- **MEDIATOR, CONCILIATOR AND ARBITRATOR:** The notary acts as a mediator, conciliator and arbitrator in the prevention and out-of-court resolution of controversies, thus reducing the workload of judicial bodies and preserving peace in society.

2. THE NOTARY TIED TO PAPER DOCUMENTS IN SUPPORT OF HIS OR HER ACTIVITY

The legal system currently governing the notarial activity limits the notary's activity to documents in paper format. It seems as if History has tied the notary to the use of paper. Why paper?

PAPER: THE BASIS OF THE TRADITIONAL DOCUMENT

Since its invention, paper has been man's preferred material for documents. Paper is so important that, when the law talks about documents it refers to paper documents where legal acts or transactions are instrumented. When we refer to a contract, we mistake it for the material used (paper), where the text of the contract is written and, in our mind, we imagine the bunch of written pages of paper.

WHY THE PREFERENCE FOR PAPER?

As explained by the Spanish notary DE PRADA GUAITIA in his presentation: "Digital Document and Legal Certainty," there are three reasons to choose paper as the format for written material:

- 1- For the long-lasting feature of paper. Throughout the centuries, paper has proven to remain and preserve the graphic signs that characterize it;
- 2- For its alteration difficulties; and
- 3- For the possibility of identifying its author and the parties involved by their handwritten signatures on the document describing the legal act or transaction in question.

Under the legal system governing the notarial activity, the following principles are applicable to such activity, all of them based on paper:

- **THE NOTARY DRAWS UP DOCUMENTS**

In his or her profession, the notary necessarily has to draw up a paper document describing the act that has occurred before him or her or the execution of a legal transaction that will meet the legal formality requirement upon his or her involvement. The notary is a natural writer of papers. When a notary authenticates acts that have occurred before him, he or she leaves record of such circumstance on paper; when the notary acknowledges the will of the parties in a purchase and sale transaction, he draws up a paper document for recording purposes, and when a testator unilaterally declares their last will, the notary is obliged to write down on paper the testator's decision.

- **FOLIOS: THE NOTARY'S OFFICIAL STATIONERY**

The security paper folios that constitute the Book of Notarial Records are the pages of the official stationery that the notary is required to use to record notarial acts and deeds. The folios are the material basis of the notarial public instrument. The Book of Notarial Records consists of 200 bound folios. These folios are exclusively provided to notaries by the Notary Association and are the only papers on which acts or deeds may be certified. Besides folios, notaries use paper pages to record official proceedings, such as service requests, letters, first certified copies, certified copies, certifications, etc.

- **PRINTING ON FOLIOS:**

To record acts and deeds on folios, writing or printing procedures that are firm, indelible and legible shall be used. The usable portion of the folio shall be used to its maximum extent, there will be no blank spaces

and the printed lines shall be equally distant from each other, except in the case of document reproduction, which may be instrumented by transcribing the text in single space lines or inserting its image by any firm and indelible means, including photographs, blueprints and any graphic document in general. The notary is free to choose the procedures to enter instruments on folios, provided they are legible, firm and indelible. The notary may use printers or scanners, if a written text needs to be transcribed or photographs, blueprints or other graphic documents are to be copied.

- **THE AUTHORIZATION OF DEEDS AND ACTS MUST BE ENTERED ON FOLIOS:**

Any temporary or definite authorization by notaries, as well as those to be given by the registrar of the Notarial Archive, must be only entered on the folios corresponding to the instrument in question.

- **THE BOOK OF NOTARIAL RECORDS CONSISTS OF INSTRUMENTS PRINTED ON AUTHORIZED PAPER**

The notary's official activity is limited to paper documents. All paper documents issued by the notary as part of his or her function revolve around the concept of the book of notarial records, which is just a file of papers. In other words, the notary may not proceed outside the book of notarial records, which may be defined as "A set of the following four books:

- FIRST: Books where acts and deeds are entered and authorized by the notary;
- SECOND: Books containing documents or elements attached by the notary to the appendix of authorized acts and deeds;
- THIRD: Books where the notary has entered comparisons; and
- FOURTH: Books containing documents compared by the notary and attached to the appendix".

- **THE NOTARY, CREATOR OF THE FIVE PUBLIC INSTRUMENTS**

The Public Instrument is a paper document with full evidentiary value, which makes it authentic. Notaries are the creators of the most important public instruments, the paper-based notarial public instruments, which are the following five documents:

- 1- DEED
- 2- NOTARIAL ACT
- 3- FIRST CERTIFIED COPY
- 4- CERTIFIED COPY
- 5- NOTARIAL CERTIFICATION

3. THE NOTARY'S TRADITIONAL WAY OF AUTHENTICATING DOCUMENTS: HANDWRITTEN SIGNATURE AND OFFICIAL SEAL

THE NOTARY AUTHENTICATES THE DOCUMENTS DRAWN UP BY HIM OR HER

The legal importance of the notarial function lies not only in the fact that he or she draws up a document, as any lawyer providing legal advice, but in the added value obtained from the notary's involvement, since he or she authenticates the document where the legal act or transaction has been recorded and, consequently, adds a value to such instrument that determines the importance of the notary's activity in the social world.

AUTHENTICATION: UNION OF HANDWRITTEN SIGNATURE AND OFFICIAL SEAL

The authentication implies the indissoluble union of the notary's handwritten signature and the seal delegated by the State to the notary. These two combined elements graphically represent the official nature of the act.

THEY ARE TWO PERSONAL ELEMENTS OF THE SAME PUBLIC OFFICIAL. WHAT DOES IT MEAN?

- **THE HANDWRITTEN SIGNATURE** expresses the person's will; it is a sign of consent to what has been written. The signature is the personal symbol of free will. When a notary signs or initials a document, he or she is expressing their acceptance of the origin and authorship of the written text; and
- **THE OFFICIAL SEAL**, generally metallic and round-shaped, with an exact diameter of four centimeters, is a symbol of the certifying power of the State delegated to the Notary. The State is the Sovereign Power, the supreme entity in charge of managing public affairs for the benefit of most citizens. The State, among other powers, has the power to certify or authenticate, in other words, the public capacity to convey the power of official truth, that is, of indisputable and mandatory acceptance by judges, public servants and individuals of the truth of the legal acts and transactions occurred or granted before such notary. The State, by delegating such certifying power to the notary, symbolizes such power of truth, and the notarial authentication will only be legal if it simultaneously includes the notary's signature and seal.

LEGAL VALUE OF THE NOTARIAL AUTHENTICATION

The legal value of the notary's involvement in authenticated documents is summarized in the following four effects:

- FIRST: They are conclusive evidence that the appearing parties have expressed their intention to carry out the act recorded in the relevant instrument;
- SECOND: They are conclusive evidence that the appearing parties have made the statements that are attributed to them;
- THIRD: They are conclusive evidence of the truth and reality of the events attested to by the notary, as described by such notary; and
- FOURTH: They are conclusive evidence that the notary complied with the formalities corresponding to the act in question.

WHAT DOES IT MEAN TO BE CONCLUSIVE EVIDENCE?

It means that such notarial instruments and the acts and transactions contained therein must be credible and taken as the official truth without "juris tantum" presumption in the legal transaction:

- a) by clerks, judges, magistrates and ministers of the Court,
- b) by administrative authorities of all levels;
- c) by notaries and brokers of the country; and
- d) by lawyers, professionals and individuals in general.

4. THE MAIN CHALLENGES OF INFORMATION TECHNOLOGY FACED BY NOTARIES

WHAT IS A CHALLENGE?

A challenge is a dare, a test that what we are and what we do have a meaning. The Information Technology and its constant evolution have posed significant challenges to the notarial activity. There are aspects of the new information technology, especially in the area of artificial intelligence, that make some people question the continuous need for the personal involvement of a notary. Some people sustain that a machine is safer than man, because the former is not subject to the temptations of corruption of men, a mystery of miseries and greatness.

THE INFORMATION TECHNOLOGY IS NOT AN OBJECTIVE; IT IS JUST A TOOL FOR THE NOTARY

The challenges of Information Technology faced by notaries are diverse and must be analyzed with serenity and prudence, always referring to the goals of Law and the notary's reason to act as such: security and legal certainty. We should recall that Information Technology is not an objective in itself, but another tool for man to develop and be fully realized as a person. Information Technology should not be a replacement for the person or an enemy of their freedom and exercise of fundamental rights, which are guaranteed by Legal Certainty. For notaries and their complex activities, the technological aspects of their work tools must be modified, thus finally eliminating senseless sensationalist questions, such as predicting that an intelligent machine will substitute the functions of a notary.

FOUR CHALLENGES FACED BY NOTARIES AS A RESULT OF INFORMATION TECHNOLOGY

In this presentation, we will only refer to the main challenges faced by notaries as a result of Information Technology that, in my opinion, are the following four:

- THE NOTARY AND E-COMMERCE;
- THE NOTARY AND THE ELECTRONIC CONTRACT;
- THE NOTARY AND THE ELECTRONIC SIGNATURE;
- THE NOTARY AND THE DIGITAL DOCUMENT

5. E-COMMERCE AND ELECTRONIC CONTRACTS

A lot is said today about E-Commerce, but its meanings are confused. It has two meanings: one in a broad sense and the other in a limited one.

BROAD CONCEPT OF E-COMMERCE: EXCHANGE OF DATA

In general, E-Commerce means any exchange of data electronically, that is, from one computer to another. This exchange may be made nationally or internationally; in this last case, it creates what is known under Computer Law as a "cross-border data flow, which raises many questions in terms of legal conflict".

LIMITED CONCEPT OF E-COMMERCE: COMMERCIAL MATTERS ONLY

In a limited sense, E-Commerce means only the commercial transactions carried out by the sole electronic exchange of data, without requiring the traditional procedure of a handwritten signature on a paper document.

Based on these two meanings of E-Commerce, it is very important to always make clear the sense in which we are using the term, so as not to mislead the listener.

THREE MAIN WAYS IN WHICH E-COMMERCE MAY BE CONDUCTED IN A STRICT SENSE

There are three main ways in which E-Commerce may be conducted:

- By electronic exchange of data (EDI: Electronic Data Interchange);
- By e-mail; and
- By the Internet.

E-COMMERCE IS ONLY APPLIED TO A REDUCED BUSINESS SECTOR

Since the Internet is an open network and the e-mail is not exempt from hackers' intrusions, the current electronic commerce through such means has been reduced to a small business sector of not very valuable goods where the seller guarantees with their prestige the legitimacy of their acts and the legality of the electronic transactions. So long as no security guarantees exist, any transaction by the Internet or e-mail will continue to be, in Mexico, just a means to conduct unimportant business transactions, unlike real estate transactions, for which safety means are required to verify the identity and capacity of sellers, the creditworthiness and good faith of the purchaser and, above all, the quality and actual value of the property to be purchased.

ELECTRONIC CONTRACTS ARE ONLY POSSIBLE FOR COMMERCIAL TRANSACTIONS

The amended section 89 of the Code of Commerce clearly refers to the possibility of executing contracts through electronic means when it provides: "Commercial transactions may be conducted through electronic, optical or other technological means..."

LEGAL REGULATIONS RELATING TO ELECTRONIC CONTRACTS

With the amendments to the Federal Civil Code, the Code of Commerce and the Federal Law of Consumers' Defense, published in the Mexican Official Gazette (DOF) on May 29, 2000, contracts by electronic means were first regulated in Mexico. The Federal Civil Code provides the general rules for contracts by electronic, optical or other technological means, which are applied to any federal legal transaction. A chapter entitled "On E-Commerce" (sections 89 through 94) was added to the Code of Commerce to regulate electronic contracts for commercial transactions. The Federal Law of Consumers' Defense regulates transactions between suppliers and consumers.

CONSENT AS A PREREQUISITE FOR A LEGAL TRANSACTION

When we refer to a contract we are well aware that its prerequisites are consent and subject matter. In electronic contracts, the debate is focused on the following question: How is the parties' consent obtained? Please note that, in electronic contracts, the manner in which the consent is obtained and the execution of the contract are different. There is no electronic consent but an electronic way to obtain consent. The consent is the manifestation of the human intention, which may be expressed in many forms: by a gesture, using words, in writing, by fax or e-mail, etc. Therefore, it is wrong to say that there is electronic consent; what exists is a new electronic way of consenting.

DIFFERENCE BETWEEN THE TRADITIONAL AND THE ELECTRONIC CONTRACT

The traditional paper-based contract distinguishes from the electronic contract by the following elements:

- The way of contract formation;
- The way of obtaining consent;
- The way of executing the contract and, consequently:
- The way it may be considered evidence both in and out of court.

SEVEN RULES TO CONSENT BY ELECTRONIC MEANS

1. There is express consent when the intention is asserted by electronic, optical or other technological means (section 1803 of the Federal Civil Code);
2. Consent by electronic means consists of an offer and an acceptance. When the offer is made to a person by electronic, optic, telephone or other technological means, without specifying the term for acceptance, the offeror is released if the acceptance is not received immediately;

3. The sender and recipient in any offer and acceptance by electronic means shall be clearly identified. For a contract to be considered legally executed, the information totally generated or sent (data message) by electronic means must be attributed to the relevant persons and accessible for further review (sections 1834 bis of the Federal Civil Code and 93 of the Code of Commerce);

4. Unless otherwise agreed, it is presumed that the information generated, sent, received, filed or communicated by electronic means comes from the sender if it is sent: a) using identifying elements, such as keys, codes or passwords of the sender; and b) by any technological means to send data messages that is programmed by the sender or on their behalf and operates automatically;

5. The contracting parties, the sender and recipient, may, but are not required to, enter into a previous agreement setting ground rules and mentioning cases where the data message was attributed to the sender. Section 1811 of the Code of Commerce provides that: “in case of a proposal and acceptance by electronic, optical or other technological means, no prior conditions shall be required between the contracting parties for the same to have effects;”

6. It is considered that the information has been received when it enters the designated system of the recipient. If there is no designated system, it shall be received when the recipient obtains such information (section 91 of the Code of Commerce);

7. Unless otherwise agreed, it shall be considered that the data message is sent from the domicile of the sender, and is received at the domicile of the recipient (section 94 of the Code of Commerce). The determination of the place of execution of the contract is important, because it refers to the judge’s jurisdiction and the tax effects of the contract.

FORMALITY IN ELECTRONIC CONTRACTS

In principle, formality is not a condition for the validity of electronic contracts, unless otherwise agreed. A contract executed by electronic means is similar to a contract executed in writing (section 1803, Fraction II). This provision is based on section 6 of the Uncitral Model Law, which provides that when written information is required by law, such requirement will be met with a data message, if the information contained therein is accessible for further review.

6. ELECTRONIC SIGNATURE, DIGITAL SIGNATURE AND CERTIFYING AGENTS

NO RELATION WITH HANDWRITTEN SIGNATURE

This computer term has nothing to do with the concept that we, notaries, have of handwritten signature and initials, which are the graphic signs of a person to manifest their express consent to a written text on a specific paper-based document. The notary signs and initials documents as part of the authentication of notarial public instruments.

IS THE ELECTRONIC SIGNATURE EQUAL TO THE DIGITAL SIGNATURE?

According to computer experts, the only safe way to identify the sender of an electronic data message is through what has been called the “Electronic Signature,” and its safest form, the “Digital Signature,” as known in Mexico, or the “Advanced Electronic Signature,” as it is called by the Spanish legislation and most of Europe.

As in all subject matters, there are different opinions. In Spain, under the Royal Decree of September 18, 1999, there are two different legal concepts:

- **THE ELECTRONIC SIGNATURE:** means data in electronic form (document), which are attached by the signatory or associated with an electronic text so as to formally identify the author of such data or document signed; and
- **THE ADVANCED ELECTRONIC SIGNATURE:** is the electronic signature capable of identifying the signatory, which has been created using means that the signatory can maintain under their sole control, so that it is solely linked to the signatory and the data to which it relates, making it possible to detect any subsequent change of the data.

This signature known in Spain as the “Advanced Electronic Signature” is what we have called in Mexico the “DIGITAL SIGNATURE.”

WHAT IS THE DIFFERENCE?

The difference between both signatures is that in the electronic signature there is no certifying authority and it is used for any type of electronic signature; the digital signature, in turn, is an electronic signature based on public key cryptography requiring a third party certifying agent.

WHAT IS A DIGITAL SIGNATURE?

The so-called Digital Signature or Advanced Electronic Signature is a set of digital characters that the sender or signatory attaches to a computer text (document), thus identifying the author (signatory's identity) and warranting the inexistence of any subsequent alteration of the original document (integrity).

HOW DOES THE SENDER SIGN THE DOCUMENT?

To sign a digital document, its author uses their own private secret key, to which he or she only has access, which prevents such author from denying the authorship thereof (non-repudiation). In this manner, the author is linked to the document signed by him or her. The digital signature may be verified by any person using the public key of the author signing the document.

WHO IS THE SIGNATORY OF A DIGITAL SIGNATURE?

It is any natural person who uses software that creates private and public keys and acts on his or her own behalf or in the name of any natural or physical person which he or she represents.

ANALYSIS OF THE DIGITAL SIGNATURE IN TWO DIMENSIONS

For a better understanding of the digital signature, we will analyze it in two dimensions:

- A) in its technical aspect, and**
- B) in its legal aspect.**

A) In its technical aspect:

A digital signature is the result of a computer process based on the reciprocal use of an associated pair of keys, one public and the other private, which are different, that is, asymmetrical keys.

- The public key may be known by everyone, is registered with a certifying agent and is linked to the private key, which is never revealed; and
- The private key, which is only known by its holder.

A digital signature is a three-step process:

1. The signatory writes the document in electronic form using a private key. Then the signatory stamps the digital signature, that is, links the text to his or her identity as a person;

2. After the digital signature is stamped, the text of the document is encrypted by the signatory to prevent unauthorized access and the recipient's public key is inserted;

3. Once the encrypted document is received, the recipient, to be able to decrypt and read it, inserts his or her own private key and the message becomes legible. The recipient may send his or her electronic acknowledgment of receipt or answer in the same way using a digital signature. Please note that the private key has the technical function of allowing the recipient to decrypt the message.

The digital signature is complemented by the second step, which consists of the signatory's encryption of the document data. As noted, the so-called digital signature is a device derived from cryptography.

B) In its legal aspect:

The digital signature has the legal function of verifying, that is, confirming the author and integrity of the contents of the document. In this manner, it is similar, in cases where it is authorized, to the traditional signature or initial on a document in paper form.

By using the public key, the recipient proves the authorship and integrity of the document and, by acknowledging the private key of the sender, verifies that the signatory is in effect the author of the digital signature. Please remember that the private key is associated to a public key, which must be in effect, that is, not expired or revoked. The private key is only known by its holder. Since the digital signature is created using the author's private key, there is an association between the private key and the digital signature that results in that the author is unable to deny their signature, given that only he or she knows the private key.

CERTIFICATION AS A SECURITY ELEMENT OF THE DIGITAL SIGNATURE

The security of the digital signature lies in the issuance of a "certificate," which consists of an electronic certification that links some signature verification data to a signatory and confirms such signatory's identity. Who provides such certification services? This is a burning issue because there are many opinions, but it is a natural or physical person authorized to provide such service. In our country, though lacking a regulation, the National Notary Association of Mexico A.C. has been authorized to certify public keys linked to private keys and, consequently, issue certificates.

A CONCEPT HARD TO UNDERSTAND FOR NOTARIES

I think that, in effect, the concept of digital signature is hard to understand for notaries used for centuries to only use their handwritten signature as an external sign of will.

The whole idea of the digital signature is an intellectual challenge for notaries, because it also requires basic knowledge in information technology and some specialized data of the field known as Cryptography.

THREE ELEMENTS OF THE DIGITAL SIGNATURE

In the digital signature, there are three distinguishing elements:

- Signatory: it is the natural person sending the document who has a device to create two keys: with the private key, he or she creates the digital signature and then, with the recipient's public key, he or she encrypts the document to be sent;
- Creation data of the digital signature: they are data, like codes or a public cryptographic key, that the signatory uses for the digital signature to be verified;
- Certificate: it is the electronic certification or guaranty used by the verifying agent to confirm the signature verification data and the identity of the signatory.

DIGITAL SIGNATURE GUARANTY

The security of the digital signature is guaranteed as follows:

1. If the encrypted information is intercepted by a hacker, such hacker will be unable to read it because he or she does not have the decrypting private key; and
2. Since the information is decrypted by the recipient using his or her private key, the recipient is sure that the information has been sent by the sender.

The advantage of this system lies in the secrecy of the private key. However, some laws have provided for the voluntary registration of private keys.

CERTIFYING AGENTS AND DIGITAL CERTIFICATES

It could happen that a person gets hold of the sender's private key and signs for him or her. To avoid such situation, a management system setting clear and specific rules for the operation and use of the keys is necessary. The key management is carried out by "certifying authorities" or "public key certifiers." If a person wants to enter the digital signature system, such person will have his or her public key registered. The certifier will identify the applicant and issue a certificate associating such person with their public key, which is linked to a private key that is unknown. The certificate has a specific duration. The register of keys must be accessible online. The public key must be kept by the certifying agent for a period of not less than ten years in general. If a person's private key is compromised, its holder must report such situation to the certifying authority, which will revoke the certificate linking such private key to the public key derived from the certificate.

CONCEPT OF DIGITAL CERTIFICATE

A Digital Certificate is the result of a technical-computer process whereby the relationship between the issuer of a document and their public key is verified. Likewise, the period of validity of the public key is certified, as well as the effective term of the certificate, which cannot exceed three years.

USE OF THE DIGITAL SIGNATURE IN THE PUBLIC REGISTRY OF COMMERCE

Following the recent amendments to the Code of Commerce, its section 21 bis, fraction II, subsection c), provides that, during the qualification period, the registrar will finally authorize the registration by electronic signature of the competent public servant, upon which the corresponding electronic commercial folio will be created or added. In the same manner, section 30 provides that the Secretary of Economy will certify the identification means used by authorized persons to electronically sign information related to the Public Registry of Commerce, as well as those corresponding to other users thereof, and will exercise control of the means to protect the confidentiality of the information so sent.

7. TWO TYPES OF DIGITAL DOCUMENTS:

- A) IN PAPER FORM, AND
- B) IN ELECTRONIC FORM

DOCUMENT CONCEPT

The term "document" derives from the Greek word "dekos," which meant, in terms of religion, hands outstretched to offer and receive. From this root derives the Latin verb "doceo," which means to teach, as well as the noun "documentum," which is understood as "that used to teach or educate," meaning something that is taught from the past.

According to the Dictionary of the Spanish Royal Academy, a document is "... the diploma, letter or writing illustrating us about some event, especially historic events, or the writing containing reliable data or data that may be used to prove something..."

Under the Law, a document is “any material means manifesting or including data, events or descriptions with evidentiary value or any other legal importance.”

In that same sense, besides writings in paper form, documents are graphic blueprints, drawings, photographs, videos, films, tapes, computer disks, etc.

TWO PILLARS OF THE VALIDITY OF THE TRADITIONAL DOCUMENTS

Since the reception of the Roman Law, the document in paper form has had full recognition and total validity based on two elements:

- Its authorship: (in manu publica confecta); and
- Its form (in publica forma confecta).

In digital documents none of these two elements are traditionally present; hence the challenge.

CONCEPT OF DIGITAL DOCUMENT

In this regard, its name is cause for controversy. Some people refer to it as “electronic document”, others, as “computer document” and, finally, there are others, like the undersigned, who prefer to call it “digital document.”

The digital document, in its broadest sense, is the document created not only with the assistance of a computer, but of an entire computer system (the computer combined with its input and output peripherals).

The Italian Law solves the problem in a simple way, and defines the electronic or digital document as any digital or electronic representation of legally significant acts, events and data.

TWO TYPES OF DIGITAL DOCUMENTS

Based on the very general concept of the digital document to be created at the will of the user of a computer system, there are two types of documents, depending on the user’s decision to have such document in paper form or not. Thus, we may concur with DE PRADA that there are two types of digital documents:

1- DIGITAL DOCUMENTS IN PAPER FORM: These are the documents generated with a computer, through the use of an output peripheral, which is generally a laser printer. The purpose of the document in paper form is to be read, corrected, authorized and, if they contain a legal act or transaction, to be subscribed with the handwritten signatures of the parties.

2- DIGITAL DOCUMENTS IN ELECTRONIC FORM: These documents are not generated with a computer, but in a computer, and may only be read using information technology. In this type of documents, the digital document has only an electronic form. The combination of the computer and telematics resulted in the communication of two or more computers through a telephone line, and allowed digital documents to be created, read and stored.

DIFFERENT TYPES OF ELECTRONIC FORMATS

The main electronic formats are:

- Magnetic media, which store information digitally and consist of:
 - a) Hard disk drives, a computer hardware component; and
 - b) Floppy disks (diskettes), interchangeable and easily portable;
- Laser optical disks, CDs similar to music compact disks. The advantage over diskettes is that they last longer and have more storage capacity;
- Universal Product Codes, known as Barcodes, basically used in commerce to read the product price and identification.

DISADVANTAGES OF THE DOCUMENT IN ELECTRONIC FORM ONLY

According to the Italian author Tarizzo, the main disadvantages of the electronic document are:

- It is written in a language only understandable by a computer;
- It may only be deciphered and used with the assistance of a computer;
- It is not distinguishable from an eventual copy;
- It may be easily modified;
- It provides no certainty as to its authorship and date;
- It is filed in a specific electronic form that is not always compatible with other computers.

LONG LIVE THE DOCUMENT IN PAPER FORM

Certainly, it is important for notaries to be open to Information Technology progress, but to say that it will be end of the paper-based document is going too far.

An important comment about the Spanish Decree 14/99 of September 17, 1999 on the electronic signature made it very clear that such Decree does not modify the existing regulation on the execution, formality, validity and efficacy of contracts and other legal acts, and does not replace or amend any regulation applicable to the notary's function.

Therefore, I believe that in Mexico and the Latin world the use of the document in paper form will continue for many years, especially in civil matters and, given that it has proven throughout the centuries to be useful and safe, I predict that paper will not disappear entirely, but will be used at the same time as documents in electronic form only.

8. INFORMATION TECHNOLOGY CHALLENGES FACED BY NOTARIES

THE NOTARY AND E-COMMERCE

There is not much to say about the notary and E-commerce, given that he or she is not professional involved in such transactions. The notary's position may be summarized in accordance with the two meanings of E-Commerce:

A) WITH RESPECT TO E-COMMERCE IN ITS BROAD SENSE,

that is, any electronic transmission of data, the notary supports the use of this technology as a way to facilitate their legal activities. The notary must be at the forefront in terms of technical resources that help improve response times and quality of notarial services. In this respect, the notary welcomes e-commerce in its broad sense.

B) WITH RESPECT TO E-COMMERCE IN ITS LIMITED SENSE,

that is, regarding commercial transactions of personal property and goods involving small amounts, the notary assumes a discrete position as observer because, for the time being, the notary's involvement is not required or permitted by law for the validity of commercial transactions conducted through electronic means. As regards E-commerce, the notary believes that more work is needed to provide it with as much legal certainty as possible.

THE NOTARY AND THE ELECTRONIC CONTRACT

IN GENERAL, THERE ARE YET NO ELECTRONIC CONTRACTS IN CIVIL MATTERS

If an electronic contract is understood as any contract executed using electronic means, when such means have an actual effect on obtaining consent or the future interpretation of the contract, clearly the electronic contract will be legally possible. However, please note that such situation is only legally applicable for the time being to commercial transactions since, in civil matters, the electronic contract has not yet been recognized by most Civil Codes of the Republic.

EXCEPTIONAL CASE: THE STATE OF BAJA CALIFORNIA

By Decree number 64, published in the Official Gazette on June 28, 2002, sections 121 and 124, among others, of the Notary Law for the State of Baja California were amended to read as follows:

SECTION 121: “..The Notary will draw up instruments in Spanish, in compliance with the following rules: XII. The Notary will attest: ...e) That the deed or act was executed by the appearing parties ... or under the terms of section 124 of this Law.”

SECTION 124: “...If notarial documents or instruments are to be signed under the Law, the signature requirement will be met with a data message, provided such data are attributable to the signatories and are accessible for further review. For the notarial formality to be complied with, the Notary shall be required to attest to the legal act, under the provisions of this Law, in which case the Notary and the signatories may, through data message, express the exact terms under which the parties are bound. Upon this, the Notary shall have to write down in the relevant instrument the elements used to attribute such messages to the parties and keep in custody a complete written version of such instrument for further review. In these cases, it will be enough to include the grantors’ statements as to their capacity for purposes of complying with the notary’s obligation to attest...”

This text is partially similar to section 93 of the Federal Code of Commerce, except that, in the legal text of the Notary Law for the State of Baja California, the written form requirement is not considered to be met as provided in section 93 but, under the second paragraph of the above section 93, the local law provides for the traditional notarial form for legal acts pursuant to the local Notary Law. The novelty is that the handwritten signature requirement is deemed to be met when:

- data message is used, provided such data are attributable to the signatories; and
- such data message may be accessible for further review.

On the other hand, the concept appearing on the second paragraph of section 93 is repeated, that is, the parties to a legal act may, through data message, express the exact terms under which they decide to be bound, in which case the notary shall have to write down in the relevant instrument the elements used to attribute such messages to the parties and keep in custody a complete “written” (that is the novelty) version of such instrument ‘for further review,’ unlike the Code of Commerce where no reference is made to the last phrase.

I am concerned about the last part of the section, because the traditional assessment of the parties’ natural and civil capacity, which the notary is required to carry out and is considered made upon the grantors’ statement, has been totally eliminated. I believe the notary must continue to perform such assessment of the natural and civil capacity of the parties, if such notary is not informed of the person’s incapacity, to justify their personal involvement and push away the ghost of being replaced in the future by the artificial intelligence of Information Technology.

ELECTRONIC CONTRACTS IN COMMERCIAL MATTERS

In light of the legal recognition of a new type of contract by electronic means, the notary shall adopt an attitude of acceptance, approval, enthusiasm and, above all, willingness to understand and grasp such tool in the best possible way, since our beloved Mexico is just catching up, with some delay, with a decision already made and applicable in legal texts of important states of the Latin legal system, such as Spain, France, Germany, Italy and Chile, in South America.

In our Mexican reality, the distinction between two different cases should be considered:

FIRST: CONTRACTS IN PAPER FORM ONLY**A) THE USE OF ELECTRONIC MEANS ALIGNS PAPER FORMAT WITH SIGNATURE.**

Sections 93 of the Code of Commerce and 1834 bis of the Federal Civil Code provide that, whenever the paper format and the handwritten signature are required for contracts by law, such requirements shall be deemed to be met if electronic means (data message) are used by the parties, provided such message is attributable to the parties and accessible for further review.

B) EXPRESS CONSENT THROUGH ELECTRONIC MEANS.

Under section 1803 of the Federal Civil Code, which is applicable to commercial matters, express consent, like verbal and written expressions or expressions through unequivocal signs, is the will manifested by electronic, optical or other technological means. Specifically, this means that it is legally possible to give consent through electronic means in commercial matters.

NOTARY'S ATTITUDE

Since the notary does not have a relevant legal role in electronic contracts, his or her attitude must be to pay attention, be informed and become aware of this novelty and, as any other jurist committed to the development of Law, to devote to the study and better understanding of the scope of this new legal tool that is the electronic contract because, as the notary is involved in many legal transactions, one day this element will necessarily affect their activity.

SECOND: MANDATORY CONTRACTS IN PAPER FORM

If the law provides that a legal act is to take the form of an instrument issued by a notary, the above sections 93 of the Code of Commerce and 1834 bis of the Federal Civil Code provide that the legal act shall comply with the formalities established by the applicable legislation, that is, the local Civil Code and the notary law of the relevant entity. This means that the act shall take the traditional form of deed or act before a notary in paper form, as established by most state laws.

NO NOTARIAL FORMALITIES FOR ELECTRONIC CONTRACTS

Due to the foregoing, we may conclude that, for the time being, it is not possible to execute contracts by electronic means before a notary. In other words, under the commercial law, the traditional form of contract, that is, in paper form is used in cases where the law provides for the involvement of a notary.

THE NOTARY MUST ACKNOWLEDGE PRIOR ELECTRONIC CONTRACTS

However, regardless of the fact that no electronic contracts or instruments may be issued before a notary, under the above section 93 of the Code of Commerce, if the parties decide to use electronic, optical or other technological means to express through data message the exact terms under which they decide to be bound, then the notary:

- shall write down in the notarial instrument the elements through which such messages are attributed to the parties; and
- shall keep in custody a complete version of the data message for further review. In other words, the notary shall attach to the appendix of the deed or act in question a complete version of the parties' messages related to the notarial instrument being authenticated.

CHALLENGE TO NOTARIES:

At present, no electronic contracts are attested to by notaries. The big challenge to notaries is that they cannot be limited, in civil matters, to the use of traditional means only, without accepting the electronic contract. The Notariat as an organization and, in particular, each notary, must actively participate in a proposal to allow both systems to coexist and, especially, to allow the notary, in their legitimating function, to have the role of certifying agent of the digital signature and be, if not the only, the most important certifying agent to issue certificates implementing the digital signature.

• THE NOTARY AND THE DIGITAL SIGNATURE

The challenge of a notary using a digital signature implies, first of all, an intention to remove the sacredness of our handwritten signature and official seal. Everything changes; therefore, our method of signing may change too, as well as the way we seal. We should not be impressed by such technical data. What we have to consider with attention is if the legal role of the notary in a legal act is going to change or not.

A first sign is that, given the social need for legal certainty, the notary's role in civil and commercial contracts that require the paper format formality should not change; what should change are the method of authenticating and the use of new information technology tools to facilitate the notarial function. To sustain our opinion, we will proceed from the following two assumptions:

A) AT PRESENT

The law does not contemplate the use of digital signatures in the notarial function. Consequently, the notary watches its use in other sectors, such as the Public Registry of Commerce. In such circumstance, the notary must make an effort to understand the scope of the cryptographic device of the digital signature, given the diffusion and expansion of such tool, which will shortly affect the specific notarial activity.

B) IN THE FUTURE

I believe that, in the near future, the notary will have the possibility of authenticating documents simultaneously using the handwritten signature and seal as well as the digital signature. The Notariat's historical trend has always been that technological progress causes the notary to update and modernize, thus acquiring a new capacity for efficient service. In the case of the digital signature, the notary will not have a different attitude, because we should contemplate the tool as an information technology advance, and the digital signature as a new work tool. It is a new legal method to express their consent as persons authorized to authenticate documents, thus eliminating the ancestral mechanism of expressing it through the notary's handwritten signature, with their own handwritten graphic signs.

WILL IT BE POSSIBLE TO REPLACE THE NOTARY'S HANDWRITTEN SIGNATURE WITH THE DIGITAL SIGNATURE?

I believe there will not be a complete and radical replacement, but its use will be permitted, in a very prudent and gradual process since, for the time being, the exceptional cases to which it will be applied must be regulated. When authorizing a minutes for a deed to be entered in the Book of Notarial Records or obtaining consent for a purchase and sale transaction, the notary will continue to verify the legality and legitimacy of the legal act or transaction and, especially, the natural and civil capacity of the parties or grantors of the act, using only the digital signature as a sign, as a digital symbol of their consent and certifying authority.

Though other countries, such as Spain and Italy, have accepted the digital signature (advanced electronic signature) by a notary as a method of official authorization, in Mexico conscientious studies on its risks and advantages are still pending since, under the Law, the use of new tools will only be justified if it offers great advantages to the user. In this specific case, the legal certainty traditionally associated with the notarial function, which is exercised by authorizing instruments using the handwritten signature and official seal, should not be compromised as a consequence of pressures.

IS A DIGITAL PUBLIC TRUST POSSIBLE?

Trust is classified by Mengual y Mengual into two categories: divine trust or faith, which is the one you have in God, and natural or human trust, which exists between men. Human trust, which is the belief in men's statements or acts, is divided into private trust, which is the belief in the statements or acts of men who have no authority, and public trust, when we believe in the statements or acts of men who have the

certifying authority of the State. The public trust is a legal concept of our law and, in turn, may be divided into: judicial public trust and extrajudicial public trust. The latter is classified as follows:

- a) notarial public trust,
- b) broker's public trust, and
- c) registration public trust.

Today we will only discuss the notarial public trust.

The notary's public trust does not only imply to leave record of facts, but also to give impartial legal advice to the parties, provide a contract with legality and legitimacy and, finally, provide the contract or legal act with the legal formality required for the same to have full effects in legal transactions.

The notarial public trust is expressed through the handwritten signature of the notary who, in this manner, gives their consent to the text drafted by him or her. However, the notary's signature is not enough; it should be simultaneously accompanied with the official seal delegated by the Mexican State. The signature and seal together authenticate the document and provide it with public trust, that is, evidentiary value against third parties.

Nowadays, to comply with their legal function, the notary needs to be personally and currently involved. Therefore, the challenge that information technology poses today to the notary is huge. Is the notary able to express their consenting signature and initials and stamp their official seal using electronic means? No, not for the time being. Will it be possible in the future? Yes, it might, if it is only the computer expression of their consent, upon conclusion of the regular notarial activity under the law.

• THE NOTARY AND THE DIGITAL DOCUMENTS

THE NOTARY AS CREATOR OF DIGITAL DOCUMENTS IN PAPER FORM

Please remember that documents created with the use of computer devices have been generally denominated as digital documents and divided into digital documents in paper form and digital documents in electronic form.

A notary completes their professional work with a tangible result: a public instrument that circulates to provide certainty and legal certainty to consumers. With respect to their circulation among the public, there are only three types of public instruments:

- A first certified copy of a deed or act;
- A certified copy; and
- A certification.

Any of such three instruments is currently drawn up by notaries almost in their entirety using electronic devices and paper. I believe there is practically no notary in Mexico who does not have a computer and print their public instruments using computer peripherals.

This is because, as we have already said, the entire legal framework of the notarial activity is based on paper: the folio, the ten books of Notarial Record, the appendix books, the index, the first certified copies, the comparisons, etc.

THE NOTARY CREATES NO DIGITAL DOCUMENTS

Today it is impossible to create notarial public instruments in electronic form only. Though we know that it is possible for the parties to express their consent electronically, and electronic contracts can be used in commercial matters, for the time being the notary is unable to accept electronic contracts in their strictly attesting professional field and, consequently, documents created in electronic form only.

The notary observes that the digital document is increasingly and satisfactorily being used in bank, financial, commercial and tax matters. The notary cannot be excluded from such progress, either because

it is required by law, as in the case of the SAT, or because he or she knows and freely implements state-of-the-art technological mechanisms. In any event, what is clear is that the notary does not create documents in electronic form only.

WILL THE COMPUTER REPLACE THE NOTARY?

I do not think so. And in such an important subject, we'd better have a defined position. The notarial function requires the direct personal involvement of a notary. The notary's legal service and, therefore, the value added to their product, the public instrument, constitute their personal involvement, with such ethical touch of security on the truth of the facts and, especially, the certainty that the transaction is legal, that there is legitimacy in the act, because the notary has personally verified the capacity and legal qualification, which implies a moral judgment and subjective assessment by the notary, who will never be replaced with a computer or any other information technology device.

What we, notaries, should be willing to change are the tools we use. To drop the pen and use digital codes; to use the Internet instead of the keyboard to write; in other words, to change the way the will is manifested, but the acts of the notary as a person should remain.

WILL THE DIGITAL DOCUMENT IN ELECTRONIC FORM REPLACE THE DIGITAL DOCUMENT IN PAPER FORM?

I believe we are facing a possible combination. In time, the use of paper will be reduced but will not disappear entirely. Its presence in legal transactions will diminish, but it is very useful to be the end of it. People need verification, security. Paper has proven to be constant and useful in that respect. Definitely, the paper will not disappear from the notarial activity. I think there will be exceptional cases of digital documents having an impact on the notarial activity. However, the public instrument and its "modus operandi" will continue to exist for a while based on paper, though always using state-of-the-art information technology means.

FINAL CONCLUSIONS:

- Today's notaries are digitalized, that is, have embraced the technological progress of Information Technology, which they have learned to use as a wonderful work tool;
 - In light of the challenges posed by Information Technology, notaries are open, willing to enthusiastically adopt new working methods and stamp their signature and official seal, for two reasons:
 - 1- Because it is an on-going global process in countries subject to the Latin legal system and Mexico cannot be left behind; and
 - 2- Because the Notariat has been historically always alongside the evolution of Humanity, and now we will not be left behind; we will be present and aware that the notarial function must not disappear but be perfected to be consistent with the signs of our time.
 - The future notary, who will accept the use of the digital signature and electronic contracts and will act as certifying agent, must maintain the essence of their legal function, which consists of their independence, impartiality, being an expert jurist, honorable, loyal to the truth, with a foolproof honesty, and will continue to interpret the parties' will and give legal form to legal acts and transactions using the then most advanced technological tools, always ensuring legal certainty with their personal involvement by means of the notarial public instrument, which will be, at the same time, digitally authorized in electronic form or handwritten in paper form, which will not disappear.
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4.2. REGIME OF POWERS OF ATTORNEY ISSUED ABROAD

BY SANTOS BELANDRO

OVERVIEW. SECURITY AND CERTAINTY

1. As we all know, the main purpose of private international law is to ensure legal relationships among individuals across the borders of States; to benefit –to the extent possible- what is usually called foreign legal transactions. Within such legal transactions, the concept of power of attorney issued abroad is specially important, since it avoids the trouble of having to appear directly –either in court or out of court- for the execution of certain acts or contracts in another country. It enables a person to act simultaneously in different places or to use third party's capacity or knowledge to carry out private businesses, etc.

2. From a notarial perspective, the use of such a power of attorney requires legal rules implying two elements: security and certainty. To know in advance the Law applicable to such power of attorney so that it may have extraterritorial enforceability: if the applicable law is the national law or, otherwise, the one deriving from rules under a Treaty or Convention.

Second, to know the formality and substance requirements for a power of attorney issued abroad to have effects extraterritorially. The applicable Law or Laws will address: capacity, form, intrinsic validity, issues related to any document issued abroad in terms of legalization, certification, translation and registration, as well as other more general problems such as the qualification of powers of attorney, the application of a foreign Law, the exception under international public order or immediately applicable rules.

3. The Latin Notariat has been studying this issue for a long time. So much so that, in the II International Congress of Latin Notaries held in Madrid in 1950, the member states of the Union were advised to adhere to the Protocol on Uniformity of Powers of Attorney to be Utilized Abroad, signed in Washington on February 17, 1940, without much impact. In the VI International Meeting of American Notaries held in Lima in 1972, a unique form of power of attorney for America was presented. All such rules are aimed at solving the problem of powers of attorney by direct or substantive rules, as done in the domestic law of each country.

Inter-American Convention

4. Notwithstanding this, for powers of attorney issued abroad to be more rapidly –and, let's say, even urgently- effective, it appears that the indirect regulation of such legal tool has been more accepted, by means of what we, as experts in private international law, define as formal or conflict of laws rules. The characteristic of these rules is that they do not directly regulate the category of “powers of attorney” but refer it, either to the law of the place of issuance and/or the law of the place of execution and/or the law that will govern the act or contract to which it relates, etc. This law will be in charge of setting the requirements to be met by powers of attorney.

5. This regulation has been widely accepted at the Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad, approved at the CIDIP I held in Panama in 1975. Its acceptance was so remarkable that it was ratified by 16 countries: Argentina, Bolivia, Brazil, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela. If we divide them in geopolitical groups, the regulation is applicable in the four founding states of the MERCOSUR: Argentina, Brazil, Paraguay and Uruguay, plus the two associated countries: Bolivia and Chile; in four countries of the Andean Pact: Bolivia, Ecuador, Peru and Venezuela; and in five countries of the Central American Community: Costa Rica, El Salvador, Guatemala, Honduras and Panama. Not included are only Colombia and Nicaragua.

This is, therefore, a real Inter-American text that, notwithstanding, has a flaw: it has not been ratified by the United States of America, Canada and the small English-speaking Caribbean countries.

This is regrettable since this Convention was precisely conceived to allow the co-existence not only of several country Laws eventually applicable to international private legal relationships -the usual purpose of private international law- but of legal families, that is, of totally different civilizations.

6. In summary, though its advantage is based on having a common text in countries of Latin origin, its real utility appears or is shown when the power of attorney is granted in a country where the public instrument or the concept of the Latin notary is not contemplated by its Law, as it happens in many English-speaking countries.

Spatial Scope of Application

7. The spatial scope of application of the Washington Protocol of 1940 is broader than that of the Inter-American Convention, since the former attempts to regulate “powers of attorney issued in countries that are members of the Pan-American Union, to be utilized abroad.” Though the Preamble of the Inter-American Convention of 1975 makes the same suggestion, section 1 of such Convention explains that the spatial scope of application will be exclusively between Party States: Powers of attorney duly granted in one Party State to this Convention shall be valid in any other (Party State).

Effectiveness of the Convention for Uruguay

8. By means of this Inter-American Convention, Uruguay is related to 15 countries of the region. The ensuing question then is: What happens when the power of attorney is issued in a non-ratifying country? The “power of attorney” category, as a specific regulation, was first used at the above Inter-American Convention. Apart from such Convention, there are the Treaties of Montevideo: in this respect, under the 1889 Treaties, Uruguay is only currently related to Colombia; the same happens to Argentina and Paraguay. The Treaties of Montevideo of 1940 are no longer in effect, since the ratifying countries –Argentina, Paraguay and Uruguay- have ratified the Inter-American Convention. The power of attorney was not specifically regulated by the Treaties of Montevideo; however, when the countries decided to ratify the new Convention, the problem became irrelevant. The legal concept of power of attorney was not regulated either by the Bustamante Code of 1928, despite the analytical technique used.

9. When conventional rules regulating the problem posed by powers of attorney are not applicable, it is necessary to apply the national rules of private international law included in the last part of the Uruguayan Civil Code, which do not specifically regulate either the legal concept of power of attorney. To fill this legislative gap, and pursuant to section 16 of the Civil Code, the domestic law of Uruguay has adopted a rule of legal hermeneutics whereby “the grounds of analogous laws” will be applied and, if not possible, the “general principles of Law and the most accepted doctrines.” The analogous law is the law that includes the ratification of the Inter-American Convention on powers of attorney. This leads to a conclusion that greatly facilitates the notarial function: that, despite the fact that the Convention is a Treaty with inter partes effects, as regards Uruguay this aspect is not important because, since the “power of attorney” category is not specifically regulated, the rules of the Inter-American Convention recover their authority over powers of attorney connecting us with countries with which not Treaties have been executed. In brief: if a power of attorney is issued in a country that has ratified the Inter-American Convention, the Convention will be applied; and if it is issued in a non-ratifying country, the Convention will be also applied, but as an “analogous rule” or as “the most accepted doctrine,” depending on the author consulted. This is also the position adopted by the Argentine Republic.

If a power of attorney is issued in a country with which Paraguay has not executed a Treaty or Convention, we see no inconvenience in implementing the same solution as in the case of Argentina and Uruguay, because section 6 of the preliminary provisions of the Civil Code of Paraguay is very similar to that of the above countries. Section 6 expressly provides as follows: If an issue cannot be solved with words or the spirit of the rules

of this Code, the provisions regulating analogous cases or issues will be taken into consideration and, in their absence, the general principles of Law will be applied.

Material Scope of the Convention

10. For representation to exist two elements are necessary:

1. a person acting on behalf of another, and 2. a power of attorney.

Normally, the legal concept of representation is included within the legal cooperation given by one person to another. The representative cooperates with and replaces the represented person, carrying out a transaction in his or her name. The representation may be necessary or legal, voluntary or organic.

a) Legal Representation: The legal or necessary representation applies to incompetent or absent persons. In a legal representation, the power of attorney is granted by law, since the incompetent person lacks the capacity to grant it.

b) Organic or Corporate Representation: It applies to cases where legal or artificial persons have to act outside the company, in which case the appearance of any of its members acting on behalf of the company, association or foundation becomes necessary.

c) Voluntary Representation: In voluntary representation cases, the power of attorney derives from a unilateral legal transaction –authorization or power of attorney- granted by the principal, whereby the attorney is authorized to act directly affecting the principal's property.

Power of Attorney and Agency

11. The representation refers to a basic relationship, which may consist of different types of transactions: agency, service contract, company, etc. Frequently, the power of attorney is related to the agency agreement. Many people believed that the power of attorney was an essential element of the agency agreement and, consequently, concluded that there could be no agency without power of attorney. For example, the French Civil Code, which influenced section 2501 of the Uruguayan Civil Code.

However, it was the studies of the German school – Ihering and Laband- that allowed the separation of the act of representation from the agency agreement. The agency is an agreement whereby a party undertakes to perform legal acts on behalf of another person; it is bilateral or mutually obligatory, with or without consideration, etc. The legal act of granting or issuing a power of attorney is called empowerment. The power of attorney is not an agreement but a unilateral legal transaction generated by the represented person and addressed to a third party, in which the acceptance of the representative is not required. There may be representation without agency, as in the case of the representation of incompetent or absent persons, or there may be agency without representation, such as in the commission. There may be agency without representation but the power of attorney is always a representation.

12. In conclusion, in a notarial context we should always distinguish agency from empowerment. They are two independent notions, though sometimes they seem to be connected. A power of attorney may exist without an agency and an agency may exist without a power of attorney. The limits of the power of attorney will always be established by such instrument. In addition, the empowerment authorizes, does not oblige. This approach has been fully adopted by section 3 of the Washington Protocol and section 11 of the Inter-American Convention, which provide that:

For a power of attorney to be effective the attorney does not need to express their acceptance. The acceptance will be implied by their performance.

13. According to the Argentine specialist Alicia Perugini, these are the characteristics that have caused Notaries to omit in certain instruments the inclusion of the representative, making only reference in the text of the instrument to the “assignment” entrusted by one person to another. In most cases, when we

refer to a mandate deed we actually mean a power of attorney deed that clearly states: the appearance of the grantor of the power of attorney, the identity of the attorney, the obligations assumed by the former, the powers granted to the latter and the precise extension of such powers. Besides being a unilateral document, the power of attorney is abstract, since its validity is independent from any eventual act or contract forcing the attorney to act in a certain way. It is independent, for example, from the validity of the agency, the service contract, etc.

As regards the Inter-American Convention, its purpose is limited to the regulation of the legal concept of the power of attorney -solely and exclusively-, without considering the underlying legal transaction, which is generally the agency but may be any other legal transaction, or contemplating the final transaction in which such power of attorney shall be used and for which purpose it was granted. In an attempt to specify its material scope more clearly, the Inter-American Convention does not qualify the power of attorney or define the regulated subject matter, and does not refer to a special type of power of attorney. Therefore, all powers of attorney are included: for civil, commercial, procedural, administrative and other matters.

The Internationality of the Power of Attorney

14. Professor Liliana Rapallini has correctly sustained that “a power of attorney is international when the State where such instrument has been granted is different from that in which it will be used, and the circumstance that the grantor and the attorney are in the same country at the time of granting the same is irrelevant, as well as the residence, domicile or nationality of the parties.” Therefore, for a power of attorney granted in Paraguay by one person in favor of another, both domiciled in Paraguay, to have effects abroad, the provisions of the Inter-American Convention on Powers of Attorney must be applicable.

Methodology Used

15. The International Conferences on Private International Law periodically held by the OAS assume no preestablished dogmatic position in terms of the method or methods used to regulate categories under private international law. That is why, when drafting each Convention project, the issue of determining if the relevant category must be regulated using the method of conflict of laws and jurisdictions or, otherwise, a substance or direct method should be used, comes up. The methodology used by the Convention is mixed; it contains conflict of laws but also substantive rules, as described below.

The Capacity to Grant a Power of Attorney

16. First of all, a person's capacity to act must be verified at the time of granting the power of attorney. Perugini distinguishes the capacity required to grant a power of attorney from the transaction that may require the attorney to act in a certain way – for example, by means of an agency – and from the final legal act, and advises that the validity of the power of attorney should not be mistaken for the validity of the purchase and sale transaction or marriage, which are problems regulated by different laws.

The capacity will be determined pursuant to the following rules:

- a) For natural persons: the nationality or domicile law will apply, depending on the applicable rules of private international law. In the countries of the region, the capacity is determined by the law of the grantor's domicile;
- b) For artificial persons: under the Treaties of Montevideo of 1889 and 1940 or the Inter-American Conventions on Business Companies of 1979 –ratified by Paraguay- or on Artificial Persons of 1984 –not ratified by such country-, the applicable law shall be that of the place of their incorporation, which shall be where all substance and form requirements that are essential for their legal existence have been met.

Legal Capacity

17. a) In the case of a natural person granting a power of attorney in their own name: Section 1 of the Washington Protocol of 1940 clearly provides that “the official authorizing the act (notary, registrar, judge or any other person entrusted to such effect by the law of their respective country) will attest to knowing the grantor and certify that he or she has the legal capacity to grant the same. We see no inconvenience for the same control to be carried out under the Inter-American Convention on Powers of Attorney.

17. b) In the case of a power of attorney granted on behalf of a third person:

- Because he or she is their legal representative: in the case of a legal representative, such capacity shall be verified pursuant to the law of the place where the person was entrusted as such.

Substitution Cases: Substitutions will also be controlled.

In the case of artificial persons: in addition to the certification mentioned above, the official authorizing the act will attest, as regards the artificial person on whose behalf the power of attorney is granted, to its incorporation, registered office, current legal existence, as well as to the fact that the act for which the power of attorney has been granted falls within such artificial person’s corporate purpose or activity. The official will ratify such statements with the documents to be submitted to such end, such as: articles of incorporation, by-laws, minutes of the board or management of the artificial person, as well as any other documents evidencing the legal existence and decisions made. These documents will be also mentioned by the official, stating their dates and origin (section 1.3 of the Washington Protocol). This solution is consistent with section 7.b) of the Inter-American Convention.

FORM

1. The Locus Regit Actum Form: A Non-Mandatory Principle

18. It appears that the applicable basic principle is the locus regit actum principle, which means that the applicable law is that of the place. In this manner, a very old rule of private international law that has existed for over eight centuries, the application of the law of the place of execution to regulate the form of the power of attorney, is applied. Section 2 of the Inter-American Convention provides the following: Formalities and procedures related to the granting of powers of attorney to be used abroad shall be subject to the laws of the States where they are granted (...)

From the above it appears that it is necessary to apply the Law of the place where it is granted or executed, for two reasons mainly: first, because the parties have more immediate knowledge of the formalities required for transactions; and second, because, in the case of a public instrument, the authorizing official has to comply with the provisions of their own Law.

Despite such affirmation, the provisions of section 2 regarding the form of powers of attorney seem to be affected by a triple alternative solution: the first solution, imposed by the exercise of free will in a conflictive context; the second solution, due to the existence of rigorously mandatory rules in the place where the power of attorney is to be used; and the third solution, due to the existence of rules demanding compliance with certain formalities unknown in the place of execution, for which case the Convention has created a direct regulation. There are three exceptions to the application of the law of the place of granting of the power of attorney, to wit:

2. The Recognition of the Free Will Principle, in a Limited Manner

19. The Inter-American Convention had a flexible approach to make valid—to the maximum possible extent- the granting of powers of attorney. To such end, the members of the Convention considered that the will of the grantor may also be a determining factor in the choice of the law applicable to powers of attorney. Consequent, the Inter-American Convention recognizes the free will principle to choose the form of powers of attorneys. It was the first CIDIP Convention to allow individuals to choose the applicable law. It is not until 1994 that we find a similar recognition with the approval by Mexico of the

Inter-American Convention on the Law Applicable to International Contracts.

However, it should also be pointed out that, in this case, free will has a triple limitation:

1. The choice will only be available if the law of the place where the power of attorney is to be used does not mandatorily impose an essential formality for the validity of the power of attorney. If mandatory rules exist in the place where it is to be used, the choice of the form will be irrelevant;

2. The grantor may elect between two laws: the law of the place of execution of the power of attorney and the law of the place where it will be used; and

3. The choice is unidirectional: the grantor is only authorized to make a choice in one way: from the place where the power of attorney is executed to the place where it will be used.

3. The Lex Loci Executionis

20. How is it possible that these power of attorney requirements, sometimes of content or substance and others of form, can be met just by applying the law of the place of execution? Experience has shown that the problem lies just there: that, on many occasions, to meet the form requirements of the law of the place of execution is not enough, or not sufficient, or not useful, because such requirements will not be accepted in the country where such power of attorney will be used.

A power of attorney is created for a purpose, to perform certain acts – in this case – in a foreign country. The effect of the law of such country is so relevant that it may happen that the linking criterion that appeared to be the most important –the locus regit actum principle – takes a secondary place to the linking criterion of the place where the power of attorney will be used, when essential formalities are required for its validity. If the law of the country where the power of attorney will be used requires a special formality –e.g., a power of attorney certified by a notary to sell or encumber a real property-, there is no choice: it shall be issued as a public deed as required by the law of the country where it will be used, leaving aside the provisions of the law of the place of execution. In this manner, the law of the place where the power of attorney will be used may be applicable in two different situations: when the person granting the power of attorney has expressly chosen it as regards its form, or when the application of the provisions of such law is rigorously necessary or mandatory.

21. For purposes of this Conference, we consider advisable to mention two sections of the Paraguayan Civil Code. Section 23 provides as follows:

The form of public or private legal acts is subject to the law of the place of execution, except in case of legal acts executed abroad before competent diplomatic or consular officials, which shall be subject to the provisions of the Paraguayan Civil Code.

In addition, Section 24 understands that:

Legal acts executed abroad in connection with real property located in the Republic will be valid provided they are issued as duly legalized public instruments, and will only have effects after being certified by a notary, by order of a competent judge, and registered with the Public Registry.

However, I have also found four articles of the Paraguayan Civil Code on the form of legal acts, which are sections 297 and 302 through 304.

297. Notwithstanding the provisions of this Code on the capacity or incapacity of persons and on the form of legal acts, such acts shall be exclusively subject, regardless of the place of execution, in terms of form, evidence, validity and effects, to the laws of the Republic, if they are to be enforced in such territory or actions are to be taken therein as a consequence of their noncompliance.

302. In the execution of legal acts, the formalities provided by law shall be observed. In the absence of a special rule, the parties will use the form that they may deem convenient.

303. If a certain type of instrument is exclusively required by law, it will not be replaced with another, even if

the parties have committed in writing to execute such instrument within a specific time and agreed on a penalty. This clause and the legal act will be null and void.

304. Any written document may be issued as a public or private instrument, except in the cases where the form of the public instrument has been exclusively provided for.

As it appears from these provisions, which are very usual in Latin America, the Law applicable to the substance or intrinsic validity of legal acts determines the specific form, since the power of attorney serves as a means to a purpose. The law of the place where it will be used may impose certain forms, such as the public deed.

22. Then, despite the recognition in terms of form and the application in principle of the law of the place of execution, we must take into consideration the Law of the country where the legal act will have effects. A solution of this kind seems inevitable. For example, under the Uruguayan Law, section 2056 of the Civil Code requires an express (special) power of attorney to settle, dispose of, mortgage or take any other action strictly regarding property rights. Under Family Law, the power of attorney for marriage purposes requires the identification of the person to whom the principal is getting married. The same applies to get a divorce, or to adopt, or to recognize a child born out of wedlock. In case of a transaction, the special power of attorney will state the rights and property subject matter of the transaction. For this reason, section 2 of the Inter-American Convention is completed as follows:

(...) unless the grantor elects to be subject to the law of the State where they will be used. In any case, if the law of such State requires essential formalities for the validity of a power of attorney, such law will be applicable.

Determination of the Place where the Power of Attorney will be Used

23. Perugini points out that it is not easy to determine what is known as the “place where the power of attorney will be used”. One thing is the place where the power of attorney will be used, another is the place where the final legal act will be carried out. According to the author, the use of a power of attorney begins in the country where the attorney enforces such document and ends in the country where the action related to the final performance of the legal act takes place.

In general powers of attorney with no designated countries, or general or special powers of attorney with more than one designated country, there is technically no place of use of the power of attorney; therefore, subsidiary linking criteria must be applied. In special powers of attorney with one designated country, there is only one place where they will be used. In the absence of subsidiary linking criteria, the only possible solution is to comply with the most rigorous law, provided the probable place of use is known. Otherwise, the power of attorney will have an unpredictable outcome.

4. A Direct Regulation for Cases of Unknown Tools

24. Due to the foregoing, we are already in a position to affirm that the Inter-American Convention is actually useful when the legal formalities required by the law of the place where the power of attorney will be used cannot be met in the country of execution, because they are unknown in such country. That is the case of the public deed, which is not known in many countries, as well as the legal concept of Latin notary.

When this situation occurs, the agonizing dilemma arises: What to do? Should we abide by the law of the place where the power of attorney is to be used but, since it cannot be used in the place of execution, we tell the client the power of attorney cannot be granted? Or we advise such client to meet the requirements of the place of execution and ignore the mandatory formalities of the law of the place where it will be used?

The problem is caused by the use of an unknown legal concept that must be observed at the time of execution of the power of attorney. This legal concept must have no parallel in the legislation of such

country, thus making its application technically impossible. As already explained, in the field of powers of attorney, the lack of knowledge of legal concepts may occur in two areas: with respect to the public deed and the existence of the notion of Latin notary or even an authenticating authority.

In this situation, it is advisable to reexamine the above sections of the Paraguayan Civil Code. What effect do these rules have on foreign powers of attorney? Because these sections clearly refer to “acts that will be exclusively subject, regardless of the place of execution, in terms of form, evidence, validity and effects, to the laws of the Republic of Paraguay” (section 297). In addition, section 303 provides that “if a certain type of instrument is exclusively required by law, it will not be replaced with another (...) This clause and the legal act will be null and void”. Furthermore, section 254 states that “legal acts executed abroad in connection with real property located in the Republic will be valid, provided they are issued as public instruments.” To overcome the legislative discrepancy between the Paraguayan Code and the *Inter-American Convention*, we should remember some principles of private international law.

1. A power of attorney granted abroad is an international, not domestic, private relationship; therefore, a specific regulation is required: the rules of private international law;
2. Paraguay has ratified the *Inter-American Convention on General Rules of Private International Law* that, in its section 1, provides for the international monism, that is, that conventional rules will always prevail over national rules of private international law;
3. Third, some of the above provisions of domestic law are rigorously mandatory rules, also known as rules of immediate application.
4. Finally, the Inter-American Convention has solved this discrepancy in a very specific manner.

1. Lack of Knowledge of the Special Formality of the Public Deed

25. In order to solve the obstacles existing between the two opposing laws and in view of the impossibility of recognizing certain legal concepts that are totally unknown in the place of execution of the act, section 3 has directly addressed the issue by providing –that is, the Convention- the manner in which the power of attorney will be understood and the minimum formal requirements needed. Section 3 states the following:

When, in the State where the power of attorney is granted, the special formality required is unknown, pursuant to the law of the State where the instrument will be enforced, it will be enough to comply with the provisions of section 7 of this Convention.

In this manner, a rule of conflict is replaced –an indirect solution that is doomed to fail due to the existence of rigorously mandatory rules in the country where the power of attorney will be used - by a supranational material or substantial rule, thus overcoming the problem in the only possible and logical way: with a solution provided by the international legislator.

If the essential formality required by the law of the place where the power of attorney will be used –e.g., the public deed- is a legal concept unknown in the country of execution, for the power of attorney to be internationally valid and to secure its circulation, the Inter-American Convention will accept a replacing formality, in which case it will be sufficient that the power of attorney is granted in compliance with the requirements of section 7. In this manner, formality equivalence will exist between the requirement of a public deed and the certified private document.

2. Lack of Knowledge of the Concept of Authenticating Official

26. In addition, the power of attorney may be issued in a country where the concept of Latin notary is unknown: the concept of the notary may exist, but such person might not be authorized to issue public deeds, or the profession of notary or, finally, of the authenticating authority may not exist.

a) Lack of Knowledge of the Concept of Latin Notary

27. Section 7 provides that, if in the State of execution, there is no authorized official to certify or attest to the matters mentioned in section 6, the following formalities will be met:

I) The power of attorney will include a sworn statement or affidavit from the grantor that he or she will truthfully provide their identity, nationality, age, domicile and civil status. This is because it may happen that the oath is prohibited in the legal system of the place where the power of attorney is executed.

In that case, their statement that their personal data are true and the certification of signatures will be enough.

II) Certified copies or other evidence regarding the grantor's right to grant the power of attorney on behalf of another individual or artificial person, the legal existence of the artificial or legal person, and the grantor's right to grant it, will be attached to the power of attorney. Such copies will be attached to but not made a part of the power of attorney.

In this case, we are talking of persons whose only power is to certify signatures but not to authenticate acts or documents. In such event, the signatures will be certified and the above documents attached.

b) Lack of Knowledge of the Concept of Authenticating Official.

28. What happens if, in the country of execution, the concept of notary is unknown? The grantor's signature shall be authenticated even if there is no notary; such task will be entrusted to an official who—pursuant to the foreign law of the place of origin of such power of attorney—has the power to authenticate. This is up to the domestic law of the place of execution.

The section was approved with the term “authorizing official” and later replaced by the Style Commission with “legalizing officer.” Therefore, Argentina made a Statement in the sense that the involvement of any authorizing official, regardless of their rank, must be included. Based on such interpretation, the certification or attestation with respect to the grantor's identity and personal data, as well as the representation of another individual or artificial person, may be carried out both by a notary and a public official, or by a specially qualified consul.

29. To sum up, when these cases occur—powers of attorney issued in the United States of America, Australia or the English part of Canada, etc., due to the application made by Uruguay and probably Paraguay—the power of attorney will be equally valid if it includes a sworn statement or affidavit from the grantor as regards their nationality, domicile, civil status—there is no mention to marriages— and age. Some data help identify the person, others, on the other hand, are aimed at verifying their capacity. These requirements do not pose major inconvenience, except for age. Many times it occurs that there is no mention in the document to the age of the grantor. Based upon a literal interpretation of the Convention, the power of attorney would not be valid outside the territory and could not be used in another country. However, such inconvenience can be overcome by verifying, through other means, if the person is of an age that presumes their capacity, because that is why age is asked. Likewise, such person's statement that he or she is of age is valid, despite the fact that the age is required by the Inter-American Convention.

30. In case a power of attorney is issued as a private document with signature certification, besides the sworn statement or promise to tell the truth, certified copies evidencing that the requirements have been met will also be added. The section refers to “other evidence,” accepting any other means of evidence provided by Law.

Forms of Publicity

31. As regards requirements of publicity of the power of attorney, they will be subject to the law of the country where such power of attorney will be used. If any requirement is provided by law in that sense, such requirement will be met. The Mexican Delegation proposed that powers of attorney should not be subject to notarial certification or registration, but the Delegation from El Salvador disagreed “with the

Mexican proposal for a fundamental reason: publicity, and especially registration, are guarantees of security with respect to the use of the power of attorney and, for certain acts, they are mandatory under several legal systems, including El Salvador. For such reason, they could not support such proposal, which is an amendment to a section already approved that states that publicity requirements are subject to the law of the State where the power of attorney is used.”

It seems that, under Paraguayan Law, notarial certification is only required for real property, pursuant to section 24 of the Paraguayan Civil Code. If that is the case, nevertheless it will be highly advisable in all cases to have a notary certify the power of attorney and the attached documents. In Uruguay, 90% of notarial certifications are voluntary, at the request of the interested party; it is extremely rare to have a notarial certification ordered by a judge. The good notarial practice has driven Uruguayan notaries to certify powers of attorney in case, after the act is executed, much later, the attorney's powers to execute such act are questioned. The notarial certification permits the creation of an original instrument in Paraguay that is stored to prevent loss or deterioration, which will serve to subsequently control the powers granted or that the instrument's issuance and circulation comply with the rules. If there is something in which we are experienced is this: powers of attorney issued abroad, especially those issued as private documents with certified signatures, must always be certified by a notary, without considering the cost thereof, since it will bring peace and tranquility to the professional practice.

As regards publicity requirements, section 3 supported the position of El Salvador, by providing that: *The publicity requirements of the power of attorney are subject to the law of the State where it will be used.*

In other words, it adopts the solution reached by the Treaty of Montevideo of 1940 that regulates publicity actions under the law of each State. Section 24 of the Paraguayan Civil Code states that, with respect to legal acts executed abroad in connection with real property located in Paraguay, the documentation must be legalized, certified by a notary upon a competent judge's order and registered with the Public Registry. In Uruguay, only the amendments to powers of attorney issued abroad, revocations, substitutions, etc. are registered with the Registry of Powers of Attorney. Notwithstanding, registered information will always be required to verify that the power of attorney has not been affected by any entry made after its execution.

Legalization of a Power of Attorney Issued Abroad

32. As we all know, the purpose of legalization is to prove that the person authorizing a document is such person, and that he or she was acting in accordance with their duties: that he or she was a Notary and was not suspended or retired. Therefore, only public documents are legalized; private documents are not legalized because no authenticating authority is involved.

After this explanation, please note that the Washington Protocol of 1940 states, in its section 5, that “in member countries of the Pan-American Union, a power of attorney issued in any of them will be legally valid in any other of such countries where the rules of this Protocol are complied with, provided such power of attorney is duly legalized pursuant to the special rules on legalization.” Section 8 of the Inter-American Convention of 1975 is much prudent, when it only states that:

Powers of attorney shall be legalized if so required by the law of the place where they will be used.

Legalization and Las Leñas Protocol

33. In that respect, I would like to sort out the following confusion existing among the Notariats of MERCOSUR: it has been said that, under the Las Leñas Protocol on Jurisdictional Cooperation and Assistance Regarding Civil, Commercial, Labor and Administrative Matters of 1992, the legalization of public deeds, notarial certifications and first certified copies to be exhibited may be waived, if such instruments are carried out via the Central Authority. And that is only partially true.

We advise to read section 26 of the Las Leñas Protocol, which provides as follows:

Documents issued by jurisdictional or other authorities of a Party State, as well as public deeds and

documents certifying the validity, date and legitimacy of the signature or conformity with the original, which are carried out via the Central Authority, are exempt from legalization, apostille or other similar requirement when they are to be submitted in the territory of another Party State.

Based on this section, it has been sustained that the above notarial documents may, in any situation, be carried out via the Central Authority, thus avoiding the legalization procedure, which is not true. The Central Authorities are administrative bodies of inter-jurisdictional cooperation. They were created to assist judges and other public authorities in terms of foreign law, execution of letter rogatories to serve notices and summons, collection of evidence abroad, requests to have attachments levied, etc. This is clearly explained by Section 2 of the Las Leñas Protocol when it states:

For purposes of this Protocol, each Party State will designate a Central Authority to receive and carry out requests for jurisdictional assistance in civil, commercial, labor and administrative matters.

Therefore, notarial documents exempt from legalization under the Las Leñas Protocol are, purely and simply, those carried out through magistrates and regarding lawsuits with international repercussion. For instance, if it is necessary to show a witness a public deed or a first certified copy, and such witness is domiciled abroad. Nobody – I repeat – nobody may appear before a Central Authority, for example that of Paraguay, and request the remittance of a notarial document to Uruguay if no legal action is pending. The person entitled to request such procedure is the judge hearing the relevant case. If, during a legal proceeding, one of the litigating parties wishes to have a notarial document shown to a person domiciled abroad, such party will have to request it from the judge, who will be required to accept. Therefore, the legalization exemption of notarial documents under the Las Leñas Protocol has a more restricted scope than it was intended. With these explanations we believe we have sorted out the existing confusions in that respect.

The legalization chain in Paraguay is as follows: for powers of attorney issued abroad, first the notary's signature is legalized by the authority controlling him or her, then the signature of the controlling authority is legalized by the Paraguayan consulate abroad, followed by the legalization by the Ministry of Foreign Affairs of Paraguay; thereafter, the instrument is registered with the Registry of Powers of Attorney.

If the power of attorney is to be used abroad: the Notary's signature is legalized by the Notary Association of Paraguay, followed by the Supreme Court of Justice, the Ministry of Justice and Work, the Ministry of Foreign Affairs and, finally, the consulate of the country where it will have effects, to be later submitted to the Ministry of Foreign Affairs of the country where the power of attorney will be used. The proceeding is similar in Uruguay, except for one aspect: we do not have a Ministry of Justice, so our proceeding is one step shorter than yours.

Translation of a Foreign Power of Attorney

34. Section 6 of the Washington Protocol states that "powers of attorney issued in a foreign country and in a foreign language may, within the same document, be translated to the language of the country where they are intended to be used. In that case, the translation so authorized by the grantor may be deemed accurate in all respects. A translation of the power of attorney may be also carried out in the country where it will be used, pursuant to the practice or rules of such country." A very correct and advisable solution that facilitates the circulation not only of powers of attorney but also of any public instrument in general. Section 9 of the Inter-American Convention states that powers of attorney will be translated into the official language of the State where the powers of attorney issued in a different language will be used.

Conflicts of Conventions. Final Conclusion

35. As a final conclusion, please note that the *Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad* has been praised for its sense of practicality. Without diminishing the value of this aspect that is so important, we believe the supranational rule makes also a significant contribution in the context of the general theory of private international law.

First, it addresses with clear relevance the issue of the rules of immediate application of Party States, demanding respect first for third party States and, in the case of powers of attorney, when this respect is not obtained, it suggests a direct material solution to the problem that is remarkable. This should be the path in the future to restrict the scope of the rules of necessary application and prevent a development that would affect the application of private international law.

Second, it is the first Convention of the C.I.D.I.P. that clearly enables the exercise of the free will to choose the applicable law, even if this choice has been limited as above described.

Third, the category of “formality of acts” is not developed independently but, with a functional criterion, depends on the law regulating the substance of the power of attorney, a criterion that prevails today in the international doctrine.

It further attempts to solve a conflict of civilizations, especially the one existing between Common Law and Civil Law countries.

Finally, it takes into consideration the unknown concept, sorting out the difficulty raised by its existence through the implementation of direct material solutions.

Determination of whether there are rules in Uruguay providing for “essential formalities” with respect to powers of attorney

36. I would like to end this presentation with a last thought. As explained above, the Inter-American Convention transfers to the domestic law of the country where the power of attorney will be used the task of defining the “essential formality.” From this it derives that the essential formalities of each country must be determined. Are there in Uruguay “essential formalities for the validity of a power of attorney” that would substitute the law of the place of execution for the law of the place of use? In the absence of an express provision in the Civil Code, several positions were adopted, of which the one unanimously taken by the Uruguayan notariat was that the power of attorney should meet the same formality required for the final act.

The Solution Offered by Law 18362 of October 6, 2008

37. However, upon the approval of Law 18362 of October 6, 2008, the situation radically changed. Section 291 is transcribed for ease of reference:

Powers of attorney for formal legal transactions shall be issued indistinctly as public instruments or private documents with signatures certified by a notary.

Powers of attorney granting powers to execute formal legal transactions and those to be registered and issued as private documents with certified signatures shall be certified by a notary prior to or simultaneously with their use.

If the requirements mentioned in the first subsection are omitted, the legal transaction shall be valid but ineffective.

No legal transactions will be registered with the Registry until the legalization of the powers of attorney invoked, which were issued as private documents with certified signatures, has been verified by a notary.

For foreign powers of attorney, since they are private documents, the double formality of notarial certification of signatures at source and subsequent notarial certification in our country will be required, as well as the legalization and sworn translation, if applicable.

Acts executed prior to the effectiveness of this section will be effective even if the powers of attorney used, including verbal powers of attorney, were not granted with the formality required. Cases where final judgments have been passed are excepted.

After reading the above provision there are no doubts: the more than centennial controversy has been finally settled. On what terms?

First, it disregards the admissibility of verbal powers of attorney for the disposal or encumbrance of real property, though accepting those executed prior to the approval of the law.

In addition, and to compensate the above solution, powers of attorney granted as public instruments –with or without signature certification– that were used for the same purpose will also be accepted.

Third, it abandons the thesis invariably sustained by the notariat regarding which the power of attorney must meet the same formality as the final act. Such abandonment, however, is not complete, since it only allows to choose between two formalities, both in writing: the public deed or the private document with certified signatures, for any legal action, regarding real property or not.

Fourth, the power of attorney issued abroad must be certified in our country by any Notary, prior to or simultaneously with the authorized final act.

Fifth, failure to comply with these requirements does not cause the final act to be invalid but ineffective.

Finally, please note that we believe that Executive Decree 175/992 of May 5 is not repealed, since its new text enables any Notary currently practicing in the Republic to certify a power of attorney issued abroad. It then states that “in the case of powers of attorney that must also have effects in another country, a first certified copy issued by the Notary in charge of the certification will be certified instead, and such certification will be mentioned on the margin of such documents. In this case, the minutes for a deed to be entered in the Book of Notarial Records will include the attorney’s statement that the power of attorney will be also used abroad.”

On the contrary, if the power of attorney has already been certified by a notary abroad, the Notary will have to certify the first certified copy of the foreign certification, after legalizing and translating the same, if applicable.

Therefore, after Law 18362 of 2008 became in effect, Paraguayan Notaries had no problems when issuing powers of attorney as public deeds or private documents with certified signatures, either to dispose of or encumber real property located in Uruguay.

The above, then, is a sign of opening and trust in the use of new formalities for foreign powers of attorney. The only thing left is to expect that the alleviation of formalities is not an obstacle to their inalterability and good use.

4.3- COLLOQUIUM ON INTERNATIONAL SUCCESSION

GENEVA, SWITZERLAND- MARCH 2, 2010- COLLOQUIUMS - CONCLUSIONS

INTRODUCTION TO TRANSMIT: WHY?

This colloquium –the second of its kind but, let’s wait, others will follow- may surprise its eventual attendees with its title. Because, is there a connection between human rights and the transfer of estate? Yes, there is, and it will be up to us to prove it, at the same time that we will provide practical answers to the problem that you are required to face internationally to decide in favor of your followers.

To transmit! The word reminds us of definitions both diverse and inseparable. It applies to cultural references and morals, as well as to material assets of any kind, from family stuff surrounding us to intangible assets, without leaving aside real estate.

In this manner, numerous proverbs are illustrated, as in the poet’s words: “Inanimate objects, perhaps you have a soul that attaches itself to our soul, giving us the strength to love”, or even in the one of the verses, quite forgotten today, of the French national anthem, La Marseillaise: “We too shall enlist when our elders’ time has come”.

The above transcriptions are essential for more than one reason. Every type of society only survives, in principle, if it secures, upon transmission, the continuity of its references and, consequently, its system of values. This is necessary to maintain each type of culture, rich and indispensable, for human progress, without any hierarchy among them but global expansion, which removes no intrinsic value from the most modest cultures. In addition, any succession, regardless of its type, is essential for such survival. The brutal dictatorships that have stained the XX century, which had already sensed it would happen, tried- in vain and ridiculously- to eradicate such transmission of memory. Their obvious failure proves that even terror, torture and death are incapable, despite their extreme violence, of blotting out the people’s memory or atavism. This information, which comes from old ages, from ancient and sometimes millenary times, cannot be erased in a few decades. Only time, a very long term, will have effects on it, sometimes beneficial, since it is imperceptibly modified, often enriched and at the same time adapted to evolution, for the greater good of everyone relying on such information.

In an apparent lower level, and in any event more prosaic, is the private transmission of material assets. However, this affirmation should be prudentially made. In effect, human society is just the addition/accumulation of all its elements. Each individual, each group, each net worth, either modest or considerable, contributes both to the existence of such society and to its enrichment, which is the sum of all such elements.

This transmission of material testimonies, though imperceptibly contributing to the general interest, satisfies everyone’s desire to live a bit longer by “transmitting their testimonies”, simultaneously solving the problem following their death, and gives to their successors a satisfaction that does not depend on a sole vulgar desire.

The history of law, as history in general, provides numerous examples of such affirmations.

In the Mesopotamia, the law fragments that have survived to this day certify the existence of property and its transmission, at least as regards certain social classes (free men).

Cuneiform laws deal with succession and wills (“simtu”: “destiny”), as well as divisions and gifts. In the ancient Egypt, the existence of private property is well proven, at least in the Ptolemaic period, by public instruments that have survived to this day. As regards ancient Greeks, private property existed and was transmitted by disposal with and/or without a consideration; even in Rome.

In several parts of the “Politics”, Aristotle analyzes the problem: “Men have two important reasons for requesting and loving: what they have as their own and what they want” (II-4).

On the other hand, such principle takes different forms. In this manner, for the Buddhists, one of the main principles of the “Noble Eight-Fold Path”, the “Middle Path”, is “not to steal”, which entails the existence of the other’s property, without which even the notion of not stealing cannot exist. For the Moslems, the right to property and transmission are acknowledged, on condition that they are used to better serve God and cause no injustice. Even the Koran contemplates the issues of inheritance and wills (II-180/182; 233; 240; IV 7/13; 19; 33; 176; 106/108; XXXVI 50; LXXXIX 19).

In the Western Civilization, the transmission of property and the concept of contract were already known in the Middle Ages with certain variations, is true, regarding the condition of individuals, either free or not, as well as geography. Many customs, such as the resurrected (or reinvented) Roman law, are evidence of that. The Byzantine legislation, which we have inherited as well as the Roman law, deals with these issues at length. For example, please remember the *novelle* 44, the best known of those related to the *notariat*, the immediate cause of which is a will problem.

Saint Thomas Aquinas states: “As regards external goods, two things are attributed to men. The first is the power to manage and dispose of them,” “...the individual property is favorable to the maintenance of peace among men...” (*Summa Theologica* – Part IIa IIae Question 66, section 2, Conclusion). These axioms will be ratified by the ideas of other laic philosophers. Pufendorf (1632-1694) sustains: “Property is a right whereby the form and substance of a thing belongs to someone,” and Locke (1632-1704) states that property right is a “private dominion exclusive of the rest of mankind”, with the resurgence of the Roman law influence that includes “the use and abuse”. The possibility of transmitting clearly arises there from.

In his “*Social Contract*”, Jean Jacques Rousseau (1712-1778) sustains (book I, chapter IX) that “the State, in relation to its members, is master of all their goods”. Voltaire (1694-1778) personally wrote on the copy kept in his library “owner of the right to have all his assets and the obligation to keep them”. Apart from the well known rivalry existing between both philosophers, which arises from this note as well as others made on the book, this comment reveals the rivalry that will be gradually intensified through the XIX century until mid XX century between advocates and opponents of property right and its transmission.

In this last category, the most renowned opponent was undoubtedly Karl Marx (1818-1883), Hegel’s infamous disciple, who believed that a capitalist society will self-destruct. Other more realistic philosophers, among whom the archetype is Louis Blanc (1811-1882), sustain that the State’s role is to curb excesses, without believing for such reason that society is inevitably heading to the transformation anticipated by Marx.

This idea of State interventionism derives from previous principles, especially those included in section 17 of the 1789 Declaration. The notion of general interest –where the particular interest prevails- has long appeared, regardless of its wording, in many legislations. In France, the principle has been included since the Middle Ages, both locally –municipalities- and in the royal context, by giving an indemnification for each condemnation.

This arbitration by the State was intensified in the last century. In France, there are many examples, such as, without limitation, the farm lease regime in 1946 and, more recently, the “housing right”, preceded by texts providing for lease limitations (1948: modified area). Ecology, the “world heritage”, has recently juxtaposed with this notion.

Paradoxically, two consequences ensue from this interference:

- The first consequence is the withdrawal of investors from sectors they believe are adversely affected by the State’s interference. The housing issue is a good example, which led to the almost disappearance of the “modified area” system (which would have been even faster if it were not for the fear of the electoral consequences of its elimination).
- The second consequence is to mention the social aspect of the property right and all its attributes, including transmission. The notion of solidarity is curiously included, given its relationship with the same for many periods in the history of mankind, from the ancient times to the beginning of the XIX

century. This is so mentioned in the German constitution (section 14): “Property obliges. Its use shall as well serve the public weal.” From this viewpoint, the role of the property right and its transmission is ratified, since it proves that it secures social harmony. In addition, human rights are joined together and respected, since the property right is part of their “first generation”. However, it cannot be ignored that sometimes in this area “human rights conflicts” exist that must be resolved by the competent authorities, for example, the European Courts of Human Rights.

Due to the foregoing, we have two essential wordings of the founding texts:

In 1789:

Section 2: “The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, safety, **property** and resistance to oppression.”

Section 17: “Since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.”

In 1948:

Section 17: “Everyone has the right to own **property** alone as well as in association with others. No one shall be arbitrarily deprived of his property.”

To conclude, please note that, in most nations depending upon the United Nations Organization, such transmission of property, inevitably including, even in a subliminal manner, the transmission of a part of one’s essence, is carried out peacefully, without controversies and, leaving aside the taxes payable to the state, at a very low cost, because the “prevention judiciary” is in charge of such control. This judiciary is the notariat, and those under its authority are the notaries.

Alain MOREAU.

France.

INTERNATIONAL SUCCESSIONS: SWITZERLAND

I- DEFINITION

International succession means the succession of a foreign national who dies in a country other than his or her homeland, that is, the succession of a person who has several nationalities, or even the succession of a person who has property outside his or her country of origin or residence.

Most international officials, employees of international organizations or multinational companies, as well as ONG employees, fall under this category.

II- LEGAL SYSTEMS

This type of person is essentially nomadic.

International officials, who come from every country of the world, pursue their career in many countries of which they are not nationals, get married or divorced there, have legitimate and/or illegitimate children, purchase property... totally unaware of the law or the different legal systems applicable to them in most cases.

In most cases, upon their death or the death of their spouse or a relative, they are filled with consternation: they learn too late about the nullity of a will, a divorce or a marriage, as well as about the endless problems resulting from such situations.

This presentation is addressed:

- To non-jurists.
- To residents of countries whose cultural horizons, legal systems and life customs and usages are widely different.
- To those people who believe are protected by their organizations, ONG or multinational companies, in

any place in the world, considering that this protection only extends to their occupation but not their private life.

- To those persons for whom protection is specifically requested under Resolution 47/144 of the United Nations General Assembly of December 13, 1985, as regards human rights of persons who are not nationals in the country where they live.

- To those persons who were considered by the Sergio Vieira de Mello Foundation when working on the designation of August 19 as the world humanitarian day.

The following distinction should be made between legal systems:

A- Confessional Systems:

Under these systems, individuals depend since birth, in terms of personal status, upon religion and the confession of faith of their family, either on their father's or mother's sides. This will follow them for life and will reflect on their marriage and succession, as well as on the personal status of their children. In these cases, it is very difficult to avoid the confessional law and its effects. In each case, it is advisable to determine the value of acts performed abroad, if a person dies in his or her country of origin or abroad and the application of the confessional law of the country of origin of the deceased is required.

a) Koranic Law

For illustration purposes, some of the countries where the Koranic law and its variations are applicable are Sunnites, Shiites, Druze, Ishmaelite, etc...

b) Mosaic Law Countries

Countries, such as Lebanon, Syria or Egypt, which acknowledge the different personal status of Christians, are: Maronites, Syriacs, Copts, Greek Orthodox or Catholic, Armenian, etc.

B- Non-Confessional Systems:

The following distinction should be made:

- Roman-Germanic Law countries.
- Common Law countries.
- Scandinavian countries.

In the case of international officials, it is not unusual for a person to be born in a confessional law country, to live in a number of Roman-Germanic law, Common Law or other countries, get married, once or twice, to persons who have different nationalities and religions, choose a different religion for their children and then retire or die in their country of origin or other country.

Our purpose is to identify the law applicable to their succession.

In all cases, the succession of an international official may be governed by several legislations, either the law of their nationality or, if they have multiple nationalities, of one of their nationalities, the law of their domicile at the time of death, even if they die elsewhere and, if they own real property, the law of the land where such property is located.

The diplomatic status of senior officials implies the application of their national laws, except for real estate owned by them abroad.

This is the same as with international treaties, usually bilateral.

Few countries, such as Switzerland, allow a foreign national to claim the application of their national law or one of their national laws. Please bear in mind that, by requesting the application of the national law, a confessional law may be applied in Switzerland.

However, sometimes it is necessary to provide the Swiss laic judge with the applicable confessional legal documents, which may be very difficult.

The European Union countries seem to be evolving towards the application for foreign nationals of the law of the country where they live, but no final decision has been made on this matter.

III- QUESTIONS MOST FREQUENTLY ASKED BY INTERNATIONAL OFFICIALS

- 1- Who is entitled to an international succession?
 - An international official, consultant or employee of an ONG or a multinational company?
 - Their spouse? Their partner? Their children? What if they die before him or her?
 - The case of real estate owned elsewhere, including bank accounts in different countries.
- 2- Who is entitled to the pension?
- 3- How is the succession procedure in the case of a Moslem abroad and a Christian in a Muslim country?
- 4- How is succession planned?
- 5- Can someone from outside the family be an heir?
- 6- How can you benefit an heir?
- 7- Who is an heir? How to prove his or her legitimacy as heir?
- 8- What are the surviving spouse's rights in an on-going divorce proceeding?
- 9- Who is entitled to the pension of an international official?
- 10- How is a refugee's succession instrumented?
- 11- What are the rights of illegitimate children in their parents' succession?

IV- TWO UNAVOIDABLE STAGES

A- SUCCESSION PLANNING

B- PROBATE PROCEEDING

These two matters must be dealt with by notaries representing different legal systems and different member continents of the UINL.

In countries where the UINL is not acknowledged, the notary must be replaced by a jurist, such as in New York or Washington.

CONCLUSION: UINL'S CONTRIBUTION

The only global network representing UINL member countries*, as well as the website for international officials, provide answers to different problems as they appear.

The UINL is working for the implementation of a treaty on diplomatic relationships similar to the Vienna Convention, which would focus on solving the issue of the international officials' personal law.

UINL MEMBER COUNTRIES:

Europe (35)

Albania, Germany, Andorra, Armenia, Austria, Belgium (FR) / (NL), Bulgaria, Croatia, Slovakia, Slovenia, Spain, Estonia, France, Greece, Georgia, Hungary, Italy, Latvia, Lithuania, London (UK), Luxembourg, Macedonia (FYROM), Malta, Moldavia, Monaco, Netherlands, Poland, Portugal, Czech Republic, San Marino, Romania, Russia, Switzerland, Turkey, Vatican.

America (23)

Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Louisiana (USA), Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Uruguay, Venezuela.

Africa (15)

Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Ivory Coast, Gabon, Guinea, Mali, Morocco, Niger, Senegal, Togo.

Asia (3)

China, Indonesia, Japan.

PROBLEMS

There is not one kind of international officials. There are different categories. Their status differs first according to the nature and duration of their commitment, then to the period for which they are hired and, finally, to the organization hiring them.

In principle, there are those who are not actually international officials but want to be. They have temporary contracts, sometimes of a very short duration, then for a specific period and, finally, for annual periods. These temporary assignments may last sometimes their entire career. On few occasions, permanent contracts are offered, which are the most sought for and hardest to obtain, regardless of the level of qualification and nationality.

When an official retires, in principle upon turning 60, they very often continue to work as an advisor. In some cases, they make their qualification and knowledge available to the international community, which offers them a position as specialist.

Others prefer to join an ONG

The status of the advisor, specialist or member of an international ONG, from the viewpoint of the civil law applicable to them, is or should be that of an official, which is not a new category. However, this is not always the case.

Some international officials pursue most of their career away from home and family. They embark in missions of short or long duration, depending on the main offices of their organization or one of its main agencies.

Certain organizations require a rotation between the main offices and the field work. The spirit of the international official changes accordingly. A person with a temporary job, at least at the beginning of their career, is oblivious to sedentary lifestyle. On the contrary, a person posted in Geneva for some years (despite undertaking regular missions abroad), whose children have attended school in Switzerland and have often obtained the Swiss nationality, is well settled and not willing to leave their country of residence upon retirement, since the bonds with their country of origin, though strong, have changed.

On the contrary, an official having one or more nationalities who marries an official having one or more nationalities (who, in addition, each have children from a previous marriage) would probably have no links with their country of residence. Officials frequently have several nationalities, but they are hired on the basis of the quota of one of such nationalities. This does not mean that, in their private life, such nationality governs their personal status or business. That is why the status of an international official should have numerous aspects and certain flexibility for them to be able to face different situations.

In principle, a person sent on an assignment for a short or undetermined period should not be considered as a resident of the country of their assignment. However, more often than not, the assignment set for a short period becomes a permanent one. It would be necessary to foresee that, after a stay of two or three years, the official would become a resident of such country. Therefore, the issue of the applicable linking criteria is raised, which is either their national law or the law of their place of residence. I believe the official should be able to choose and discard any supplementary rule.

After several years of residence, the supplementary rule should be reversed and priority should be given to the primary residence. This is even more important when an official marries a person having a different nationality. The “home leave” issue (the mandatory return for holidays, every two years, to the country of the quota that is not necessarily the country of origin) is also raised. If both officials have the same nationality, the supplementary rule should be the law of their nationality and, on the other hand, if they have different nationalities, it should be the law of their residence or domicile.

An Official should be Able to Choose

Certain officials living in Geneva for many years do not speak French and are totally unaware of local institutions and laws to even consider applying the law of their residence to them. For all intents and purposes, they have no intention of relating to Swiss law. They need to be able to request their link with

their country of origin.

International organizations, officials' unions, should request an organization, such as the International Law Conference, the creation of a status applicable to the different categories of international officials, similar to the one created for diplomats and consuls.

Pierre Natural

General Advisor

UINL Representative to International Organizations in Geneva - February 2010

LAW APPLICABLE TO INTERNATIONAL OFFICIALS. SWITZERLAND

Switzerland has adopted the domicile as the main linking criteria. However, this principle is moderated by the fact that, both in terms of marriage and succession regimes, a foreign national with domicile in Switzerland may always request the application of their national law. For successions, the choice of law must be included in the will.

A foreign national with domicile in Switzerland is consequently subject, for family law purposes, to the Swiss law. The new private international law of Switzerland (1992) certainly provided for an exemption to the application of the law closest to the person when the solution is clearly inadequate (Section 15, L.D.I.P). At present, it seems doubtful that an international official could succeed in getting such exemption.

I.- LAW APPLICABLE TO MARRIAGE

Marriages celebrated abroad are recognized in Switzerland. If a spouse is Swiss or domiciled in Switzerland, the marriage is recognized, unless it was celebrated abroad with the clear intention of avoiding the nullity clauses provided by Swiss law.

Consequently, a Swiss person could not, by converting to Islamism and getting marrying in Egypt, have two wives.

Switzerland acknowledges the effects of a Muslim marriage or certain effects of this marriage on foreign nationals in the country, but not on Swiss or other persons domiciled in the country, given the public order reservation.

On the contrary, a marriage by proxy, a concept unknown under the Swiss law, could be recognized, provided the conditions of Section 45, subsection 2, of the LDIP are met.

The same-sex marriage is not recognized in Switzerland, based on case law (ATF 119 II 264).

II.- LAW APPLICABLE TO THE MARRIAGE REGIME

In Switzerland, the applicable marriage regime is that of the current matrimonial domicile. If a couple of foreign nationals have married outside of Switzerland without executing a marriage agreement, three different regimes would apply: the regime corresponding to the first matrimonial domicile, the regime resulting from the nationality or even the one of the current domicile in Switzerland. From a practical viewpoint, the law of the first court involved in the dispute resolution, which will determine the marriage regime, will be applicable.

The same happens in terms of succession (Section 90 LDIP). However, many countries believe that their own is the only legislation applicable to successions regarding real property located in national countries. In addition, this situation may be modified by certain international bilateral treaties. Our purpose is not to discuss here these aspects that are within the competence of a specialist.

Married people who have executed a marriage agreement, even abroad, are not required to change their marriage regime upon taking residence in Switzerland. The rules of their marriage regime will continue

to be applicable.

However, the principles of the general effects of marriage shall be applicable to them; especially in terms of separation of marital property where, despite the principle of separation, the spouses are entitled to reports, indemnification or similar amount.

On the contrary, couples getting married abroad without executing a marriage agreement shall be subject to the Swiss legal regime of sharing of marital property, in light of the application of the new private international law of Switzerland that became effective on January 1, 1989 (Sections 51 and 55 of LDIP). Thus, on January 1, 1989, the legal regime applicable to marital property was converted, with retroactive effects as of the marriage day, into the legal regime of sharing of marital property. Please note that there are different interpretations of whether the Swiss regime is applicable as from the day of arrival in Switzerland or is antedated to the first day of the marriage. The controversy has not yet been solved by the Federal Court (Supreme Court of Switzerland).

Even the legal regimes of persons whose domiciles were originally abroad are automatically converted into the Swiss legal regime of sharing of marital property.

Marital law has two aspects. One, which is common to all regimes, is known as the primary regime or the regime of the “general effects of marriage”. The other aspect characterizes the different marriage regimes.

Since married people without marriage agreements in Switzerland are automatically subject to the Swiss legal regime, this chapter needs to be expanded.

A. PRIMARY REGIME (Sections 159 through 180 of CCS), that is, of the General Effects of Marriage Marital law includes two aspects. One, which is common to all regimes, is known as the primary regime or the regime of the “general effects of marriage”. The other aspect characterizes the different marriage regimes. The general effects of marriage are governed by Sections 159 through 180 of CCS.

Please remember that these rules are applicable to all couples subject to Swiss law, regardless of the previous marriage regime, and to all foreign nationals domiciled in Switzerland.

The law provides no hierarchic organization of the couple, no distribution of chores and financial obligations based on sex:

- a) The marital home is jointly chosen by the spouses.
- b) Each spouse contributes to the expenses of the family, according to their income.
- c) The spouses must determine the contribution of each of them. Work performed at home must have the same value as paid work. Whoever manages a household, if they have no income of their own, is entitled to receive from their spouse a fair amount that such person may freely dispose to meet their own personal needs.
- d) If one spouse assists the other in their profession or company in a manner that clearly exceeds what can be expected of such person and receives no payment under an employment agreement, such spouse is entitled to an equivalent compensation.
- e) Spouses are joint and several liable for the debts incurred by any of them in connection with regular household expenses.
- f) None of the spouses may terminate a lease agreement or sell the family house or apartment without the other spouse's consent (new item under Swiss law).
- g) All agreements between spouses are allowed, unless otherwise provided by law.
- h) Each spouse is entitled to be informed about their spouse's income, property and debts.
- i) Brides or wives may use their maiden name followed by the last name of their husbands. Provisions of national law will prevail over Swiss provisions, given that, in that matter, the Swiss legislation refers to the foreign law.
- j) In case of dissolution of any regime upon death, it is established that the surviving spouse may request the right of ownership or enjoyment of the family apartment or house, as well as its furniture. In case of dissolution upon divorce, annulment or adoption of another marriage regime, any spouse may request the right of ownership of the marital property or joint owned property, only if such right of ownership is proven.

B. SECONDARY REGIMES, MARRIAGE REGIME OR REGIMES, IN A STRICT SENSE

1B. Legal Regime, Separate Property with Sharing of Marital Property

Since its effective date on January 1, 1988, the new matrimonial law provides for three marriage regimes. Previous regimes will continue in force until their dissolution, but cannot be applicable after the new law has become effective (1988).

The legal regime applicable in Switzerland, in the absence of a marriage agreement, is the regime of sharing of marital property (Sections 196 through 220 of CCS). It involves separate property with sharing of income (net marital property) from the husband and wife.

Separate property includes the contributions to the marriage, the acquisitions by inheritance or gift, personal effects, and damages for pain and suffering.

The spouses, under a marriage agreement, may agree that certain marital property used by a company or to practice a profession should be included within their separate property or that any income received from separate property should not be included within the marital property.

Under the law, it is presumed that any income is part of the marital property, unless proven otherwise. Thus, any income earned from work, amounts paid by pension organizations or insurance companies, indemnification for work disability, income from the spouses' own property, and property acquired by utilizing marital property fall within the category of marital property.

It is presumed that debts affect marital property rather than separate property, unless they are connected. Non-regular gifts affect separate property, except with the spouse's agreement.

There are complex provisions regarding debts and rewards affecting different property, but such issue would exceed the scope of this analysis.

Finally, under a marriage agreement, the spouses may provide for a distribution of proceeds other than in halves. However, these agreements cannot affect the legitimate portion of inheritance to which non-common children and descendants may be entitled.

2B. Conventional Regimes

a) Marital Property (Sections 221-246 of CCS)

Marital property is composed by the spouses' joint and separate property. It may be universal or jointly owned assets or certain specific property. Pursuant to the terms of the marriage agreement, income is included or not in the marital property.

The separate property is determined by the marriage agreement, third party gifts or the law.

Please note that the legitimate portion of inheritance may not be set by parents out of separate property, if the terms of the marriage agreement provide that it must include joint property.

Note: This regime is hardly applied in Switzerland.

b) Separate Property (Sections 247-252 of CCS)

This regime is too well known to need an explanation.

Please note that the general effects of marriage moderate the hardness of the separate property regime (right to reports, indemnification and/or fair amount), since the spouses are married and not strangers to each other.

The law provides that, unless evidence to the contrary, an asset is deemed to be jointly owned by both spouses. Any form of evidence may be given.

C. FREEDOM TO CHOOSE A MARRIAGE REGIME

Under the Swiss private international law, the spouses are free to choose the law applicable to their marriage regime, provided this law is applicable in the State where their matrimonial domicile was established after the marriage ceremony, or in the State to which one of them is connected by way of nationality.

The choice of the applicable law must be made in writing or clearly arise from the provisions of the marriage agreement. This choice may be made or modified at any time, retroactive to the marriage day, unless otherwise provided in the agreement. The chosen law continues to be applicable regardless of any change of domicile and for as long as the chosen law is not amended or revoked.

In this respect, married people who have not executed a marriage agreement, even abroad, will not have their marriage regime modified when living in Switzerland. The provisions of their marriage regime will continue to be applicable (Sections 52 and 55 of LDIP).

D. MARRIAGE REGIME DETERMINED BY OBJECTIVE RELATIONSHIP.

In the absence of a marriage agreement or a choice of law, any couple domiciled in Switzerland is subject by law, since their marriage date, to the legal regime of sharing of marital property.

Moreover, persons married abroad without executing a marriage agreement become subject to such legal regime since their change of domicile to Switzerland (Section 55 of LDIP). This new regime is retroactive to the marriage day, unless it is decided to exclude this clause or maintain the law previously applied.

However, if none of the spouses is domiciled in Switzerland, and the notary has to proceed to the separation of the marital property, the applicable regime is determined by the law of the State where both spouses have established their matrimonial domicile. In the absence of a matrimonial domicile, it will be the law of the State where both spouses have established their domicile at the same time. If no domicile was established by them at the same time and in the same State, the common national law will be applicable to them. And, if they have no common nationality and no matrimonial domicile was ever established in the same State, the spouses shall be subject to the Swiss regime of separate property (Section 54 of LDIP).

Finally, please note that an interpretation conflict would exist due to the fact that the LDIP became effective only on January 1, 1989. The temporary provisions of this new law raise the question of knowing if, for a foreign national who has established their domicile in Switzerland prior to January 1, 1989, the Swiss regime is applicable upon their arrival in Switzerland or is retroactive to their marriage day. This issue has not yet been resolved by the Federal Court (Supreme Court of Switzerland). The prevailing doctrine advocates respect for acquired rights, which results in the application of a marriage regime until their arrival in Switzerland and of the Swiss legal regime of sharing of marital property thereafter. The intervening party should point out that such dissociation is not possible, from a practical viewpoint, unless formal evidence is submitted and, in absence thereof, the regime should be retroactive to the marriage day.

E. MARRIAGE REGIME FOR DIPLOMATS AND PERSONS WITH DIPLOMATIC PRIVILEGES

It is considered that a diplomat accredited to a foreign country is domiciled therein, but has civil, administrative and criminal immunity in the host country. Consequently, such diplomat is subject to their national law, including the rules pertaining to conflicts of law.

If such diplomat is married to a person of their own country, it is relatively easy to determine the marriage regime, especially if the first matrimonial domicile has been established in their common country. A very sensitive problem may arise if the diplomat posted abroad marries, without executing a marriage agreement, a citizen of another country, that is, of the country where such diplomat is posted or a third country. In that case, it is advisable to apply the national law of the diplomat as if he or she were an ordinary citizen.

III.- DIVORCE

A. RECOGNITION OF A FOREIGN DIVORCE.

A divorce decree issued by foreign authorities is recognized if the decision was made in the State of the spouses' domicile or habitual residence or in the national State of one of the spouses, or if it is recognized in one of such States.

Please note that repudiation under Muslim law, which is a unilateral act of a spouse, is not equal to a judicial decision and is considered against the Swiss public order.

It should be pointed out that The Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations was ratified by Switzerland on May 18, 1976, and became effective for such country on July 17, 1976.

B. DIVORCE FROM A FOREIGN SPOUSE.

The domicile is still the essential criterion to determine the jurisdiction of the court (Section 59 of LDIP):

- a) The Swiss courts of the domicile of the defendant spouse.
- b) The Swiss courts of the domicile of the plaintiff spouse, if such spouse has been living in Switzerland for a year or is a Swiss national.

The Swiss law shall be applicable to the divorce and separation.

However, when the spouses have a common foreign nationality and only one of them has established their domicile in Switzerland, the common national law will be applicable to them.

IV.- SUCCESSION LAW

A. LAW APPLICABLE TO SUCCESSIONS

One of the main principles of the Swiss private international law of succession is the unity of successions (Section 86 and following sections of LDIP). The law usually applicable to any succession is the law of the last domicile of the decedent (Section 90 of LDIP). If this matter is referred by the foreign law to the Swiss law, such referral will be accepted. If the foreign law does not contemplate the foreign national's assets in Switzerland, the Swiss law will be applied.

However, many countries believe that only their legislation is applicable to successions in the case of real estate located in their national territory. Switzerland, in turn, does not sustain this exclusive jurisdiction and, therefore, accepts the application of foreign law for real estate located abroad.

This situation may be modified by international bilateral treaties. Bilateral agreements were executed in the past.

B. RECOGNITION OF FOREIGN WILLS

Under the Swiss international private law, the recognition of the validity of wills is directly referred to The Hague Convention of October 5, 1961 on the Conflicts of Law Related to the Form of Testamentary Dispositions, where it is provided that this convention will be applicable by analogy to the form of other wills.

However, to secure that the validity requirements of a testamentary disposition are met, it is recommended to have such requirements drafted in a specific manner, such as a will attested by a notary public.

Switzerland recognizes the validity of reciprocal wills upon death, even when their citizens are prevented from drafting joint or joint and mutual wills. The validity of the provisions of one of them will depend on the validity of the other. For these wills to be valid they must be subject to the law of the domicile of each testator or to the national law chosen by them.

C. DETERMINATION OF HEIRS

To determine if a person is an heir and, therefore, to distribute the decedent's estate, the following documents should be filed with the Swiss authorities:

- Certificate of death.
- A copy of the marriage certificate, or family record in Switzerland, issued by the municipality of origin (the family record is a document stating all marriages, divorces, children).
- Determination of heirs or heir certificate.
- Name of the Swiss municipalities where the real property is located, in order to request the relevant certificates from the Property Registry. Under Swiss law, title deeds are less important since ownership is only conveyed upon registration with the Property Registry.
- Name of the banks where the decedent had accounts.

In Switzerland, a general search in an important bank throughout the country costs between Francs 1,500 and 2,000. There are 6 to 10 banks in the country. A search conducted in a canton for one of the most important banks costs approximately Francs 400.

There are no means to conduct a general search across Switzerland, except for criminal proceedings.

The Swiss succession law was also amended in 1988 to consider that, generally, when parents die, their children are mostly over 40 years old, capable and settled. It seemed very important to protect the surviving spouse.

Foreign nationals domiciled in Switzerland who have no diplomatic immunity are subject, in principle, to the Swiss succession law.

D. SURVIVING SPOUSE

1) Legal Portion of the Surviving Spouse (Section 462 of CCS).

The surviving spouse is entitled to the following:

- together with the descendants, to one half of the estate,
- together with the father, mother or descendants, to three quarters,
- in the absence of second degree descendants, to the entire estate.

The legal rights of usufruct of the surviving spouse were eliminated. There is always the possibility to bequeath to your spouse the usufruct on the ordinary descendants' portion.

2) Legitimate Portion of Inheritance (Section 471 of CCS).

The legitimate portion of the surviving spouse is one half of their inheritance right.

It is three quarters of the estate, in the case of descendants, and one half for the father or mother.

E. HEIRS

Heirs are the decedent's descendants or, in their absence, his or her father or mother or, in their absence, their descendants. If there are no parents and descendants, heirs are the grandparents and their descendants, always together with the surviving spouse (Sections 447 through 462 of CCS).

In the absence of the three categories of heirs mentioned above, and if there is no surviving spouse, the estate is bequeathed to the canton of the last domicile or the municipality determined by the legislation of such canton (Section 488 of CCS).

F. WILLS

The issue of wills drafting is very sensitive, since the freely disposable portions of inheritance change according to the countries. The interpretation of wills not amended by the new Swiss law could be contrary to the will of testators.

Finally, please note that, under Swiss law, a foreign national's succession is, pursuant to a clause included in the will, subject to the law of their country of origin (*professio juris*). In case of plurality of nationalities, the applicable nationality is, in principle, the last obtained. Therefore, it is advisable that any person involved, especially if married, should verify the legitimacy of the provisions adopted or the

consequences of the lack thereof.

It should be further stated that, if the succession law applicable to foreign nationals is the one of the decedent's domicile at the time of death, international treaties (including those executed with Germany (Grand Duchy of Baden, December 6, 1856, Law of the Last Domicile), with the United States of America (Treaty on Residence, dated November 25, 1850, Law of the Last Domicile), or with Italy (Treaty on Residence, dated July 22, 1868, Law of Nationality), and the convention with France effective January 1, 1991) or testamentary dispositions may result in the application of a different law. Mention should also be made to the treaties with the Persian Empire of April 25, 1934, the Convention on Residence and Legal Protection with Greece, dated December 1, 1927, as well as the Consular Convention with Portugal of August 27, 1883, whereby the succession is subject to the national law.

G. SUCCESSION UNDER A CONTRACT

Switzerland recognizes the agreement by which one party promises to appoint the other as heir in a will, known as the succession under a contract, a true agreement that is mutually obligatory upon death, the validity of which is subject to personal appearance before a notary and two witnesses of whoever intends to contractually dispose of their property upon death.

It is a very useful but sensitive and dangerous instrument, since it may only be amended by decision of all parties involved. In case of change of domicile abroad of the "testator", for instance to France, this act becomes null and void, which could lead to unsolvable problems.

All acts are allowed, especially between spouses. Consequently, gifts are clearly allowed. A gift to the last surviving spouse (under French and Belgium law) is not recognized under Swiss law. The Swiss notary may, in case of a bilateral agreement, provide for an agreement to make mutual wills between spouses, as a legacy of more than the legally prescribed portion (Section 245, subsection 2, of CO).

H. ESTATE TAX LAW

International officials are subject to the ordinary tax law that, in Switzerland, varies according to the canton. There are several differences, since each canton has its own estate tax law and, therefore, it is impossible to provide specific characteristics.

For example, it could be mentioned that estate taxes in direct line, between parents and children or between spouses, were eliminated in Geneva, except for foreign nationals subject to a tax calculated on expenses (global tax amount). Under such same conditions, at present no estate taxes are applicable in Valais and many other Swiss cantons.

1) Tax law on successions in Geneva applicable to international non-diplomatic officials domiciled in Geneva and non-diplomatic members of diplomatic missions:

For these officials, the Government of Geneva has recently decided that the succession of real and personal property will no longer be subject to the succession law but to the ordinary law.

Geneva is currently the only place that has no taxes on the succession of international non-diplomatic officials.

2) Tax law on successions in Geneva applicable to international diplomatic officials domiciled in Switzerland:

With respect to diplomats or senior officials with diplomatic privileges, there is no succession law on the real property located in the State of residence only due to the diplomat's presence in the place of work. There could be problems depending on the importance of the bank accounts or other assets in Switzerland (Section 39, number 4, of the Vienna Convention on Diplomatic Relations of 1961). Very likely, diplomats and senior officials with diplomatic privileges would rapidly benefit from the decision taken in favor of non-diplomatic officials.

As regards real property privately owned by the diplomat or senior official, such property is subject to the ordinary tax law.

V.- MISCELLANEOUS

A. INCOME AND WEALTH TAXES

Any income earned by international non-diplomatic officials who have Swiss nationality are exempt in Switzerland from income tax and any tax on personal or real property located abroad.

Please note that, as in any other place abroad, real property wealth and income derived from real property are subject to the ordinary tax regime and taxed under the ordinary law.

Retired officials, as well as retired diplomats, are subject to the ordinary law.

However, Switzerland, pursuant to negotiations with the WTO, resolved to consider for retired officials of the organization the request for pensions to be exempt from income tax, so long as an internal withholding is made by the organization. Pursuant to this resolution, which is based on agreements executed by the headquarters with different organizations, apparently with all of them, the most favored organization treatment should extend to retirees of the other organizations. It may happen that this measure is only applied to officials domiciled in Switzerland at the time of retirement and not to officials of international organizations changing their domicile to Switzerland upon retirement.

To date, Austria, Portugal and Malta are the only countries where income earned or pensions received from international organizations are not taxed; all other income is subject to the ordinary law.

B.- Retirement and Possibility of Staying in Switzerland.

When an international official domiciled in Switzerland retires after living some years in Switzerland, in general they are easily allowed to stay in the country with their family. Such official becomes then subject to the ordinary law applicable to Swiss residents.

If an international official gets divorced, sometimes their spouse will be entitled to stay in Switzerland; other times, this is impossible, since it depends on treaties executed by their country with Switzerland. Thus, no problem exists for citizens of the European Union or the EFTA.

In principle, a diplomat or international official with diplomatic privileges is not allowed to perform business activities in the Swiss territory, or to be registered with the Register of Commerce as director or head of a company.

However, this only occurs in extraordinary situations, and even limited, since the spouse of a diplomat or diplomatic official is allowed to practice a profession in Switzerland.

More details are provided in the circular transcribed below:

RETIREMENT OF INTERNATIONAL OFFICIALS

The residence in Switzerland of international officials is not specifically regulated by the Swiss national law. First of all, this is a current practice that has been implemented for some years now and was set by the Federal Office of Foreign Nationals and the Federal Department of Foreign Affairs.

This practice, detailed in the directives and comments of the Federal Office of Foreign Nationals in terms of entrance, residence and stay of foreign nationals, derives from sections 34 and 36 of OLE, where the requirements to obtain a residence permit with no gainful employment are defined.

Without getting too legal, I would like to list the requirements provided in sections 34 and 36 of OLE for your better understanding of the criteria considered by Swiss authorities for purposes of granting a residence permit with no gainful employment.

According to section 34 of OLE, a resident permit may be granted to lessees if the applicant:

1. is over 55 years old,
2. has strong bonds with Switzerland,
3. is no longer employed, neither in Switzerland or abroad.
4. transfers its main interests to Switzerland, and
5. has the necessary financial means.

As regards section 36, it is established that residence permits may be granted to foreign nationals with no gainful employment for important reasons.

In practice, and as regards the granting of a residence permit to an international official retiring in Switzerland, these provisions are applied to a certain extent, with some flexibility.

The following two cases may occur:

- 1) The case of an international official with privilege remuneration who obtains a stay permit upon retirement.
- 2) The case of an international official who does not meet the requirements of having privilege remuneration but, notwithstanding, applies for a residence permit based on the provisions of section 34 or 36 of OLE.

1) The case of an international official with privilege remuneration who obtains a stay permit upon retirement.

a) Retirement at the age provided by the bylaws of the International Organization and five years of activity in Switzerland prior to the retirement age.

The international official retiring in Switzerland at the age provided by the bylaws of the International Organization may, in principle, obtain a stay permit if he or she has worked in Switzerland for such organization for five years prior to the retirement age, if he or she was not a party to any criminal action and has sufficient financial means.

“Sufficient financial means” means that the retiring official shall be able to provide for him/her, as well as for all dependants. To that end, such official shall be required to submit a document issued by their employer certifying the years of service and that the bearer of such certificate is entitled to pension, as well as the amount thereof.

b) A mission abroad at the international organization’s expense.

The international official is also able to obtain a stay permit upon his or her return from a mission abroad at the international organization’s expense, if he or she is transferred within five years prior to the retirement age and if he or she has lived and worked in Switzerland for an international organization for 10 years prior to their transfer abroad. For any person who has worked in Switzerland on several occasions (ten years in total), the Federal Office of Foreign Nationals reviews each case and determines if such residence periods may be considered to issue a stay permit.

c) Early retirement after 55 years old.

As a common practice, an early-retiring international official may obtain a stay permit if he or she is 55 years old at least and has lived and worked in Switzerland for an international organization for the last ten years.

2) The case of an international official who does not meet the requirements of having privilege remuneration but, notwithstanding, applies for a residence permit based on the provisions of section 34 or 36 of OLE.

a) Retirement at the age provided by the bylaws of the international organization and less than five years of activity in Switzerland prior to the retirement age.

When the period of activity is less than five years, the retiring international official may be authorized to live in Switzerland under the provisions of section 34 or 36 of the resolution of the Federal Council restricting the number of foreign nationals. In this case, the approval of the Federal Office of Foreign Nationals remains pending.

b) Early retirement before 55 years old.

If the official is under 55 years old, a residence permit with no gainful employment may be issued under section 36, provided there are justifying reasons. In such case, the official obtains a stay permit, according to their nationality, five or ten years after being issued an ordinary residence permit.

c) International officials living in a neighboring border zone.

Please note that these provisions do not apply to international officials applying to stay in Switzerland at their retirement age who live in a neighboring border zone. The authorities, especially the Federal Office of Foreign Nationals, will review the application based on the provisions of Section 34 or 36 of OLE.

European Citizens (EC/EFTA):

In general, the provisions of the general law for retirees of international organizations are very favorable. In most cases, the provisions of the Agreement on the Free Movement of Persons are not better.

However, if a person has worked on several occasions, for 10 years, for an international organization, or if he or she retires before turning 55, the conditions are more favorable. In any way, it is advisable to analyze the situation at the time of filing the application.

January 2010

Pierre Natural - Notary for Geneva

UINL Representative to the UN and International Organizations.

SUCCESSION LAW IN EUROPE

COMPARATIVE OVERVIEW EVOLUTION REGARDING THE PROPOSED REGULATION OF THE PARLIAMENT AND COUNCIL (2009/0157/COD)

The succession law is fascinating; it is a law that includes both the rigor of fixed, stable rules and the flexibility of the freedom of the will, a law almost bordering the public law that is a part of the private law, a law relating to the sadness of a death and the very frequent pleasure of acquiring assets.

Originated in the Pharaonic Egypt, it was drafted with wisdom by the ancient Greeks but, above all, in a subtle and complete manner by the Romans; it is there where the roots of the different contemporaneous succession laws of Continental Europe are found.

Two main clarifications should be made as regards the current Europe, the one of the European Union:

First clarification: The growing importance of cross-border successions, which may be understood with the following figures:

There are 450,000 new cross-border successions per year, regarding estates of almost 120 billion Euros.

More details: in some member states of the European Union, there are a large number of citizens of other member states (e.g., 1.8 million citizens of other member states live in Germany, or over 20% of the total population in Luxembourg are citizens of other state members of the EU).

In addition, many citizens of some member states live in other member states. For example, over one million Italians or 11.7% of Irish people.

Many EU citizens have bank accounts (Luxembourg!) or real estate in other EU states: it is assumed that 1 million Germans own real property in other member states; a large number of English and Holland citizens would also have real property in other EU countries.

Second clarification: the great diversity of national laws of member states. This diversity impedes the full exercise of the private property right that, according to the case law of European Courts (Luxembourg –

Strasbourg), is part of the fundamental rights, the respect for which they guarantee.

The substantive law of the member states is not uniform and, despite their common origins, the succession laws of the member states are very different. It is a national context impregnated with the social, cultural and religious characteristics of each country.

In some countries, there are different laws in some parts of the territory or even different laws are applied to the diverse stages of the succession (e.g., England, Spain).

Domestic Succession Law:

Legal Succession

Clearly, it is very difficult to make a comparison due to the great variety of provisions.

However, there are comparable principles and frameworks.¹

In **legal** successions, the kinship principle is widely applied.

¹ The data provided derives from an important comparative study conducted by the German Notarial Institute.

The number of heir orders varies according to each country. In France, Belgium, Luxembourg, Spain, Portugal, Austria and Greece, there are four degrees; in Germany, Denmark, Finland and Sweden, there are three.

Another fundamental principle is representation. The child and grandchild inherit the same in all member states.

Other principles provided by the different legislations are the successions per stirpes (France, Germany) or the distribution by ascending paternal or maternal lineages. A very important principle is the succession of relatives with the closest degree of kinship. As regards the surviving spouse, despite the great importance of their inherited portion, there are huge differences.

In the legal succession, there are also other categories of heirs, such as natural or adopted children, concubines or partners in a domestic partnership, or even the State, which results in the existence of different rules in member states. With respect to the State's intention to become an heir, it is surprising the large number of different rules.

(For example, in Germany, the estate goes to the State if there are no relatives of any degree of kinship; in Greece, the State is considered a sixth order heir; in The Netherlands, it ranks fifth in order but is not considered a heir, etc.)

Testamentary Succession:

Since the will is the fundamental expression of the last will, it exists in all member states.

There are differences regarding its form, registration or filing.

The holograph will exists everywhere, but in countries subject to Anglo-Saxon law, there are no wills attested by public notaries; instead, the will is drawn up before witnesses. There is a central registry of wills in Austria, Denmark and Greece, but not in Germany, Portugal or Sweden.

The countries that have ratified the Basle Convention of 1972 apply a will registration system.

In the systems of the other member states, despite regulation differences, there are similarities among tools, such as the joint will, the agreement to make a will or the legitimate portion of inheritance. The latter is a key safety tool of the decedent's family heirs.

In several countries, the legitimate portion of inheritance is known as a property lien, such as in Finland, Sweden and Greece.

The Netherlands abandoned this concept in 2003, providing the interested persons with a right of claim against heirs, similar to that applied in Germany, Austria and Ireland.

The beneficiaries also vary according to the country.

The descendants are beneficiaries under all legal regimes, while the surviving spouse is a forced heir only in Germany, Austria, Belgium, Denmark, France, Greece, Ireland and Italy.

Conflicts of Law Harmonization

In this European context, which is so diverse, it is clear that a harmonization of the substance law is neither possible nor desired.

What can be “harmonized” and unified are the rules of the private international law and international jurisdiction.

To such end, great support was given through several relevant conventions of The Hague Conference, the scope of application of which is not limited to Europe but extends to the entire world, wherever there are states that have ratified or recognized such conventions.

The following are the most relevant conventions, among others:

- The Hague Convention of 8/1/1989 on the Law Applicable to Successions (which was not ratified by most countries).
- The Hague Convention of 10/5/1961 on the Conflicts of Law Relating to the Form of Testamentary Dispositions (ratified by 16 member states). It would be advisable to have this Convention ratified by the other member states in the interests of the Community.
- The Hague Convention for Trusts Recognition.

In view of this legal and social framework, the European Community, under section 61 of the Treaty, provides for a progressive implementation of a common space of liberty, safety and justice (The Hague program (in 2004) invited to submit an instrument addressing the problem in its entirety: applicable law, jurisdiction and recognition, administrative measures (inheritance certificates, registry of wills)).

It was a long and comprehensive preparation. The Commission received a study on international successions within the European Union prepared by the German Notarial Institute in 2002. (The Greek Notarial Institute, which I presided at such time, was in charge of the Greek contribution).

A green book was published, a public hearing was held and a significant number of national specialists made their contribution, which confirmed the need to have a community document in that respect. With the support of the European Parliament and the Economic and Social Committee, a study was conducted by the Commission that resulted in a proposed regulation (COM/2009/0154 final) regarding the jurisdiction, applicable law, recognition and enforcement of decisions and public instruments in terms of successions, as well as the creation of a European certificate of succession.

Why a regulation? Because the need for legal certainty requires clear and uniform rules, which may only be achieved by means of a regulation to be directly and uniformly applied throughout the Union.

The proposed regulation consists of 51 sections and creates, in a simple and clear manner, a new framework for international successions in Europe.

Clearly, this is just a brief introduction for informative purposes.

Scope of Application: The regulation is only applicable to mortis causa successions. It does not extend to other forms of transfer of property, either with or without consideration. The legislation on trusts regarding successions is included in the regulation.

The property laws of member states remain unchanged. The regulation mainly applies to the acquisition of rights, but not to the contents of such rights. In addition, the different forms of acquisition instruments, as well as their registration with the real estate registry or survey in countries where such registration is required, are also preserved.

Definitions: For purposes of the regulation, the term “court” is used in its broad sense, including all other divisions and authorities of member states involved in successions.

International Jurisdiction: It is a very general concept. The regulation provides for the international jurisdiction of the courts of the decedent’s habitual domicile, as well as a subsidiary jurisdiction if the decedent’s domicile is not in a member state or an additional jurisdiction to accept or reject the succession.

Applicable Law: The Commission intends to have one single law governing successions. A uniform regime will also allow testators to handle and plan the distribution of their estate in a safe manner. As such, the regulation further proposes, accurately, the law of the decedent's habitual domicile. However, in consideration of the characteristics of the country of origin, its institutions and customs, especially in terms of the legitimate portion of inheritance and the protection of family members, the regulation provides an alternative for testators to personally choose the law applicable to their succession. The alternative law, which is the law of their nationality, profession juris, also proposed by The Hague Convention on the Law Applicable to Successions, which unfortunately was never enforced, will become a particular and important issue upon the sanction of the regulation.

Agreements to Make Wills: The validity of an agreement to make a will is subject to the law applicable to the decedent's succession at the time of its implementation.

If, under such law, the agreement has not effects, it may be subject to the provisions of this regulation.

Exequatur: As regards its possible execution and with respect to execution instruments, the proposal refers to regulation 44/2001.

Public Instruments: Considering the practical significance of public instruments, the regulation secures their recognition, even prior to their circulation.

This means that they have the same full evidentiary value, regarding the contents of the registered instrument and the facts described therein, as that provided to national instruments or, under the same concept used in their country of origin, regarding the presumption of authenticity and executory authority, within the limits set by this regulation.

European Certificate of Succession: This new tool is addressed by most provisions of the proposed regulation.

The competent court would also have international jurisdiction. The European certificate does not replace national certificates. It proves the status of heirs or legatees and the powers of administrators or executors of successions. It is issued on the standard form attached as Annex II to the regulation, and recognized by operation of law by all member states.

There is an important final rule addressing the relationship between the regulation and international conventions. They are not affected by the law; however, paragraph one of the relevant section prevails over the conventions ratified by the member states regarding the issues governed by the regulation.

Our final comment, which summarizes the succession regime in Europe, is the following: The proposal, despite its simplicity and flexibility, still has some sensitive points subject to debate. However, Europe, as regard this matter, is moving towards an efficient uniformity that will allow citizens to circulate and better integrate their goals.

February 2010

Sofia Mouratidou - Notary for Greece

Vice President of the UINL Human Rights Commission.

ROMANIAN LAW AND INTERNATIONAL SUCCESSIONS

I. INTENTION TO APPLY ROMANIAN LAW TO INTERNATIONAL SUCCESSIONS

The freedom of circulation and the opening of Romania to international organizations considerably fostered the intention to apply the Romanian law in situations involving foreign matters, based on international treaties or conventions, or upon rules of conflicts under domestic legislation.

In terms of international successions, the Romanian private international law provides that personal property shall be subject to the national law of the decedent, and real property, to the law of the place where it is located. These laws regulate: the opening of the probate proceeding, the persons who may inherit, the requirements for succession, the ownership of estate, the conditions and effects of the option to accept or reject the inheritance, the limits of the heir's obligation to meet liabilities associated with the succession, as well as the rights of the State to escheats.

In the case of testamentary successions, the testator may choose a law different than the one elected under such rules; however, the application of mandatory provisions cannot be avoided.

Therefore, either because the decedent had Romanian nationality, the real estate is located in Romania or, ultimately, the testator had so decided, these matters will be regulated by the Romanian substantive law.

II. PRINCIPLES OF ROMANIAN SUCCESSION LAW

From the viewpoint of the substantive law, the main principles of the Romanian succession law derive from the Civil Law, considering that the Romanian Civil Code was enacted in 1864 and had been inspired, regarding most of its provisions, by the Napoleonic Code. A significant amendment will be introduced upon the sanction of a new Code (not yet in effect) but, notwithstanding, the principles have not been changed, at least not in terms of succession.

Under Romanian law, succession is instrumented by law, the decedent's will or legacy.

1. Legal Transmission.

The law contemplates four categories of heirs:

- a. Descendents;
- b. Ascendants and preferential collateral relatives (fathers, sisters and brothers and their descendents);
- c. Ordinary ascendants (grandparents, great-grandparents, etc.);
- d. Ordinary collateral relatives (uncles, aunts, cousins).

Each such category excludes the others and, within each category, second order heirs are excluded by first order heirs.

Heirs of the same degree, within each category, are entitled to the same portion. Ascendants and descendants inherit without limitations, regardless of the degree of kinship, while collateral relatives inherit up to the 4th degree.

Adopted children have the same rights as natural children, and the latter have the same rights, whether they were born in or out of wedlock.

On the other hand, the effects of concubinage are not recognized from a succession viewpoint.

The surviving spouse is not included in any of the above categories, but inherits together with the four categories and, if there are no heirs in such categories, such spouse receives the whole estate.

Finally, if there are no heirs in such categories and no surviving spouse, the estate goes to the State.

There could also be issues regarding the law applicable to the determination of filiation with the decedent. In the case of children whose parents are married at the time of birth, the law applicable to filiation shall be that governing the effects of marriage, while in the case of illegitimate children, it will be the national law of the child at the time of birth.

2. Decedent's Will.

If a decedent wants to privilege a particular heir or totally or partially give their estate to persons other than those provided by law, he or she must draw up a will, or carry out an inter vivos transfer with consideration (e.g., life annuity agreements, sale of bare ownership, etc.) or without consideration (gift). The validity of the form of a will is verified by the requirements imposed at the time of drafting or upon death, either under the decedent's national law, the law of their domicile, the law of the place of execution of the will, the law where the relevant real estate is located, or the law of the authority involved in the transfer.

In the absence of any convention to the contrary, gifts are subject to the decedent's national law.

Romania, a country of written laws, does not accept oral wills. For a holographic will to be valid, it must be handwritten, dated and signed by the testator. The absence of any of these conditions shall render it null and void.

The most common form of will is the will certified by a notary, which is also the most informed and less challenged form. Wills are not registered with real estate registries, but with the national registry of certified wills created by the National Association of Public Notaries. The notice of revocation of a will must also be registered.

The validity of a gift is also subject to certification by a notary. In principle, gifts are irrevocable, except for gifts between spouses. Even if a gift to the surviving spouse is not accepted under the current law, the donor's possibility of revoking the gift, even after the death of the donee and the condition subsequent in case of a predeceased donee, has practically similar results.

Due to the principle of the legitimate portion of inheritance, restrictions are imposed on the transfer without consideration. This principle is also applicable under Romanian law, almost pursuant to the same terms as under French law. Consequently, a portion of the estate reserved by law to the closest heirs: descendants, surviving spouse and parents, cannot be prejudiced by gratuitous actions –wills, gifts–.

The surviving spouse could also benefit under a marriage agreement, which for the time being is prohibited under Romanian law, but may be applicable when the new Civil Code becomes effective. The marriage agreement is subject to the substantive conditions provided by the national law of each spouse, bride or groom, while the applicable regime and its effects shall be subject to the law chosen by such parties or, otherwise, by the common national law or the law of their common domicile.

3. Inheritance Option Statement.

Heirs, either legal or testamentary, have a term of 6 months as from the decedent's death to express their option to accept or reject the inheritance.

The acceptance may be express, by way of a statement certified by a notary, or implied, which is presumed from certain acts by the heir during such term that leave no doubts of their intention to accept.

On the other hand, the rejection must be always express, by way of a statement before a notary.

The National Association of Public Notaries also keeps a national record of inheritance option statements.

4. Tax on Succession.

In Romania, the succession is subject to income tax only with respect to real property. Income derived from the transfer of personal property is not taxable, not even in the case of gifts or successions.

If the probate proceeding concludes before the second anniversary of the death, no tax is payable. Upon expiration of such term, the heirs and/or legatees are required to pay a 1% tax calculated only on the value of the real estate to be inherited. This rule is also applicable in cases where a supplementary certificate is required, upon expiration of the 2 year term, even when, initially, the proceeding has concluded before the expiration of such 2 year term. Please know that a supplementary certificate is issued to complete the estate when certain assets or rights were omitted, regardless of the reasons.

As regards officials of international organizations, strictly in compliance with the principle of non-taxation of income and remuneration, as derived from the Vienna Convention of 1961 on Diplomatic Relations, the Romanian Tax Code defines as non-taxable all income earned by “officials of international organizations and entities for activities performed in Romania in their official capacity, provided such official capacity is confirmed by the Ministry of Foreign Affairs” (Section 42). On the contrary, all other income received for activities not performed in their official capacity, including successions, would be taxable.

In addition to the tax, and regardless of the time elapsed after the death, the registration with real property registries (real property books) will also be subject to a registration fee of 0.15% on the real property value.

III. ROMANIAN NOTARY’S ROLE

The Romanian notary has the authority to participate in probate proceedings, mainly due to the decedent’s domicile. Therefore, the involvement of a notary or any notary of the jurisdiction of the decedent’s last domicile must be requested, without considering the nationality of the decedent. If the decedent’s last domicile was abroad, the Romanian notary’s participation would be required if the most valuable assets of the estate are located in his or her jurisdiction.

The petition for the opening of the probate proceeding, including data on the decedent, the alleged heirs and the composition of the estate, including liabilities, must be delivered to such notary. To avoid multiple proceedings, there is a registry in each association of notaries, which the notary is required to consult on a mandatory basis.

At the conclusion of the probate proceeding, the notary will determine the status of the heirs, either legal or testamentary, and their rights, as well as the estate, including the assets and liabilities. At the heirs’ request, the notary will certify the estate distribution document.

If certain assets or rights are omitted, regardless of the reasons, the law will provide for the issuance of a supplementary certificate to complete the estate.

A certificate only evidencing the heirs’ status as such may be issued if the procedures to calculate the estate take too much time.

If there are no legal or testamentary heirs, upon expiration of the option period, at the request of the authority representing the State, the notary will issue a certificate of inheritance without heirs.

However, the involvement of a notary in the succession is not just limited to this proceeding. On the contrary, such involvement could and should begin long before since, considering the complexity of the problems raised, and even if at least one foreign element is involved, each person should plan their succession well, at any age. This would help to reduce payable taxes, privilege certain heirs and exclude others, considering the characteristics of each case.

To respect the person’s wishes, find adequate solutions and avoid conflicts and litigation; it is all part of the profession and art of the notary. For people who feel responsible both for their future and the future of their descendants, it is consequently essential to consult such a professional.

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THE MUSLIM WOMAN'S INHERITANCE PORTION

Before the appearance of the Islam in the VII century, heirs were exclusively males and had to be knowledgeable about guns to go to war.

Another condition was the right of primogeniture of men, ignoring women and other children (brothers and sisters of the first born).

The Islam provided succession equality in general and, especially, with respect to women (widow, orphan heir, descendant, etc.) in the sense described by the Sacred Koran, which imperiously determines, without any other modifications or changes, the following:

“... Men shall have a portion of what their parents and relatives leave, and... women shall also have a portion of which their parents leave, whether there is little or much of it, as a stated portion” imposed both in a divine and forced manner.

If we referred to the verse of the Koran that states: “men shall have the portion to which two women are jointly entitled...,” we would understand that:

A man shall have two portions and a woman, one portion; that means that a man shall be equal to two women and, therefore:

2 portions for a man, that is, $\frac{2}{4}$, one portion for a woman, $\frac{1}{4}$, and one portion for a second woman, $\frac{1}{4} = \frac{4}{4}$.

However, we must prove that the portion to which the female heir is entitled could be, in some cases, clearly higher than that to which the male heir is entitled.

Hence, in principle a woman first inherits one half ($\frac{1}{2}$) of the portion to which a man is entitled, that is:

1 woman: 1 portion = $\frac{1}{3}$

1 man: 2 portions = $\frac{2}{3}$ } $= \frac{3}{3}$

In other cases, a woman receives the same proportion or sometimes even more than the portion to which a man is entitled, because in most cases studied, the woman has a priority to inherit, which means that she will receive what remains after the forced heirs have received their share. However, under the Koran, God has designated the woman as a forced heir, without having to receive what remains after the forced heirs receive their share.

There are cases in which a woman inherits the same portion as a man, if such woman is included in the succession of her father, mother, grandparents (ordinary ancestors), as well as of her uterine brothers and sisters.

In other cases, a woman inherits twice the portion to which the male heir is entitled.

In this manner, when such woman is his sister (and has the same father and mother), together with several brothers born to the same father only, such woman receives half of the estate, and the other half then goes to the other brothers, regardless of their number.

If she is an only daughter, she is the sole heir and the sole owner of half of the estate. If the decedent had more than two daughters, they inherit two thirds of the estate.

The balance, that is, one third of the estate, is distributed to the other heirs other than the brothers, of course, that is, uncles and aunts.

There are two cases in which a woman is the sole heir, excluding a male, her brother:

In case her mother dies:

The widower (father) receives half of the estate, the woman and her sister, when there are two daughters, receive the other half, and the brother of both of them who has the same father but not mother, receives nothing.

PRACTICAL CASES - WOMAN'S SHARE

1/ As a Widow

One widow: in principle, she receives one eighth (1/8).

Several widows: one eighth divided among the widows (no more than four widows).

The widow receives one fourth together with her brother in law, that is, her husband's full brother, who receives three fourths.

2/ As a Daughter

In principle, the daughter receives half of the male's portion.

3/Other Cases

One daughter: 2/3

Her aunt: 1/3 (she is the decedent's full sister)

One widow: 1/8, or 3/24

One daughter: 2/3, or 16/24

One aunt receives the rest, that is, 5/24 of the estate (she is her aunt on the father's side, the decedent's full sister)

In the above examples, GOD favored and protected the woman in her pre-Islamic succession status.

However, in her ordinary social life, a woman retains the income received from her relatives' succession (separate property) since the Islam provides for the separation of property under the marriage property regime between Muslim spouses.

The husband is required to pay the dowry (sadaq).

He is further required to provide support (food, clothing, medical care, education and school for children).

Consequently, the husband's inherited income will be indisputably allocated to household expenses.

However, the portion of the inheritance to which a woman is entitled shall be inevitably allocated, in most cases, to savings (purchase of jewelry), and the husband will have no rights to such goods.

Therefore, under the Islam, a woman cannot be characterized as a person with a reduced inheritance portion, while under European legislations a woman is just the usufructuary.

GOD knows what He does, and knows about the interests of these creatures.

Succession Regime of the Moroccan Jew Woman

IF THE HUSBAND DIES BEFORE HIS WIFE

1- If there are children who are heirs

In case the husband dies before the wife, the heir or heirs shall give the decedent's widow shelter in their house, food and support in general to meet her needs.

If the widow refuses to live in the heirs' house, or elsewhere but depending on them, such heirs will choose to pay her a widow's life estate rights or one third of the estate.

2- If there are no children who are heirs

The woman may waive all her rights and recover the remaining real or personal property contributed by her to the community property.

SPECIAL CASES

There are other testamentary heirs (Al ouaḥiya) who are regulated by chapter VII of the same book (6), sections 266, 267, 268 and 269.

In addition, chapter 7 of book VI of the Muduwana provides for other cases, such as:

Al Maada

Al Akdariya and Al Gharde

Al Malikya	PERTAINING TO THE PRACTICE OF THE ADOUL
Chib Al Malikya	(religious notary)
Al Kharæ	Under the supervision of the CADI
Al Moutcharka	JUDGE FOR PERSONAL STATUS AND
Al Gharaouine.....	SUCCESSION MATTERS
Al Moubahala.....	UNDER MUSLIM LAW
Al Moubariya	

These cases are so complex that only the cadi for personal status and succession matters is able to understand and solve them.

All cases not contemplated by the code shall be resolved according to the prevailing opinion in the Maliki rite, included in section 297 of the Muduwana.

MUSLIM SUCCESSIONS - PRACTICAL CASES

1 widower, 2 sons, 2 daughters 1 widower + 1 son
 1 widower $\frac{1}{4}$ 2 1 1 widower = $\frac{1}{4}$
 1 son 2 3 1 sons the rest
 1 son 2 4
 1 daughter 1
 1 daughter 1
 Common denominator 8 4 Common denominator
 1 widow, 1 son, 1 daughter 1 widow + 1 son
 1 widow $\frac{1}{8}$ 3 1 1 widow $\frac{1}{8}$
 1 son $\frac{1}{4}$ 7 1 son (the rest)
 1 daughter 7
 Common denominator 24 8 Common denominator
 2 widows, 2 full brothers 1 widow + 1 full brother
 1st widow, one half of $\frac{1}{8}$ share
 1 1 1 widow = $\frac{1}{4}$
 2nd widow 2nd half of $\frac{1}{8}$ share
 1 3 1 full brother (the rest)
 1 full brother 3
 2nd full brother 3
 Common denominator 8 4 Common denominator
 4 daughters ($\frac{2}{3}$) 4 full sisters 1 daughter + 1 full sister
 1st daughter, $\frac{1}{4}$ of $\frac{2}{3}$ 2 2 1 daughter = $\frac{2}{3}$
 2nd daughter 2 1 1 full sister, the rest
 3rd daughter 2
 4th daughter 2
 1st full sister 1
 2nd full sister 1
 3rd full sister 1
 4th full sister 1
 Common denominator 12 3 Common denominator
 2 widows, 1 son, 1 daughter 1 widow, 1 son
 1st widow, half of $\frac{1}{8}$
 3 1 1 widow = $\frac{1}{8}$
 2nd widow 2nd half of $\frac{1}{8}$

3 7 1 son has the rest
 1 son 28
 1 daughter 14
 Common denominator 48 8 Common denominator
 2 widows, 2 sons, 2 daughters 1 widow, 1 son
 1st widow $\frac{1}{4}$ of $\frac{1}{8}$ 3 1 1 widow = $\frac{1}{8}$
 2nd widow $\frac{1}{4}$ of $\frac{1}{8}$ 3 7 1 son has the rest
 3rd widow $\frac{1}{4}$ of $\frac{1}{8}$ 3 8 Common denominator
 4th widow $\frac{1}{4}$ of $\frac{1}{8}$ 3 1 widow, 3 sons, 1 daughter
 1st son 28 1 1 widow $\frac{1}{8}$
 2nd son 28 6 3 sons have $\frac{2}{8}$ each
 1st daughter 14 1 1 daughter
 2nd daughter 14 8 Common denominator
 Common denominator 96
 4 widows, 3 daughters, 2 full sisters 1 widow 1 daughter 1 full sister
 1st widow $\frac{1}{4}$ of $\frac{1}{8}$ 9 3 1 widow = $\frac{1}{8}$
 2nd widow $\frac{1}{4}$ of $\frac{1}{8}$ 9 16 1 daughter = $\frac{2}{3}$
 3rd widow $\frac{1}{4}$ of $\frac{1}{8}$ 9 5 1 full sister
 4th widow $\frac{1}{4}$ of $\frac{1}{8}$ 9
 1st daughter $\frac{1}{3}$ of $\frac{2}{3}$ 64
 2nd daughter $\frac{1}{3}$ of $\frac{2}{3}$ 64
 3rd daughter $\frac{1}{3}$ of $\frac{2}{3}$ 64
 1st full sister 3
 2nd full sister 3
 Common denominator 288 24 Common denominator
 Succession of the Decedent's Mother
 1 widower 2 sons 4 daughters
 1 widower $\frac{1}{4}$ 8
 1st son Houcine 14
 2nd son Abdelhay 14
 1st daughter Touria 7
 2nd daughter Badia 7
 3rd daughter Najima 7
 4th daughter Ratiba 7
 Common denominator 64
 Succession of the Decedent's Father
 1 widow 4 sons 5 daughters
 1 widow $\frac{1}{8}$ 13
 1st son Mohamed 14
 2nd son Houcine 14
 3rd son Abdelhay 14
 4th son Fouad 14
 1st daughter Touria 7
 2nd daughter Badia 7
 3rd daughter Laila 7
 4th daughter Najima 7
 5th daughter Ratiba 7
 Common denominator 104

Interfaith Marriages

Sections 8 through 11 of the DCC provide the general rule of application of the national law of each future spouse.

Consequently, such national law will provide the substantive requirements of age, capacity, consent, absolute or relative impediments, etc.

However, some difficulties related to certain confessional prohibitions will clearly arise.

Regarding a Muslim Wife

Under the Koranic provision and section 39 4/ of the Moroccan Family Code, and in order to secure the continuity of the Muslim community, the marriage of a Muslim woman with a non-Muslim man is prohibited.

This prohibition will only be lifted in case of the non-Muslim spouse's conversion.

Regarding a Non-Moslem

Since there is no prohibition in the Sacred Koran for Moslems to have a wife who has a different faith, a Muslim man may, if he so wishes, marry a kitabya, a woman of the Book (Christian or Jew).

In Case of Death

Section 332 of the Family Code provides "that there is no succession between a Moslem and a non-Moslem."

Houcine Sefrioui, Ph.D. in Law, Notary

Management Counsel and General Counsel of the UINL

President of the Commission of African Affairs - CAAF/ U.I.N.L

INTERNATIONAL SUCCESSIONS UNDER MUSLIM LAW**INTRODUCTION:**

In effect, at the beginning of the Muslim society, Moslems were governed by the Koranic law. Each Muslim state was just a part of the "HOUSE OF ISLAM", subject to Muslim or Shariah law. Nationality was not known with its current meaning. A Moslem was at home in any Islamic country and had the same rights regardless of their place of origin.

Therefore, a law existed that governed a society of believers and non-believers

From a strictly legal viewpoint, a unique Muslim nationality was a reality, but there was no legal nationality, as discussed below.

The total integration to the Muslim nationality was subject to the Islam, there was no naturalization. Therefore, we find great similarities and even a legal uniformity with few differences as regards the personal status in all Muslim countries, given that the basis is still formed by the rules and principles of the Koran, with the use of rites maintained in a subsidiary manner.

CREATION OF AN AMBIVALENT SYSTEM

Upon the evolution of international relations, the access to independence by many Muslim countries, and the opening of economic and political exchanges, we notice in the Muslim world the existence of ambivalence in the private international law system in terms of personal status, mainly in Morocco, where the international and Muslim communities live.

In effect, since the independence of Morocco, we observe a normalization of the system, a return to the territoriality and a certain revival of the Islamic lex fori.

Under such context, the nationality connection stands out within a conflictive reasoning, which is only

applicable if the foreign national is not a Moslem.

At the same time, as regards a Moroccan or Moslem, the “UMMA” transcends nationalities. An effort is made to protect the Islam, considering that a Moslem cannot be subject to any foreign law in the Islamic land.

However, any person, regardless of their nationality and religion, has free access to the ownership of real and personal property in Morocco, unlike other Muslim countries where the access to real property is solely limited to nationals.

Please note that foreign nationals are not allowed to purchase in Morocco real property located within the rural region.

Two elements are essential to be able to transfer title to a real estate together with any of its personal property and valuable goods: The nationality effect, as well as the marriage and filiation effect.

NATIONALITY EFFECT

I. NATIONALITY

Closely related to the notion of modern state, nationality continues to be, above all, a privilege of sovereign states granted on the basis of the law of the land (*ius soli*) or of filiation (*ius sanguinis*). However, the provisions of the international law and new and opposed factors, related to globalization, must also be considered: the movement requirement and the economic immigration policy, plus the principles of religion in Muslim countries.

Some Muslim countries maintain a strict control as regards the granting of nationality, which continues to be closely related to religious beliefs.

In Morocco, the following is recognized:

A/Nationality by Filiation (consulted book: Nationality Code).

A Moroccan is:

- Any child born to a Moroccan father or mother. The Moroccan legislation provides, therefore, together with the farther filiation criteria, the transmission of the Moroccan nationality by the mother.
- Any child born to a Moroccan mother and unknown father, because children born to Moroccan mothers are considered to be Moroccan, as well as children born in Morocco to Moroccan mothers and a stateless father.

The recognition of nationality transmitted by the mother is a great step towards leveling the Moroccan legislation with the international law

B/ Nationality by Birth in Morocco

A Moroccan is:

- Any child born in Morocco to a Moroccan mother and a stateless father.
- Any child born in Morocco to unknown parents.

It is presumed, unless proven contrary, that a newly born found in Morocco was born in Morocco.

- The child's filiation has effects on their nationality only if determined while such child is under age.

Filiation must be established pursuant to the requirements governing the personal status of the ascendant, the source of the right to a nationality.

C/Nationality by Operation of Law

Children born in Morocco to foreign parents also born in Morocco, unless opposed by the Ministry of Justice, acquire the Moroccan nationality.

Any person born in Morocco to a foreign father, who was also born in Morocco, if they state their intention to choose this nationality, when the father relates to and is a member of a country the majority population of which is an Arabic-speaking community that has embraced the Islamic religion.

D / The Moroccan Nationality may be Acquired by the “Kafala”**(legal foster care for neglected children):**

The Kafala, an institution inherited from the Muslim law as the legal means to care for abandoned children or children with unknown parents, is a commitment to assume the protection, education and support of an abandoned child as any father would do for their child. However, under the Kafala, there is no filiation or succession, as per the Muslim and Moroccan laws, where the adoption is not recognized (attabani).

However, the Nationality Code goes beyond this restrictive concept of the Kafala, turning the latter, even if not legally recognized, into a filiation bond, a prerequisite to obtain the Moroccan nationality “by operation of law”. From now on, the Moroccan nationality may be obtained by any child under the care of a Moroccan Kafil, even if such child was born outside of Morocco to unknown parents.

This provision, however, raises the issue that the international private law wants to accept the Kafala institute, which is a concept originated under the Muslim law.

A foreign judge may consider the Kafala, which creates no filiation bonds or succession rights, as against the child’s interests, since it does not give the same rights as in an adoption where the child is totally integrated to the family group and has the same rights as biological children.

E/ Acquisition of Moroccan Nationality by Marriage

A foreign woman married to a Moroccan man may file a statement with the Minister of Justice to obtain the Moroccan nationality if the couple has habitually and regularly lived in Morocco for at least two years. This nationality is granted if, within six months from filing such statement, no objection is informed by the Minister.

In effect, the acquisition of the Moroccan nationality by marriage is reserved to the “foreign woman married to a Moroccan man”, but the Moroccan wife cannot transmit the nationality to her husband. However, under the new Family Code, interfaith marriages are not prohibited, including the marriage of a Moroccan woman to a foreign man. It is assumed that the provisions of the Code apply to “any relationship between two persons if one of them is Moroccan”.

On the other hand, if the union of a Moroccan woman with a non-Muslim man is a legal impediment to the marriage, it is logical then that a Moroccan woman married to a non-Muslim foreign man cannot transmit the nationality by marriage, considering that such marriage does not exist under the Moroccan law. We could infer then that a Moroccan wife can transmit her nationality to her Muslim husband without violating the Moroccan or Muslim law.

II. NATURALIZATION**A/ Conditions to Naturalization**

Notwithstanding the exceptions provided in section 12 of the Nationality Code, a foreign national applying for naturalization has to meet the following conditions:

1. To have a domicile in Morocco at the time of executing the naturalization certificate.
2. To prove their habitual and regular residence in Morocco for five years prior to filing the application.
3. To be of age;
4. To have no health problems or mental disorders.
5. To lead a healthy life cultivating good habits, not to have been sentenced for any crimes or with a penalty restricting freedom for a heinous crime, which sentences have not been reversed in both cases upon rehabilitation.
6. To prove sufficient knowledge of the Arabic language.
7. To prove sufficient means of existence.

B/ Exceptions

Despite the above conditions, a foreign national suffering a disability or disease in the service of or in the

interests of Morocco may be naturalized.

Notwithstanding such conditions, a foreign national who has rendered extraordinary services to Morocco or whose naturalization would extraordinarily result in the interests of Morocco may be naturalized.

C/ Withdrawal of the Naturalization Certificate

When, after the execution of the naturalization certificate, it appears that the interested party has failed to meet the legal requirements for naturalization.

When the foreign national knowingly made a false statement, filed a document with false or wrong information or fraudulently maneuvered to obtain the naturalization.

D/ Effects of Naturalization:

A person who has obtained the Moroccan nationality has, as from such date, all rights inherent in Moroccans. However, such person will be subject to the following restrictions for five years:

- He or she will not hold a public office or electoral position for which the Moroccan nationality is required.
- He or she may not be a voter when the Moroccan nationality is required to be registered in the list of voters.

Minor children of persons obtaining the Moroccan nationality acquire such nationality simultaneously with their parents.

Unmarried minor children of a reinstated person, if they stay with such person, recover or obtain by operation of law the Moroccan nationality.

E/Loss and Lapse:

The Moroccan nationality is lost by:

1. Any Moroccan of age who voluntarily acquired abroad a foreign nationality and is authorized by decree to waive the Moroccan nationality.
2. Any Moroccan, including a minor, who, despite originally having a foreign nationality, is authorized by decree to waive the Moroccan nationality.
3. Any Moroccan woman who, by getting married to a foreign national, acquires by marriage the husband's nationality and was authorized by decree, prior to the marriage ceremony, to waive the Moroccan nationality.
4. Any Moroccan who declares to repudiate the Moroccan nationality acquired before becoming of age.
5. Any Moroccan who has a position for a foreign country or in the armed forces of a foreign country and keeps such position for six months after being demanded by the Moroccan government to resign to such position.

Applications and statements to acquire, lose or repudiate the Moroccan nationality, as well as reinstatement applications, are filed with the Ministry of Justice.

Attached are the titles, documents and instruments required to:

- a) determine that the application or statement meets the legal requirements,
- b) assess if the requested benefit is justified from a national viewpoint.

If the author of the application or statement lives abroad, he or she may appear before the diplomatic or consular authorities of the Morocco.

CLOSE RELATIONSHIP BETWEEN THE NATIONALITY CODE AND THE FAMILY CODE

As part of the accommodation of the Moroccan law to the international law, and to solve this problem, the Moroccan Nationality Code was amended to match the new Family Code, the advanced provisions of which constitute a true revolution under the Muslim legal system.

Accommodation of the Nationality Code to the Provisions of the New Family Code

The implementation of a new Family Code in Morocco helped to leave behind most of the patriarchal notion of family group, granting both spouses shared parental rights and duties in respect of the family created by them.

Under a system as the one prevailing in Morocco (*jus sanguinis*), where filiation is the main criteria to determine nationality, it is accepted that the Islamic system of *Kafala*, which is the legal means for a person to take care of an abandoned child, will also determine nationality, in an attempt to accommodate the Muslim Moroccan system to the international rules.

The Nationality Code supported some amendments introduced in the Family Code, when providing that the latter is to be applied to “all Moroccans, even those who have a different nationality”. Therefore, through this provision, the legal recognition of the double nationality status is established.

In this aspect, the Moroccan legislation is different from many foreign legislations and more close to the international ideal that tends to have each person freely choose or change their nationality.

Under the Moroccan law, interfaith marriages are recognized with an important restriction not accepted by law: the marriage of a Moroccan woman and a non-Muslim foreign man.

MARRIAGE EFFECT

Except for Jew Moroccans, who are subject to the Moroccan Hebrew status, the Personal Status and Succession Code, now known as the Family Code, applies to all Muslim Moroccans and national citizens. Please note that non-Muslim foreign nationals residing in Morocco or another Muslim country are subject to their national law in terms of personal status; the Moroccan public order does not oppose to the application of the foreign law imposing religious impediments to marriage.

To reconcile the law of the country where he or she practices the international private law, a notary whose scope of activity includes the personal status of non-Muslim foreign nationals, and in order to preserve and protect their clients' rights, requests a certificate of customs from the diplomatic authorities to which the future spouses are subject.

I/ MARRIAGE

A/ Conditions to Marriage:

A Muslim marriage is performed with the mutual consent (*Ijab* and *Quaboul*) of the bride and groom, expressed in traditional terms or any other terms accepted by the language or customs, or by a sign that the other party and both *adouls* (religious notaries) may understand.

It is subject to the following conditions: (book of reference: Family Code)

1. the spouses' legal capacity;
2. their intention not to eliminate the *sadaq* (dowry);
3. the presence of a matrimonial prefect (*wali*) in some cases;
4. the verification by both *adouls* (religious notaries) of the spouses' consent and its registration;
5. the absence of legal impediments.

The marriage is officiated in the presence of the bride and groom by the *adouls*, notaries specialized in Muslim law.

However, a power of attorney may be granted to such effect, with the authorization of the family judge in charge of the marriage, according to the conditions provided by the Code.

The marriage capacity is acquired, both for the man and woman of sound mind, upon turning 18, according to the Gregorian calendar.

Notwithstanding this, the family judge in charge of the marriage may authorize the marriage if the bride and groom are under the marriageable age, if grounded reasons are submitted and the interests and

motives for such marriage are explained.

The matrimonial guardianship (Wilaya) is a right now exercised by the woman. The woman of age may exercise such right at her discretion, without a guardian, and may delegate it to her father or a close relative. This enabled the inclusion of the notion of fundamental rights of women and the principle of equality of spouses.

However, these rights are subject to legislations and, above all, to the legal order of the receiving country but, especially, to the manner in which the rules of private international law are construed by judges.

Interfaith marriages, to be valid, cannot ignore the concept of the sadaq (dowry), consisting of property given by the husband to the wife, which implies the wife's firm intention to make a home and express mutual affection.

All or a part of the sadaq may be paid in advance or in installments.

In case of a divorce under judicial supervision before the marriage consummation, the wife is entitled to one half of the sadaq.

The wife's contributions to the home as jhaz or chouar (household goods and clothing) will remain her property, because the general rule under the Muslim legal system is the legal automatic division of property between spouses, even those acquired after the marriage.

Under the Moroccan Family Code, the possibility given to the spouses to agree on the conditions for usufructing and dividing the property acquired during the marriage was recently added. This agreement must be instrumented on a document other than the marriage certificate for the Muslim marriage, which is considered a religious marriage officiated before the adouls, and which may be concluded upon the issuance of a civil record by a modern notary specialized in contract law.

If no written agreement is reached, the general rule of evidence is applied.

A file is opened for each officiated marriage, which is kept in the clerk's office of the family court of the place of celebration of the marriage and contains the following:

- a special authorization application form to formalize the marriage certificate;
- a birth certificate: the officer of the civil registry makes a notation, on the margin of the civil registry record, of the date of issuance of the certificate and its use in connection with the marriage ceremony;
- an administrative certificate of each spouse;
- a medical certificate for each spouse;
- a marriage authorization, in the following cases:
 - marriage of a person under the age of marriage;
 - polygamy, upon compliance with the conditions provided by law;
 - marriage of a mentally disabled person;
 - marriage of Islam converts and foreign nationals;
- a certificate of fitness for marriage, or equivalent certificate for foreign nationals.

As regards marriage of foreign nationals, the substantive conditions are subject to the national law of the spouses.

Procedural conditions are subject to the law of the place of celebration of the marriage.

Marriage effects are governed by the spouses' national law or the law of their domicile, if they have different nationalities, or the law of the jurisdiction (that is, the law of the competent judge), if they do not have the same nationality or domicile.

The community property regime is subject to the law to be chosen by the spouses; if no such law is expressly chosen or determined, the applicable law shall be that of the spouses' domicile.

The existing eventual difficulties are very clear: while, under the Private International Law, the procedural conditions are subject to the law of the place of marriage celebration, the Moroccan law requests the presence of two Muslim witnesses. However, at present, case law and doctrine show an increasing trend to apply the territorial principle under the Family Law.

B/ The spouses' reciprocal rights and duties are, among others:

1. both spouses jointly assume the responsibility for the household administration and protection of their children;
2. they will consult each other about decisions related to the household administration, children and family planning;
3. the spouses' right to be each other's heir.

C/ Temporary Impediments:

a-The following cases are prohibited, among others, as temporary impediments:

The marriage of a Muslim woman with a non-Muslim man, as well as the marriage of a Muslim man with a non-Muslim woman, unless the woman belongs to the People of the Book;

b-Polygamy is prohibited when an injustice may be done to the wives. It is also prohibited upon the existence of a condition by the wife that the husband will commit not to have another wife.

However, some Muslim countries, such as Morocco, tend to reduce the use of the polygamy, even if it is authorized by the Islam and may be submitted to the court's approval, when its objective justification and extraordinary nature have not been established or when the plaintiff lacks the necessary means to maintain both homes and equitably secure support, housing and other life expectations.

II/ DISSOLUTION OF MARRIAGE

The marriage dissolution results from the death of one of the spouses, a divorce under judicial supervision, a judicial divorce or a divorce in exchange for compensation (khôl'e).

Under Muslim law, a divorce may be expressed verbally, using explicit terms or in writing, but also using an unequivocal sign, in the case of a person who is unable to express verbally or in writing.

A/ Divorce under Judicial Supervision:

The divorce under judicial supervision is the dissolution of the bonds of marriage at the request of one of the spouses, according to the conditions of each of them, under court supervision and pursuant to the provisions of law.

The party filing for divorce must request the court that a divorce certificate be issued by two duly qualified adouls.

The court shall attempt to reconcile the spouses.

When both parties appear in court, a hearing is held in the council chamber with the attendance of the witnesses and third parties that the court may deem appropriate.

If the spouses' reconciliation proves impossible, the court sets an amount to be deposited by the spouse at the clerk's office within a maximum term of thirty days, in order to pay the rights owed to the wife and dependent children, according to the law.

The amounts owed to the wife include:

- the balance of the sadaq (dowry);
- if applicable, the pension owed for the widowhood period (Idda) and the Conciliation Gift (Mout'â), which is assessed based on the length of the marriage, the husband's financial means, the reasons for the divorce, and the degree to which the husband has abused this right.

B/ Judicial Divorce at the Request of a Spouse for Dispute Reasons (Chiqaq):

When one or both spouses request the court to solve a dispute between them that could lead to divorce, the court shall use all efforts to reconcile the spouses.

The wife may request a judicial divorce for the husband's failure to comply with his obligation to support, as per the following provisions:

1. If the husband has assets that allow the deduction of the support, the court will decide on the manner in which such deduction will be made and will deny the divorce proceeding;
2. In case of the husband's proven indigence;
3. The divorce will be immediately granted by the court if the husband refuses to provide support to his wife without proving his financial incapacity.
4. If the husband is absent from the spouses' house for a period longer than a year.
5. A judicial divorce may also be granted in case of hidden defects impeding marital relations or diseases that will endanger the life or health of the other spouse.

C/ Divorce by Mutual Consent or in Exchange for Compensation (Khôl'e)

A divorce by mutual consent exists when both spouses agree on the principle of ending their marital union without affecting the interests of their children.

A khôl'e divorce is when the wife accepts to receive a compensation to obtain a divorce.

D/ Revocable (Rijii) and Irrevocable Divorces:

A divorce granted by the court is irrevocable, except for a divorce for oath of celibacy and a divorce for lack of support.

A divorce due to the husband's fault may be revoked, except for a divorce after two prior successive divorces. A divorce before the marriage is consummated, a divorce by mutual consent, a khôl'e divorce and a divorce as a result of an option right accepted by the spouses.

Problems Related to the Application Abroad of the Muslim Personal Status.

Problems arise as a result of the judges' lack of information when applying the Muslim law to Moroccans residing abroad.

Problems may also arise in connection with the mandatory reconciliation, which is an unavoidable condition to the marriage dissolution procedure. If such reconciliation is not conducted within the proceeding filed abroad, the judge may refuse to enforce the decree of divorce.

The simple repudiation, by being replaced with the judicial divorce, which is an adversarial action, establishes the main principles of human rights.

However, a divorce in exchange for compensation or khôl'e is always a problem in terms of its application abroad. In effect, for European jurisdictions this type of marriage dissolution is equal to having a woman buy her freedom, which is clearly against the principle of equality between spouses.

III/ CUSTODY OF CHILDREN (HADANA)

Custodian and order of priority.

Custody is first granted to the mother, then to the father, and finally to the child's grandmother on the mother's side. In absence of such persons, the court decides, based on the available information and in the interest of the child, to grant custody to the more appropriate closest relative.

The non-custodian parent is entitled to visit and be visited by the child in certain conditions provided by the law.

Support is to be provided to the wife and children.

The father must provide support to his wife upon consummation of the marriage.

He must also provide support to his children until they are of age or turn 25, in they are still studying.

The father is required to continue to support his disabled children or those who are unable to provide for themselves.

EFFECTS OF SUCCESSION

I/ FORM OF SUCCESSION

The legal grounds for succession are marital and family bonds. Neither the heir nor the decedent can waive their capacity as such or choose a third party over them; however, there are totally different conventional or testamentary reasons under Latin law (e.g., tanzil).

There will be no succession rights between a Moslem and a non-Moslem and vice versa (prophet's words: "Whoever dies and leaves a wealth behind, it belongs to his or her heir) or in case the paternal filiation is legally denied.

Classification of Heirs per Category and Overview of Heirs' Portion.

There are four categories of heirs:

- A FARD: there are only six, the mother, ascendant, husband, wife, uterine brother and sister.
- TAÂSSIB: there are only eight, the son, the son's son and so on; blood brother, half brother, their respective sons and so on; the uncle, uncle on their father's side, their respective sons and so on.
- A FARD and TAÂSSIB together: there are two, the father and the ascendant.
- The A FARD or TAÂSSIB heirs who do not have both characteristics are four: the daughter, son's daughter, blood sister and half sister.

Heirs' portions:

- There are six portions for A FARD heirs: one half, one quarter, one eighth, two thirds, one third and one sixth.

- In these cases, there are no portions for AÂSSIB heirs.

However, the estate is divided on the basis of the number of AÂSSIB heirs.

- The sole AÂSSIB heir is entitled to the whole estate; if there are more than one, their portion depends on the degree of their relationship with the decedent.

II/ HOW TO CONVEY THE ESTATE

A estate may be conveyed by succession, under the Muslim legal rules directly derived from the Koran and Sunna. It may also be conveyed by other means, such as legacy –tanzil- and inter vivos gift.

A/ LEGACY UNDER MUSLIM LAW

• Testamentary Gift

Under the Muslim law, the testamentary gift is limited to the one third of the testator's estate, which becomes a demandable right upon death.

To make a will, the testator must be of age and mentally capable.

Unlike other laws, under the Muslim law, a will is restricted to one third of the estate and cannot be made in favor of one heir, except with the consent of the other heirs, and the one-third portion is calculated on the decedent's estate, after deducting the applicable taxes. These taxes shall be deducted prior to making the testamentary gift.

The same is applicable to any present or future legatee.

The will must be made by means of an instrument certified by an adoul or any official authority in charge of issuing certificates, by a document handwritten and signed by the testator, or verbally in the presence of witnesses.

• Mandatory Legacy

A mandatory legacy occurs when the decedent had grandchildren born to a son or daughter who dies before or at the same time as such decedent.

These grandchildren receive, within the available one-third portion of the estate, a mandatory legacy. The mandatory legacy applies to the grandchildren of son or daughter who dies before the decedent, to preserve the succession rights of such grandchildren, if they are relegated by other descendants or ascendants.

B/ TANZIL

The TANZIL is the designation of a person as heir when he or she is not. A TANZIL is carried out in the same manner as a will.

The portion to which the MONAZAL is entitled is equal to that of the heir regarding which the former is put at the same level. If, in the case of the TANZIL, there is no forced heir, the person who is designated as MONAZAL heir is put at the same level, as applicable, as male or female heirs.

Any cases that may not be resolved under the provisions governing the TANZIL shall be solved according to the provisions applicable to wills.

In my opinion, the issue of the adoption not recognized under the Muslim law may be solved with the concept of the TANZIL complemented with the KAFALA

C/ INTER VIVOS GIFT

Only inter vivos gifts are acknowledged by the Muslim law, where the gift to the surviving spouse is not contemplated.

To be valid, gifts must be immediately followed by possession, according to the saying that states: "You don't take what you give."

The Moroccan case law has recently acknowledged that a gift of solely the bare ownership of real estate is legal, considering that recording the transfer to the donee in the real estate books constitutes an actual taking of possession

A gift may be given to any heir or not, regardless of whether the latter accepts or rejects the same.

By means of an inter vivos gift, the donor may easily plan their succession without complying with any legal obligation in terms of legal portions and degree of heirs.

D/ DISTRIBUTION

In Muslim successions, no distribution among co-heirs is mandatory, since the estate may remain undivided for an unlimited period.

However, a friendly distribution is possible if the co-heirs express their intention to do so. In such case, the estate is distributed in proportion to the portion to which each such heir is entitled.

In case of disagreement, the co-heirs may request a judicial distribution, if such estate cannot remain undivided.

FEES AND TARIFFS

Successions are not subject to tax laws in Morocco, only registration fees are payable:

The determination of heirs is registered at a fixed fee of 200 DH.

The inventory and assessment of assets is registered at 1.5% of the value declared.

The will is registered at a fixed fee of 200 DH.

The gift is registered at a fee equal to 1.5% of its value.

The legatee statement is registered at a fee equal to 1.5% of its value.

Distribution fee is equal to 1.5% of the estate subject to distribution.

Other than the registration fees, no taxes are payable on the transfer of assets by succession to legal or testamentary heirs.

PUBLIC ORDER: It is a fluctuating notion.

The current rule must prevail. In this manner, the issue arises of when to determine that a foreign law is contrary or not to the fundamental notions of a jurisdiction. The determining time is, therefore, when the judge must decide if a foreign law or its provisions are consistent or not with the international public order.

When a judge verifies that the provisions of the usually applicable foreign law are contrary to the international public order, such judge will replace them with applicable provisions on the subject matter. The criteria to assess if a foreign law is contrary or not to the public order shall be subject to the principle of human rights and the principles of the compared International Private Law, in order to obtain a more objective law.

If the autonomous law applicable to contracts were transposed into a personal status context, a half-way solution would be found to moderate confrontations between laic and religious systems.

The convention system (The Hague conventions, French Moroccan convention) provides that the public order is only applicable if the usually applicable foreign law is clearly against the values of a jurisdiction.

For example, in case of divorce, foreign nationals are subject to their own national law. The application by accumulation of applicable laws is possible, but sometimes there are inconsistencies. If it is impossible to mediate in case of contradictory foreign laws, the tendency is to apply the law of the domicile or jurisdiction.

In the Islamic world, many countries, to overcome problems resulting from the conflicts of law, apply and adhere to some international conventions while trying to maintain the essence of their national laws and public order.

In some Muslim countries, such as the Maghreb countries, the notary, who is not different from a western notary, continues to be the specialist in the contractual law and regulation applicable to foreign nationals in commercial matters, property and personal status.

Ratiba SEKKATE, RABAT - MOROCCO

VICE PRESIDENT OF THE HUMAN RIGHTS COMMISSION

TRANSFER OF ESTATE

This document is not intended to conduct a thorough analysis on succession in France, but to remember its principles so that any person facing this problem has some points of reference. I will first describe how a person may be involved in a succession, later I will remind you of the legal principle of the legitimate portion of inheritance, before analyzing the rights of the surviving spouse, the order of heirs and, finally, the formalities to be fulfilled upon death.

Principles of International Private Law:

Successions may be subject to the French law on the basis of the decedent's domicile in France or the location of real estate in such country.

Legitimate Portion of Inheritance:

In France, the Civil Code, also known as the Napoleonic Code, created in 1804 after the Revolution and the Universal Declaration of Human Rights, governs the transfer of estate. However, it was adapted to society evolution by successive laws.

The fundamental principle of the transfer of estate, unlike in Anglo-Saxon countries, is the legitimate portion of inheritance. This concept imposes an obligation to the decedent to leave a portion of the estate to their heirs. In France, it contrasts the parents' obligation to provide support and care to their children regardless of their age, if they so need. This legitimate portion is only applicable to the children and surviving spouse. (Until 2002, when the decedent had no children, he or she could not disinherit their parents). Its amount depends on the number of children: in the case of one child, the decedent is required to bequeath half of their estate; in the case of two children, such children are entitled to 1/3 thereof at least and, in the case of three or more children, 3/4 of the estate are distributed among them and the decedent is allowed to freely dispose of the remaining 1/4, also known as the disposable portion of the inheritance.

However, there is a special disposable portion between spouses that protects the surviving spouse, who is entitled, in addition to the ownership of the disposable portion, to the usufruct of the remaining property. To verify that the legitimate portion has not been affected, all assets donated by the decedent prior to their death may be added to the estate at the time of death. If the legitimate portion is affected, the children are entitled to a type of probate proceeding whereby they may claim the share to which they are entitled but is held by the beneficiary.

Surviving Spouse's Rights:

Under the law of December 3, 2001, it was finally possible to legally protect the surviving spouse by giving him or her specific rights to the family house and increasing their inheritance rights.

The surviving spouse has the right to stay in the family house for one year after his or her spouse's death and, during such year, he or she may request that such right be granted for life.

In the case of common children or no child at all, the surviving spouse may be entitled, at least, to the usufruct of (the right to use) the assets.

If there are children of different unions, their protection will not be very efficient. In effect, in such case, the spouse is entitled to the ownership of one fourth of the estate, which would force a division with the children. In such scenario, it is reasonable to consult a notary to improve the surviving spouse's protection.

Legal Heirs:

If there are no testamentary dispositions, heirs are defined by law. There are 5 categories of heirs.

The presence of one heir at least in one category excludes the following order, except in the case of the surviving spouse.

They are:

- Descendants (children, grandchildren, great-grandchildren,...) and parents
- Spouse
- Brothers and sisters or nieces and nephews
- All ascendants (other than the parents)
- Collateral relatives (uncles and aunts, cousins)

Heirs have inheritance rights the significance of which will depend on the degree of kinship with the decedent. These rights range from 0%, for the surviving spouse or partner in a domestic partnership (please note that the domestic partnership is not sufficient for protection purposes since no rights are acquired; the drafting of a will is mandatory), to 60% for a person with no degree of kinship with the decedent.

There are different ways to reduce such rights, especially by making donations in advance.

Formalities to be fulfilled upon Death:

The notary draws up mainly 3 certificates:

- The determination of heirs, which allows having a list of heirs and unblocking bank accounts, since all bank accounts in the decedent's name (other than the joint accounts) are blocked by the bank when it takes knowledge of the death. Such accounts will only be unblocked upon submission of a notarial certificate, together with evidence of payment of estate taxes if the heirs are domiciled in France.
- A certificate of real estate, which allows updating the real estate file, unless a division among the heirs takes place within 10 months from the death.
- A statement of probate: the status, as of the date of the death, of all the decedent's assets in order to calculate estate taxes. Such statement of probate must be made together with the payment of such estate taxes, within 6 months from the death, if it occurs in France, and within one year, if the person dies abroad.

Nathalie Andrier
UINL France

SUCCESSION REGIME IN ARGENTINA

We will refer to successions by cause of death; that is, *MORTIS CAUSA* successions.

The Roman notion of the continuity of the person was adopted by the Argentine system; a fiction is created that the decedent's personality continues to exist in the heir. The German system provides for the separation of property.

Following the ideas of Aubry et Rau, the basic idea is that the PROPERTY is a *universitas juris*.

I. LEGISLATION APPLICABLE TO SUCCESSIONS

In Argentina, the question is whether to apply a Unity regime or a fractionation or plurality of succession regime. The Treaties on International Civil Law of Montevideo of 1889 and 1940 –year of Argentina's adhesion– support the last position. There are contradictory provisions that cause doctrine and case law not to support the same system. In effect, section 3283 provides that the only law applicable to succession is the law of the last domicile of the decedent (unity). Section 3612 offers the same solution for testate successions. On the other hand, sections 10 and 11 of the Argentine Civil Code are in favor of the law of property location (fractionation), applying as many laws as there are countries where property is located at the time of the decedent's death. The prevailing case law supports the partial fractionation, that is, only for real property, in which case personal property would be subject to the unity regime (decedent's last domicile). However, there is a tendency in recent court decisions to adopt the unity regime, which has been supported by different legal congresses. Case law, in turn, is divided as regards this issue, since there are decisions that opt for the unity system and others, for the plurality one. We could say we have a mixed and casuistic system, but favoring the succession unity and prioritizing the decedent's last domicile.

II. TYPES OF MORTIS CAUSA SUCCESSIONS

They are divided into

- 1) INTESTATE SUCCESSIONS, where heirs are determined by law; or
- 2) TESTATE SUCCESSIONS, when the will of the CUJUS or decedent is formally instrumented by means of a will.

1) In intestate successions, the decedent's will is presumed by the law, creating forced heirs, who are determined according to the family order contemplated in our legal order.

The family order includes descendants (consisting of children, grandchildren, great-grandchildren and so on, without limitation), ascendants (consisting of parents, grandparents, great-grandparents and so on, without limitation), collateral relatives (brothers and sisters, nephews and nieces, and their descendants, uncles, aunts, cousins to the fourth degree, including the order of the spouse and the widow daughter in law without children).

SPOUSES' SUCCESSION

The spouse's order cannot be excluded by anyone and, in turn, excludes collateral relatives, and the spouse inherits together with descendants and ascendants of his or her deceased spouse and the widow daughter in law.

When there is no other order, the spouses are each others' heirs, receiving the entire estate.

When it is shared with the decedent's descendants, the spouse inherits as another son or daughter from the separate property of the decedent and is excluded from the community property, since he or she receives one half of it as a partner of the marriage.

When the estate is shared with the decedent's ascendants, the widow or widower will receive one half of the decedent's separate property and one half of the community property.

When the estate is shared with the widow daughter in law without children, she will receive one fourth of the portion to which her predeceased husband would have received, and the rest will be inherited by the surviving spouse.

Causes for Termination of the Spouse's Right to Inherit.

The spouse is not subject to disqualification from inheritance or disinheritance.

- a) Marriage in articulo mortis, with the spouse's death within 30 days.
- b) Absolute divorce, upon the dissolution of the bonds of matrimony.
- c) Legal separation from the spouse declared guilty.
- d) Voluntary separation, without the intention of getting back together.

There is a Right of Dwelling of the surviving spouse, for assistance purposes, that continues in effect so long as the spouse continues to be a widow or widower.

HEIRS

Legal heirs are relatives up to the fourth degree, following the above succession order.

They inherit the estate upon the decedent's death, regardless of having knowledge or not of such inheritance.

They are also entitled to waive the inheritance, which will be deemed irrevocable.

Escheated Property

If there is no will or legal heirs (that is, relatives up to the fourth degree) or the existing heirs waive the inheritance, the property will be escheated in favor of the State. Each province determines the governmental entity that receives the estate.

In this case, the State is not a heir. It receives the estate in its capacity as holder of the eminent domain of inherited property located in any province of the Argentine territory.

Agreement to Make a Will

No agreements to make a will or regarding future inheritance are permitted in Argentina. This prohibition is based on principles of public order.

Succession Tax Law

The so-called tax on the gratuitous transfer of property or succession tax was eliminated in 1978. However, it was recently regulated in the Province of Buenos Aires with different rates applicable as from AR\$ 3,000,000 (approximately 550,000 Euros).

On the other hand, following Savigny, a distinction was made in our codifier between successions under a specific title and a general title, depending on the METHOD OF TRANSFER.

A) When the right to a single property or several properties is transferred separately, it is a succession under a specific title and the successor is known as the LEGATEE.

B) When the right to a group of property or a proportionate share thereof is transferred, it is a succession under a general title and there is a general successor known as the HEIR.

Under Argentine legislation, there is a RIGHT OF REPRESENTATION, whereby the most distant relatives share with those nearest in degree, taking the place of their predecessor as regards amount and extension.

The concept of LEGITIMATE PORTION OF INHERITANCE is also contemplated, which means:

It is the portion of the estate that the testator must respect and limit its disposition upon making a will, if there are legal heirs: a) for the children (legitimate, illegitimate or adoptive), the portion is 4/5 of the estate; b) for the spouse: 1/2; c) for ascendants: 2/3; and for the widow daughter in law without children:

¼ of the portion to which her predeceased husband would have been entitled in his father's succession. The succession order should be noted: for example, ascendants are excluded by children who share the separate property with the spouse. If the testator fails to provide for the legitimate portion of inheritance, there is a type of probate proceeding (*acción de reducción*) regarding the inheritance in favor of totally or partially excluded heirs.

In Argentina there is:

A) the Disqualification from Inheritance (decided by a judge at the request of a heir, section 3304 of the Civil Code; and

B) the Disinheritance (determined by the decedent). In both cases, the Code provides for the existence of serious reasons that prevent the heir from sharing the estate.

As noted above, there are INSTESTATE AND TESTATE SUCCESSIONS.

2) TESTATE SUCCESSIONS are those where the decedent's will is instrumented by means of a VALID WILL.

The WILL is a written, formal, personal, special and revocable legal act.

Form: The Civil Code provides that, if a will is issued in the Argentine territory, it will obligatory take one of the forms listed in the Code (nuncupative will attested to by a notary public, sealed or holographic will, without prejudice of special wills), without prejudice of being an Argentine or foreign testator (section 3634). On the contrary, if the will is issued abroad, it will be deemed valid in Argentina if it complies with the formalities of the testator's domicile or nationality or the provisions of the Argentine law (section 3638).

The reciprocal will issued by two or more persons is not permitted in Argentina, since it is considered a personal act that must be carried out individually.

Substance: The Code provides that it will be governed by the law of the TESTATOR'S DOMICILE at the time of death (section 3612).

The provisions on property are limited by the legitimate portion of inheritance, if applicable.

FORMS OF WILLS:

- a) Holographic will
- b) Nuncupative will attested to by a public notary (3 witnesses)
- c) Sealed will (5 witnesses)

Our Code provides for a WILL IN A FOREIGN LANGUAGE. It is possible to instrument a nuncupative will attested to by a public notary, in the presence of two translators, and to have the will drafted in two languages.

The 3 witnesses must understand both languages.

The testator dictates or delivers to the notary a draft or record including the testamentary provisions in their language, which is signed by him or her and then translated by the interpreters into the national language. The testator's draft or record and the translations signed by the translators will be certified by a notary public.

DRAFTING A WILL AT A CONSULAR OFFICE

Argentine citizens living abroad and foreign nationals domiciled in our country may draft their wills before a Minister, Business Attaché or Consul, in the presence of 2 witnesses, whether Argentinean or foreign nationals.

Consuls have the power to authorize abroad the same acts as notaries in the country, that is, nuncupative wills attested to by a notary public and sealed wills.

III. OUT OF COURT SUCCESSIONS

In Latin America the experience of France and the rest of Europe in this matter has been gradually but continuously accepted. Though there are legislative bills in Argentina, out of court successions have not yet been instrumented; although our involvement is essential in nuncupative wills attested to by a notary public, assignments of inheritance rights, distribution and adjudication of inheritance, there are no successions before a notary public.

There are out of court successions in Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Mexico, Peru and Puerto Rico.

IV. CONCUBINE'S RIGHTS

Concubines have no inheritance rights.

As regards concubinage, applicable laws may be divided into two systems:

a) The French system, followed by the Argentine Civil Code: the concubinage is not regulated; it is ignored.

b) The Latin American system, where concubinage has received legal treatment, either regarding some partial aspects or regulating it in its entirety.

Mexico was the first country to include in its Federal Civil Code of 1928 specific provisions in that respect, giving the female concubine the right to alimony and to inherit in an intestate succession.

For example, in Oaxaca, the female concubine has all rights, while the male concubine has not. This means that this Civil Code is protective of women.

In Mexico, there is the freedom to grant a will; therefore, the only existing obligation is to provide support to minors, the spouse (and/or female or male concubine), parents and other relatives to the fourth degree.

If this obligation is not enforceable because they already own property, the testator will be allowed to bequeath 100% of his or her property to any person, without considering kinship bonds.

The Civil Code of Venezuela of 1942 provides for a community property quasi-contract between concubines.

Under the Civil Code of Peru of 1930, the paternity is presumed when the alleged father was living with the mother at the time of conception.

The women civil rights law of Paraguay of 1956 provides for community property between concubines after they have lived together for five years, etc.

Personal and property effects of concubinage are regulated by other Latin American laws, by requesting the approval thereof by a competent official (Common Law Marriage Law of Panama of 1956; Civil Code of Guatemala of 1963).

Finally, other laws directly align concubinage with marriage, as is the case of the Civil Code of the Mexican state of Tamaulipas and the Family Code of Bolivia of 1972.

Notary Agueda Crespo (Argentina)

UNIL COMMISSION OF HUMAN RIGHTS

WORKSHOP ON HUMAN RIGHTS AND INTERNATIONAL SUCCESSIONS

PALAIS DES NATIONS, GENEVA , 2 MARCH 2010

CONCLUSIONS

The various linking criteria: aiming at the creation of a personal international status?

The present condition of International Private Law, as it has just been unveiled to us is marked by the existence of a range of various legal systems, with a variety of implications on internal legal systems. This situation when applied to persons who because of their functions have to spend most of their life in different countries is clearly unsuitable.

At a time of globalisation it is difficult to face the fact that no proper legal solution has been provided to protect the personal status of International civil servants wherever they may be around the world.

Very wisely, Suleiman the great, had governed his subjects throughout his huge empire by using a personal status system according to which the legal aspects of the private life of the people were ruled by the laws of each community.

Nowadays, in Morocco, as well as in the various countries where this system still applies, social peace seems to be found.

Nevertheless such a system cannot be applied in countries where laicity is settled and guaranteed.

It must be stressed that the nationality criteria used as preferable link in laic countries does not seem to be working to satisfaction any more. Therefore it is often replaced by the domicile or the main residence criteria.

Can this rule apply to international civil servants? This type of persons is moving more than ever in our globalized world.

In addition they seem to be less well prepared to protect themselves than other foreigners do. This is mainly due to the fact that they believe to be under the protection of their various organizations. They are mistaken for outside of their organizations they are not shielded and unaware of the local legal systems that may apply to them in their daily life.

Many of them are in total ignorance of the existence of linking criteria:

- Linking them (when abroad) to their homeland, or not linking them
- Linking them (or not) to the country where they are living.

In the view of this situation it would be most advisable to create a Personal International Status.

In a first stage this status could be the same as the international civil servants' national status. But after residing for some years abroad, in cases when he/she married a foreigner, it does not seem possible to continue to apply the husbands' national law, mainly, when the spouses have different nationalities.

Therefore the law of the country where they are living seems to be better suited to govern them. If they do not wish it so, as provided for in The Hague Conference Treaty on marriage settlements, they may choose the legal system of one of the countries of their nationalities, or the law of their country of residence or the law of the country where they plan to live.

If they make no such choice, then the law of the country where they live will be applicable to them.

In the case of divorce the law applied is the local law. This is understandable for many reasons including the vicinity.

Can the choice of the national law be advisable in the case of a foreign couple (even both having the same nationality) when they have spent a long period of their lives abroad, in a country where their children became nationals and where they, themselves, have elected to retire? Furthermore it must be underlined that the interpretation of foreign law or of custom certificates, by a judge can be very awkward.

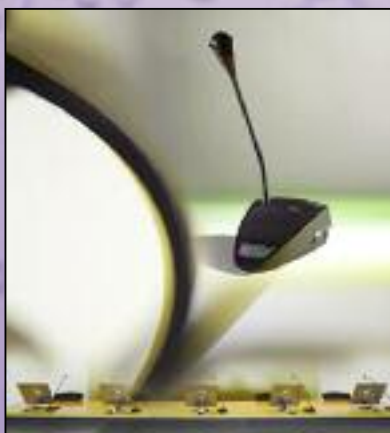
Therefore it seems wise for a couple having resided for over 5 years in a foreign country to choose to be governed by the local law, if it has not elected to be linked with a particular foreign legal system. The choice should be made by way of an official declaration, prepared by a notary (or by a similar legal

officer, in countries where notaries do not exist) and communicated to the Human Resources department as well as to the Pensions Fund.

This settlement does not concern international civil servants who are posted in a foreign country for short periods of time and must only apply to those who are meant to remain for a long period of time in the same country. The latter category should take specific dispositions.

Pierre Natural

Geneva, 8 March 2010



CONFERENCES AND SPEECHES

5

CHAPTER



Not. Eduardo Gallino

5.1. SPEECH OF THE PRESIDENT OF THE INTERNATIONAL UNION OF NOTARIES, NOTARY EDUARDO GALLINO

XLIV NATIONAL CONGRESS OF NOTARIES, VENICE,
OCTOBER 21-24, 2009

As President of the International Union of Notaries, I would like to specially thank President Piccoli for giving me the opportunity of addressing the Notaries of Italy.

I have always felt great admiration for this Notariat that honors the noblest roots of our profession.

The Italian wit has made a contribution of uninterrupted ideas to the Notariat, keeping intact the level of its contribution to a profession that wants and must be at the service of society and that derives its main source of inspiration from the service provided.

I have also the privilege of visiting and being a guest in this wonderful city of Venice, the city of Marco Polo and Carlo Goldoni.

The International Union of Notaries reminds me of the spirit of Marco Polo, because to gather together seventy six countries –many times totally different from each other – requires the same fraternity spirit of the great Venetian. And, though undoubtedly there are in the world many institutions gathering a lot of countries, it is not easy to find others with the same unity and cohesion, the same that you will find in the next International Congress of Notaries to be held in Morocco, in October 2010, to which you are now specially invited.

The entire world is aware that the involvement of a notary provides legal certainty, and Marco Polo had no doubts about this when, on January 9, 1324, Notary Giovanni Giustiniani received his last will, which you may find here in Venice.

Of course, when we speak about the past, when tradition is mentioned, we do not speak about the present and the future, thus ignoring, for example, the great conquests of the Notariat in terms of the use of new information and telematic technologies, of which

the Italian Notariat is a true testimony, given the remarkable work performed by it in this sector and further considering that its know how in this matter is requested everywhere.

Therefore, though it is essential to find and recognize our roots, the Italian notarial tradition, I do not think it is accurate to link the Notariat only to tradition, because it would not reflect reality.

It shows us a constant professional and scientific update, without which it would be materially impossible to attribute security and certainty to legal acts.

This Congress is held, as it has been introduced, “accompanying a changing society” and, in the same manner as the notary adjusts and adapts the parties’ will to the law, the notary further accommodates the notarial science to the changing times, often proposing new solutions to new challenges, solutions that end up prevailing and being imposed even in Parliament and society.

On the other hand, our impression is that some debates, though useful and fruitful, may have an even more productive basis if their starting point is the awareness of the notarial identity.

We will certainly continue to debate and constantly attempt to teach the authorities and society the three big axes that constitute the essence of our identity: who we are, what we do and what we work for.

As regards ‘who we are’, sometimes it is not easy to explain this symbiosis between public official and professional of law or professional of law vested with an attesting function.

About ‘what we do’, our product is the notarial public instrument, with authenticity and the highest procedural value that distinguishes it from all other means of proof.

And ‘what we work for’ refers to the purposes and values we defend: first justice, but indissolubly attached to security and preventive legal certainty, which are guarantees of peace and social progress.

When trying to establish the acts that require notarial formality: How could we do without the full awareness of the indissoluble relation between the concept of Notary and public trust?

Legal certainty derives from the delicate equilibrium between the concepts of public official and notary public, between public trust and the knowledge of the rule and its interpretation. Without the Notary, public trust loses most of its value and effectiveness, and conventions lose most of their effects.

It is not a coincidence that, in England and Wales, the Civil Procedure Rules now provide, in rule 32.20, that a notarial act may, in principle, be received in evidence without further proof.

Undoubtedly, as regards the Notariat, the Common Law is heading towards the Civil Law, and not the other way round.

It is not a coincidence either that the legal systems of the seventy six countries that are members of the Union that I am honored to preside, which come from the most diverse regions and cultures of the world, build social peace on the basis of the notary’s involvement.

A deep analysis of the identity of the notarial professional would certainly contribute to establish the structure and limits of each legal order. Harmony in a legal order may only result from the attribution to each legal profession of a role specific to its nature, in a delicate equilibrium where the wisdom and courage of the rulers cannot be replaced with proposals that, lacking scientific rigor, may endanger the conquests of law.

The identity of the Notariat, in short, must be a strong and unquestionable issue when it comes to proposing, building, and moving forward.

When tasks and activities are to be attributed with respect to legal transactions that require impartiality, neutrality, legality control and legal skills, only the notarial profession may prevent serious alterations in the legal order in detriment to the citizen’s rights.

In addition, if the notarial identity is of no interest, it will be hard to explain why the notariat is a service of general interest and, as such, subject to the provisions of section 86, subsection two, of the Treaty establishing the European Community.

It was not at random that the Italian Court of Cassation, in its decision of April 15, 2008, number 9878, resolved that it is certainly possible, with respect to the notarial activity, which is carried out as a public function for which purpose the legal order provides the designation of public officials with special subjective characteristics, appointed after a qualification exam, subject to control and periodic supervision and inspections, as well as rigorous rules of discipline, to have services rendered in a liberal manner, under a competitive regime, by other professionals of the same or other countries of the Community.

Naturally, the fact that the Notariat is radically different from the business activity also means that we have multiple and specific duties to society.

As we have already said, this Congress is held under the motto “accompanying a changing society.” But, how should we accompany it?

First of all, by continuously reviewing and rethinking the way we act: if we do not change and adapt to the new requirements of this constantly changing and globalized society, we will continue to obtain the same results that we suffer and enjoy today.

Only the necessary adjustments, without waiving our essence of Latin notariat, will allow and make possible the desirable future.

We accompany it also with specific actions:

- Offering our availability and excellent service across the territory;
- Anticipating legal and social problems with adequate scientific update for notaries to be prepared in advance for the new social rules and requirements and, in particular and in the European context, for the significant reforms introduced by the European Union to private law;
- Assisting the legislator in their activity, by creating centers of study that will propose reforms of unquestionable technical value;
- Contributing with all possible means to the newly born World Notaries Network, which will result in no Notary in the world being left aside;
- Constantly collaborating with the International Union of Notaries, because it is not enough to speak in favor of international cooperation, it is necessary to fight for it.

Let me conclude by stating that it has been an honor to express these thoughts, in this wonderful country, the cradle of law.

I convey my warm greetings, fondness, admiration and affection, as well as those of the rest of the notariats of the world, wishing my distinguished and dear Italian colleagues a happy and fruitful Congress, hoping that Italy will continue to enlighten us with its culture and exemplary talent.

Many thanks.

5.2. LECTURE: SOME CONSIDERATIONS ON PROPERTY LAW IN MARRIAGE AND OTHER COHABITATIONS UNDER COMPARATIVE LAW AND PRIVATE INTERNATIONAL

DELIVERED BY PROFESSOR ANTONIO BOGGIANO AT THE FIRST INTERNATIONAL SESSIONS HELD BY THE NOTARY ASSOCIATION OF MENDOZA IN SEPTEMBER 2009.

H.E. PROF. DR. ANTONIO BOGGIANO MCSGM

A deep crisis is being observed in our field. The decrease in marriage and the increase in cohabitation are notorious. In the West, the social consensus on marriage, family and sexual relationship has weakened. There are more divorces and less marriages. Alternative cohabitating couples do not get a divorce; they cease to live together and be partners. People seem convinced that marriage offers more disadvantages than advantages. Cohabitation seems more attractive because it does not involve so many termination expenses, and its economic consequences are not as serious as those caused by divorce.

The gravitation of money is not new. Perhaps higher. Extramarital unions have more flexibility to agree on personal and property relations; they also result in tax savings. In unions, women appear to be more free and equal to men. Marriage may end with the social benefits of one of the spouses, unlike unions. The relative equality of income makes marriage less attractive for people with low income; economic factors are important.

Another issue to consider in the crisis is the denial of any religious influence or effect on civil marriages. The principles of the ignored Natural Law or of any religion will not consecrate civil marriage. The Catholic Church asks its members to commit, not only to living in a Christian marriage but also to applying its principles and values to civil marriage. Others, even outside the Church, support a civil marriage based on natural law. Other religions also affect with their principles the civil marriage. Others do not recognize any valid union other than marriage. There are also those who substantially put marriage and other unions in the same level. Some prohibit same-sex unions, while others accept them. Many encourage the exclusion of marriage from any stable union, no cohabitation, no responsibility.

Another aspect of the crisis is the relationship between State and marriage. In addition to separating the religious meaning from the civil marriage, in some States polygamy, polyandry or unions of close or open groups are forbidden. Society must accept secular marriages. Can the civil issue be raised? Is the State interested in having two types of unions: marriage and the others? Why a double regime? Why not have an ample and flexible union regime that could even be called marriage? Why have two unions, calling them with different names, and why not have all these unions under the term marriage? Why not have a single union that can satisfy all parties? Such union could have any name. Which compelling rules could apply to it and why would it not be better to regulate the same with statutory rules so that the parties are able to provide otherwise at any time? Why not apply to such union, for instance, the *lex mercatoria*, or just let the parties govern themselves with unlimited autonomy: *lex unions*, each union subject to its own law established by the partners as if they were rulers? Does any union offer more benefits to society or is it the same? Which are the advantages of any type of union and which mandatory limits could be imposed? If the State admits that the traditional marriage is good for society, that is, a common good, it must explain and support its reasons. If the State maintains a certain regulation on marriage it may be because it considers it a common good; yet the traditional marriage is a good business for society and the current State. The interest or interests of children appear to be more protected by marriage.

The child has rights with respect to their parents and also to society. Society, however, is absorbing the rights of family. Who provides food, support and education to children? Marriage and unions, what are they contributing to society? Who says today what is good: the United Nations, the European Union?

Another issue is the question of whether marriage is dead. We wonder what good does marriage to society to have such a preferential importance. If we consider marriage as a long-lasting cohabitation with long-term continuous obligations for spouses and children, where the upbringing of children is more appropriate, it could be considered that it has a preferential hierarchy and, moreover, that the legal recognition of children is only politically advisable in such marriage. Unions would be left for homosexual couples or couples that cannot or do not want to have children. However, this consideration would be theoretical. Couples living together both without getting married, either homosexual or heterosexual couples, can have children; either adopted or born to one parent or both. The indissoluble marriage, open to procreation as it is the traditionally position, has its basis in Christian morals and appears to be appropriate in the West to face the fertility crisis. The lack of children threatens the occidental culture. Every day, the arrival of young people and children from all over the world to work and support a growing number of western elderly, particularly European, is noticeable. Immigration, in the absence of sufficient robots, may be a palliative, but it will imply a new culture, a new society. What education will western citizens have? Will they receive values and principles from the Christian West or will they culturally colonize the West and convert Christians? Who will have more education? Will Asians and Africans end up converted into Europeans or the other way round? There may even appear a third gender. Will spouses with children and big families become a value in society over work efficiency? Now then, spouses with many children require special policies and, in that sense, in a property regime of a well-adjusted marriage, family economists and jurists specialized in family and business economy will be needed. Nowadays, family economy has a great international importance to the extent that planning and investing property has become more international to protect themselves from local economic policy risks. Children are the human and economic infrastructure of the future; the growth of such infrastructure should be encouraged. We must invest in children's development because it is essential. How many children will pay for their parents' pensions?

These considerations of a very general nature must be regarded from philosophical, sociological and political perspectives in order to analyze our subject matter. This is because the economic effects of marriage and other unions are naturally connected to the fundamental issue of the institution in question. I call your attention to this crucial issue. The next entire consideration must be based on a philosophical reflection on these matters.

As regards the matrimonial property regime, today several elements must be taken into account. First, the marriage regime must be considered, but in a comparative way the regime of the other unions should also be contemplated. We will divide them for methodological reasons only; we should not forget that, in many countries, when they speak about marriage they make no distinction between unions. Words should not be disregarded, because words refer to concepts; therefore, it is not the same to talk about marriage here than in Switzerland, where marriage includes all types of unions. Consequently, it is important to make it clear what we mean when we talk about marriage, union or when we use other alternative words.

As noted, it is hard to make an analysis of the matrimonial property regime without having an idea of marriage. To us, marriage still is what it traditionally was, but this is not the case under the comparative law. In the European law, there is a tendency to conceptualize as marriage any type of union. Legislators

then wonder if every type of union must have the same property regime, or if marriage should have a property regime and unions another.

For the time being, I will take a conservative approach and will see what today's matrimonial property regime actually is from a comparative viewpoint. I have tried to simplify the regimes currently considered for comparison purposes, and those that matter are regimes like ours or very similar to ours, with some characteristics such as the community property regime.

Another system prevailing under the comparative law is the separate property regime. In turn, it is important to observe that none of these two systems, especially the separate property regime, is a unique system. For example, in the Scandinavian countries there is a separate property regime but with differential community property; that is, a community that ends upon the dissolution of community property, though it is a theoretical notion to talk about the dissolution of community property without thinking of the dissolution of marriage. In Scandinavia, spouses have their separate property during the marriage and equally divide the property upon their divorce, or separation or termination of the matrimonial property regime. Both in Norway and Denmark, there is a new concept of acquisition of a house with the indirect contribution of the wife; for example, even with an existing separate property regime, it is considered that if the husband has bought a house to live, the husband is the "breadwinner" and the wife the "housemaker." This means that, traditionally, the man supports his family with the money he earns from his work and the woman stays at home. Thus, there is a judicial balance because the woman's indirect contribution to the property is recognized by virtue of such tasks, which are not measured in money and, when they get a divorce, it is considered that the woman owns one half of the property and, in some cases, of the value of the property acquired with the husband's money.

Now then, we see that most European current systems have this mixed regime of separate property not included in the community property.

I personally believe that, today, under the comparative law, there is a huge difference in real life between community property and separate property regimes.

When the amendments to the Civil Code were analyzed and the question to maintain this regime or allow the spouses to choose the separate property regime was raised, it was finally decided not to innovate. The idea was considered as a possibility to choose between the applicable regime and the separate property regime. Apparently, today it is still important to protect the woman in marriage and the idea of separate property was considered to be less humanistic in order to protect the spouse. However, I feel inclined to believe that these hesitations of today are not very different under comparative law. Let me tell you an interesting story. A marriage was officiated in Germany. She had assets for 100 million pounds sterling.

The husband was French, had some money but not so much. They reached an agreement whereby he would waive to claim any amount out of such 100 million pounds, which, under Argentine law, would be considered as separate and not community property. They got married, lived for a while in London, had children and the husband quit his financial job and went to Oxford to study neurological biology so as to apply this knowledge to financial research. In England, under Common Law, the spouses may not validly execute or later enforce antenuptial settlements. This was the case law and there are precedents.

The judges based their decision in that today a country that refuses to acknowledge such antenuptial settlements would cause an unbearable situation of isolation because they are recognized across Europe. This shows the atmosphere in which the decision was made. It was resolved that the settlement would not be directly recognized by English case law. The Court of Appeals sustained that, in the future, in cases

clearly in line with the facts of this case, the property regime freely agreed by the parties should be duly weighed by judges. This does not mean that the foreign law will be applied or that a foreign agreement will be enforced under English law; it is the legitimate exercise of a very broad discretion granted to judges to seek equality among the parties in any division procedure, and this settlement was considered by virtue of such judicial discretion. By recognizing the same, it was decided that the husband had a certain right that was reduced from the amount of 5 million determined in first instance, to a lower amount short of 1 million pounds to acquire a house for him and his daughters when they visited him in London, as well as money to support his daughters and himself.

As noted, this matter is today a great issue. For the time being, I suggest to have it in mind and remember that in the world there is a dual system of community and separate property.

Let's see now which our system of conflict is in reality or, in other words, the law that we choose when the spouses establish their domicile first in one country and then change it to another. However, what is more important and frequent today is not so much that the domiciles are spread throughout the world, but that every guy has a kiosk in several places of the world where he earns and invests money. When I say guy, I imagine that he is not so young, a bit older, and multimillionaire, and then the property becomes internationally dispersed. Therefore, jurists will have a hard work and will be consulted a lot because the property becomes increasingly dispersed. This happens because he has a large or small capital, always wants to have risks distributed and, consequently, puts his savings or investments in different places. It is easy to see that today property is naturally connected to the world, even small or the most territorial property. Because of this, when marriages are dissolved, more conflicts appear. Then the question arises of what each of them has and where. At such point, another consideration should be taken into account.

There are three things that must be considered intrasystematically: one is the dissolution of marriage linked to the dissolution of the property regime, and frequently these dissolutions go hand in hand with problems with the spouse's succession that, in some cases, cause the dissolution. This means that the death of one spouse causes two legally related problems: the dissolution of the community property regime and the marriage. In addition, we must face two problems related to the community property regime, which have their own law, though it is not actually clear the law that is applicable to the validity and, in particular, the dissolution of marriage and divorce, and which are generally associated with the dissolution of the community property. Furthermore, mention should be made to another *lex societatis*, the one related to the companies formed by spouses. At this point, two companies' laws should be distinguished: the law applicable to marriages and that applicable to companies. They are two; one has effects on the other and the former defines if the incorporation of the corporation is valid or not. In addition, we should consider the duality of *lex contractus*; there is the possibility of executing antenuptial settlements in a marriage. That results in a *lex contractus matrimonii*. In turn, spouses may execute agreements between them; some are permitted, while others are not. Under the comparative law, it appears that there are systems prohibiting spouses from entering into agreements, while in other systems they are free to do it. There is also a limited regime under which some contracts may be executed. In addition, there is the case of the donations made by the spouses on occasion of the marriage ceremony. Under the comparative law, we should then study the *lex contractus matrimonii* and the law applicable to contracts executed thereafter.

Finally, the succession law should be considered. In the case of a death that causes the dissolution, several laws are applicable. Each such law may address a different right and, as you will see, it is very hard to internationally harmonize decisions, which is the purpose of private international law. My proposal is

to harmonize this issue as much as possible because the principle of effectiveness is critical. We cannot harmonize if it is impossible to apply the German law to real property in Syria. Our regime has the sacred principle of applying to the matrimonial property regime the law of the first domicile of the spouses. The first issue that is raised is if this rule may be maintained, if it is desirable and reasonable. I think otherwise, but do not make a big deal of it. I believe it is advisable to consider the historical function that this rule has had and, in my opinion, was lost because it was attempted to protect the woman from the arbitrary change of domicile by the husband and the submission to a property regime favorable to him.

Today, that sounds like a theory; I do not believe it is done to change a matrimonial property regime to commit a fraudulent act against woman. Every change of domicile would be presumed to be fraudulent. However, it has other cons, such as that it goes against the laws to be considered at a decisive time. What law applies to divorce? The divorce is governed by the law of the last domicile, not the first; therefore, we choose a number of laws that are always impracticable. What law applies to succession? It is governed by the law of the decedent's last domicile; the last domicile, not the first. Consequently, the reality of the concepts related to the dissolution of the matrimonial property regime is subject to the last domicile. We still have to deal with the law of the first domicile of the spouses to give some sort of protection to woman.

It may happen that, under the law of the first matrimonial domicile, the law of the last, and not the first, matrimonial domicile is applied, which causes what in doctrine is known as the *renvoi* or remittance. In other words, the law of the first matrimonial domicile remits the issue to the law of the last domicile. As regards remittance, the problems does not end there because the first matrimonial domicile could admit other linking criteria such as nationality, and we should determine if the law of the first matrimonial domicile is applicable –when it does not want to be applied – or the law of the nationality of the spouses, which is not the case. Therefore, the criticism to the choice of the first matrimonial domicile, in my opinion, is very serious.

The matter gets more complicated because, today, there are two big tendencies in the world in terms of conflicts. The strong tendency is that everything related to divorce and property regime should be subject to the *lex fori*, the law of the court. Actually, the law of the court is not so pure because, behind the law of the court, it is always the domicile of the spouses. They do not appear in court in any place of the world; they go to the court where they are domiciled. Therefore, the law of the court coincides with the law of the court of the last domicile, and this creates a new problem. We are now not trying to determine the law applicable to the community property, but the judge that could be considered internationally competent to decide upon a controversy between the spouses. Nowadays, under Argentine law, both the jurisdiction and venue as well as the applicable law are subject to the linking criterion of the last matrimonial domicile.

At this stage, we should remember the Vlasov case. He was a Hungarian who had married and had a lot of money. It is not impossible for a poor person to become rich, let's remember Onassis. The spouses moved to Buenos Aires. The husband devoted to the management of his maritime fleet in different parts of the world. When Vlasov's wife filed for divorce, he said that the Argentine judge had no jurisdiction and it took four years for the Court to resolve the issue. The supreme court decided that the last domicile was the last place where the spouses lived. The first problem was the incompetent judge and it took four years to solve this issue. Then it was the turn of the property and their international nature. The case was heard in an Argentine court and the dissolution of the property regime was resolved. I have raised a third problem, the problem of enforcing abroad an Argentine judgment for the dissolution of the property regime. How would this judgment be enforced where the vessels are located, such as Geneva,

for example? When an asset is located in New York or Prague and an Argentine judgment has to be enforced, the existence of the International Union of Notaries gets complicated. Therefore, here we are facing three issues on jurisdiction or venue, the applicable law and the enforcement of the law in other places of the world. Please note that the issue of the property regime is important as regards the spouse's capacity to execute agreements, let alone the organization of corporations. Consequently, we should not forget that, under the matrimonial property regime, in addition to the original antenuptial settlement, there may be other contracts and company incorporations. At this point we should remember and determine the elements that fall under the matrimonial property regime and those that do not. There are issues that must be determined with respect to the elements subject to the *lex societatis matrimonialis*. Under section 2612, we have a total untransferability regime, which relates to this imperative nature and the same question previously considered. The other thing is if it mutates or not, if it changes or not. The law of the first domicile may change. Then, there are other matters, not related to the scope of application but to the change of rules. In addition to the problems raised, there is that concerning the material change of the applicable law and the change of rules determining the applicable law (conflict of laws). In other words, if the contents of the law of the first domicile changes, if the community property regime is modified, is the law of the first matrimonial domicile applicable as it was or as it is now? There are also conflicting changes when conflict of laws rules are modified; this happens when the last domicile is replaced by the first matrimonial domicile. It should be determined whether the applicable law is the one in effect when the marriage was officiated and, if we take the last matrimonial domicile, whether the current law is the one of the first domicile. The Argentine or foreign temporary laws are also subject to analysis. If the Uruguayan law of the first domicile changes, the community property regime will be replaced by the separate property regime. Which temporary law is applicable? Ours or the Uruguayan law? It is quite a problem. There is then another problem, which is the law applicable to the community property in cohabitation. We have two problems here; one possibility is to use the same criteria as in marriage. About this, no determinations exist and, for the time being, no situations have arisen. There are questions regarding concubinage because it is not just a union; and in the Argentine doctrine, so far, it has been considered that neither the marriage regime nor the *de facto* business associations regime are applicable, but the rules of general law, considering the concubinage as a fact. Now then, as regards domestic partnerships or civil unions, because there may exist a case of a same-sex union registered in Montevideo: What happens when such couple come to Argentina, can we recognize such union or not? Does it affect the principles of public order? Or we can say that it is a foreign institution that must be assimilated to a known institution and apply a regime if there is a problem between them that has to be solved here? We have no substantive laws or conflict of laws rules that may be applicable to this situation.

CONCLUSIONS

- 1) The first idea is the need to directly take into account antenuptial settlements, not in a limited but in a broad sense; therefore, as regards Argentine private international law, I feel inclined to believe that the law applicable by the parties by virtue of their decision to sign a antenuptial settlement should be recognized in Argentina, unless it includes a clearly abusive clause in detriment to a spouse. I think this principle should be recognized under private international law.
- 2) The second issue is the need to conduct a permanent coordination study of legal orders. Private international law is no longer just the law coordinating substantive laws. In my opinion, private international law also has to contemplate the relations between legal orders.

3) There was a time when private international law was strictly considered only as conflict of laws; now, not only the legal orders of foreign States should be considered but also any other domestic legislation of a person subject to private international law. In addition, the influence of the international law on the systems and orders of the different persons should also be taken into consideration, because international law today has two faces, one constitutional and the other international. There are the international treaties on human rights, which have constitutional hierarchy. The Inter-American Convention on Human Rights includes a chapter on family protection and, in such chapter, we find some words that may cause judges to consider Argentine rules to determine if they agree with such legislative criteria. For example, it is said that no marriage can be officiated without the full guaranty of the spouses' free consent. Is it the freedom of the marriage ceremony affected if one of the spouses has a higher economic power over the other and imposes on such spouse a certain regime to get married or not?

4) Every marriage regulation must provide for an adequate equivalence relation between spouses and, if we review all the solutions found in terms of matrimonial property regime, we are faced with the question of knowing if such systems comply with this principle of adequate equivalence between spouses in a marriage and, consequently, in the community property. It is not unthinkable that the parties to important legal actions regarding property may resort to the Inter-American Court of Human Rights.

5) I propose that the International Union of Notaries issues an international notarial opinion; a notarial report including the opinion of several notaries related to this issue. We must think how this international notarial opinion could be implemented. The notarial activity has a function similar to the judicial activity, because they both seek truth and reasonable legal solutions. In addition, nothing prevents, in my opinion, the study of the possibility of having a notarial court to solve property issues between spouses if no third party's rights have been affected. I do not mean the divorce. These are two issues that I submit to your consideration. I also believe that it would be important for notaries to conduct a research, within their offices, of the matters discussed.

5.3. OPENING SPEECH OF THE III ONPI NOTARIAL PRIVATE INTERNATIONAL LAW SESSION

DELIVERED BY THE ONPI PRESIDENT, NOTARY LEON HIRSCH, ON AUGUST 5, 2010, AT THE SCHOOL OF LEGAL SCIENCES OF UNI-VER-SI-DAD DEL SALVADOR (USAL).

The events in commemoration of our Bicentennial are, without any doubts, a specially auspicious occasion to hold the III ONPI Notarial Private International Law Session.

For a fair and equitable order in society, pursuant to the development requirements of any order and the rational building of coexistence, it is a transcendent task for the science of Law to find the adequate solutions that the current society is claiming with hope and urgency.

And it is precisely us, the operators of Law, who have the responsibility of undertaking such huge enterprise.

It is no wonder that a Session on this legal subject is welcomed as an important cultural event, since it is the result of the quality of the topics chosen for the same: suggestive topics, full of issues, current events and high emphasis on legal research.

Undoubtedly, the movement of people from one country to another and the need to issue documents in

one place to be used in another created the problem of the validity of documents issued abroad. Therefore, the notarial function has a fundamental importance in international legal transactions, and is also the basis of the doctrine of free will, given that it seeks legal certainty in a specific legal transaction. This function performed by a notary is currently very important and basic for international security purposes.

At present, with the intense international commercial traffic, the search for legal certainty in the legal world makes it possible to appreciate, in a clear and precise manner, the importance of Private International Law to execute legal acts.

Without exaggerating consequences, I believe that if the notarial function, which many times reconciles the opposing interests of individuals, did not exist, we would be practically facing a legal chaos.

To such end, ONPI has created this Notarial Private International Law Sessions, to promote the study thereof, which is not always considered at the time of submitting topics for national and international Congresses, Sessions and Conventions.

Finally, I would like to say that the Notarial Private International Law is today one of the most important branches of law in terms of international legal certainty, and that the work performed by the Notary in that respect is essential for legal transactions and acts to be carried out under the law.

I truly have not enough eloquent words to express my profound satisfaction and gratitude to this prestigious house of studies for its decision to fully support and share the development and organization of this legal event, and to the distinguished jurists who will enlighten us and make this Session shine. Finally, I declare that this III ONPI NOTARIAL PRIVATE INTERNATIONAL LAW SESSION is formally open.

Thank you.



HISTORICAL ISSUES

CHAPTER 6



6.1. NOTARIAL ARCHIVES:

RECORD OF NOTARY VICTOR-GERVAIS-PROTAIS MANGEARD, HOLDER OF A BACHELOR'S DEGREE IN LAW, COURT'S CLERK AND NOTARY FOR THE ISLAND OF GORÉE, DATED WEDNESDAY, APRIL 2, 1817

BY NOTARY DANIEL-SÉDAR SENGHOR

Record of Notary Victor-Gervais-Protais MANGEARD, holder of a Bachelor's Degree in Law, Court's Clerk and Notary for the Island of Gorée, dated Wednesday, April 2, 1817

Freeing of the above mentioned Amarouba
(Record No. 2 of April 2, 1817)

Before notary Victor-Gervais-Protais MANGEARD, holder of a Bachelor's Degree in Law and Court's Clerk of Gorée.

Today, Wednesday, April two of year one thousand eight hundred seventeen, Ms. Sophie Mérée, owner, resident of the Island of Gorée, appears herein and, due to the good conduct of the above Amarouba, her prisoner, hereby states that he is granted freedom. She intends that, as from this date, he is declared free of any servitude and enjoys, under the laws, all benefits associated with a free man.

This freeing order is issued as a pure, simple and irrevocable inter vivos gift that Mr. Amarouba hereby acknowledges and accepts, with much appreciation.

Due to the foregoing, the acting official attests to and issues these presents in the office of the court's clerk, before Messrs. Jean-Baptiste BAUDIN and René DUPUY, both owners, who live in the Island of Gorée and are the witnesses who have signed together with the appearing party and the court's clerk. These presents are read, since Mr. Amarouba has claimed to be illiterate and unable to sign, followed by the appearing party, who also claimed to be illiterate and unable to sign.

Protais Mangeard - Dupuy – Baudin
There follows identical handwritten text.

COMMENTS ON THE PUBLIC INSTRUMENT FOR SLAVE FREEING

issued in the Island of Gorée, Senegal, on April 2, 1817,
by Notary Victor Gervais Protais MANGEARD, Court's Clerk.

Comments by Notary Daniel-Sédar SENGHOR, Notary for Dakar
(in charge of the Book of Notarial Records of the Secretariat-Notariat of Gorée).

INTRODUCTION

If there is a period in the history of social events that specifically disturbs the conscience is, without doubt, the day when a businessman led men into the trade of fellow men, thus reducing human beings to simple property.

Unfortunately, slavery is a universal constant, since there is no place or town that may be exempt in that respect, though for a brief period of its history.

The “Negro Traffic” must have been a kind of paradox, adding a systematic dimension to the “Triangular Trade”, to the “Crime Trade” (Abad Grégoire), due to the convergence of interests of the three poles that each, in its own way, organized as its own opportunistic legitimization.

The Island of Gorée, located in the Western extreme of the African continent, is known today as the “African Sanctuary of Black Pain” (Pope John Paul II), in memory of a time forever gone.

The testimonies of such shameful transactions are kept, to exorcise the reappearance of this period, in the first secretary-notary's Register set by Louis XVIII, King of France, in 1817.

Out of concern for legal certainty, this embryonic notariat was questioned since its inception as regards the records for the creation or transfer of this specific right, which implied a human being's intention to take another human being as their own, as an *inter vivos* transaction or on account of death, with or without consideration.

To illustrate our contribution to the history knowledge by the notariat, we have decided to refer to this painful period of time as an act of hope, since it is the liberation or, more precisely, the annulment of an illegitimate order, though presented for pure academic reasons, as an *inter vivos* gift issued as a public instrument.

We intend to review, first, the socioeconomic context of the period, describing the players' profile, as well as their perception of the facts, before referring, in a second part, to the most classic comment taken from the law, so that the reader can assess its structure and scope.

I. BRIEF HISTORICAL NARRATION AND SOCIOECONOMIC CONTEXT

1- HISTORY

According to the legend, the discovery of the African Western coast is attributed to the ancient Carthaginian seamen, but the first precise narration of a Western discovery corresponds to a Portuguese seaman, Denis Días, in year 1444.

The division of the new world between the Crowns of Spain and Portugal, on one side, and the 60° West meridian, on the other, will be rapidly abolished by the violent attacks of the conquering ambitions of the Dutch, Danish, English, French, Genoese, Swedish and German people, who took possession of land in the African continent, depending on their maritime influence at the time, or by means of treaties marking the stages of their campaigns and conquests in continental Europe.

The Island of Gorée will change flags 17 times in 230 years. From 1587 to 1817, the island will be under Portuguese, Dutch, French and English domination, and other successive references, some of which only lasted for a few weeks.

Though scarce in size, this island offers the first protected natural bay in the South routes of the Atlantic, and allows vessels to stop, repair average and secure the supply of drinking water and fresh supplies before continuing their route to America, the Indies or Southern Africa.

Its steep configuration facing the sea allowed a fast fortification and housing of the garrison, securing sovereignty at the time, the strategic control of coast sailing and trade from the continent that, though reduced at the beginning, would soon experienced a sustained development due to its exceptional position as the coastal place where all passing ship would regroup.

It will participate in the organization of the “Triangular Trade,” but its role will be restricted in this area, given its exiguity and shortage of drinking water that naturally confines it to a technical interlocking role.

The legal status of slaves in French territories was organized under the Royal Ordinance of 1685, best known as the “Black Code.”

The main type of slavery existing in the Island during the French Revolution was the “house” slavery, which especially constitutes a type of lifelong paternal domesticity for the needs of the life style in a bourgeois house, during the flourishing trade that was developed there in favor of the unions of European seamen and daughters of the country, and of the actual talent for business of children born from such unions.

The Paris Treaty of 1815 executed between France and England, immediately after the fall of the Empire of Napoleon and the Restoration of the Bourbon Louis XVIII to the Capetian Throne, provides for the return of the Island of Gorée to the French Crown, following the sixth and last period of English occupation that lasted 13 years (1804-1817), period during which the Negro traffic was abolished by England in 1807, as promoted by Lord Wilberforce and the “Society of the Friends of the Blacks.”

The return of the Island to France also marks a definite breaking with the old way of administration, represented by a concessionaire “private society of colonial interest,” in favor of a direct administration by the colonial sovereignty that was to rule for over a century, thus duplicating the number of institutions of the metropolis, under the authority of the ministry of navy and colonies.

Among other institutions, a District Court was set in Gorée, with a clerk’s office whose official in charge served at the same time as Court’s Clerk, Notary, Appraiser, Officer of the Court, Secretary of the District Council and Civil Registrar.

In this historical scenario, the second public instrument is issued in the Island of Gorée on April 2, 1817, by Notary Victor Gervais Protais MANGEARD, Court’s Clerk-Notary recently appointed and a possible survivor of the “La Méduse” shipwreck in July 1816, which ship had sailed with almost all French administrative officials as a consequence of the ceding back of the Island to France by England.

2- SOCIOECONOMIC CONTEXT

This new method of direct administration by the state secures investments and, at the same time, allows the inclusion of social education and health services by religious congregations.

The Island of “Happy Gorée” enjoys a period of great prosperity that enables its bourgeoisie to build beautiful and luxurious houses where intense social life is cultivated and fabulous parties are organized, during which the revolutionary ideas of freedom and equality emerged, despite the fact that Napoleon had restated in 1802 the slavery abolished by French colonies due to the Revolution, by Decree of February 4, 1794 (16 Pluviose Year 2).

The “Bachelor’s Degree in Law” of the recent Court’s Clerk-Notary is mentioned in the preamble of the public instrument. This means that he holds a university degree and is an accomplished jurist who holds a position in the Court’s Clerk Office and the Notary’s Office of the Island, where he has probably disembarked without a prior opinion but convinced by the greatness ideas of the “civilizing mission” of his country in African land.

The two witnesses to the act are Messrs. Jean-Baptiste Baudin and René Dupuy, French traders, known in the island as “married according to the ways of the country,” who left a legacy to posterity that is honorably known to this date. They both perfectly represent the socioeconomic concept of the time and are considered as moral referents, as members of the bourgeoisie and attorneys at law, necessary bridges between the embryonic colonial authority and the native people. Ms. Sophie Mérée, the “Donor,” has the capacity as owner and inhabitant of the island, which means that she is a “signare” (a lady in the Portuguese native language), born from the union of an European Master and his indigenous prisoner, a mulata and aboriginal woman, with a privileged status as rich owner as a result of her possible condition as companion of a powerful official or trader in the colony. Though rich and privileged, she is “illiterate and unable to sign.”

The “above mentioned Amarouba, her prisoner” is “a house slave,” which means that, though a prisoner, he has an envied house status and is affected to the service of an important house of masters in the Island of Gorée.

His surname explains his origin, since it is precisely Amarou or Amar, or even Omar or Oumar, a Muslim name, followed by the last name BA, from the Toucouleur ethnicity, bordering the Senegal river, to the North of what will later become the Republic of Senegal.

What is important about this instrument is that it confronts the owner with her prisoner, both “naturals of the country” and illiterate, in a freeing instrument drafted on the basis of the most classic form, the public instrument for gift purposes.

On other hand, did they only share such illiteracy? History says nothing about the “good conduct” or how “with much appreciation” is instrumented.

Was he paid for his good and loyal services, as a servant, or for even more secret activities, such as lover?

3- METAPHYSICAL PROJECTIONS

The alchemy of a man subdued by another man is special in that it does not exempt any of them from the promiscuity necessarily resulting from this supposed intimate appropriation of the essence of one of them by the wanting of the other.

It is the typical syndrome of the master’s submission, to whom service is unavoidably provided and, consequently, of a relationship to which the service provider is subject, reverting the master-slave binomial, since he is the provider of a service of which he is the slave.

From the analysis it appears that the apparent frontiers are not necessarily the ones that one would assume, and that the relation between a master and his prisoner is governed by infinitely changing ways, until the polarity is reversed for the master to become the slave and prisoner.

Beyond the appearances and agreements, nothing could replace the close relationship of influence that must exist between two constantly confronted persons, both of whom are rich in their differences, though losing their conscience could have caused their loss of memory.

What did the three persons involved, the notary and the witnesses to the instrument, make of this?

They probably thought it was a pure academic formality or just an intention to doctrinally, but prudently, promote the new ideas arising from the French Revolution, which were deemed suspicious under the monarchy restoration.

The idea of *freeing* includes the notion of dynamic liberation from a stage, a formative self-improvement, from a status endured but not wanted, in the imprescriptible memory of an arbitrary aggression.

The notion of *prisoner* implies the confession to a submission to the external influence of a dominant energy, a direct consequence of an apprehension, which had previously determined this precarious situation. The union of both propositions describes the arbitrary nature of the captivity or slavery status with its imprescriptible mark of illegitimacy.

The “Black Code” of 1685 qualifies liberation as the “restitution” to the slave of his or her full ownership, by proving, on the other hand, that slavery could only be a temporary deprivation or kind of suspension, which in no case could be a derogation.

It is quite unlikely that the involuntary actors in this page of history would have sufficiently indulged in this type of speculation to rightly assess the grounds of the formative rite to which they were invited by history.

We will limit to this, to our work of research and understanding of the old interlocking of a period long gone, because we are fully convinced that, in this line of thought, the slave is not always who we think and we must jointly assume this testimony to be certain that, in the future of the human being, this issue will never be considered again!

The magical emotion of a beautiful page of the history of the Senegalese notariat in the colonial period is kept, in which the profound, inalienable and sacred missing link of FREEDOM is acknowledged.

.....

II- THE FREEING INTENTION BY CONTRACT

The notarial instrument for the “freeing of the above mentioned Amarouba,” issued on April 2, 1817, is the second instrument in the Book of Notarial Records of the Court’s Clerk Office – Notariat of the Island of Gorée that, despite being in a mediocre conservation condition (humidity and mold), was attached as an annex.

This original document calls the attention of the specialist of law, both as regards the form used as well as the contents and scope of formalities.

1- LOOKING FOR THE RIGHT FORM

At first, the freeing intention had to search for the best ways of arranging and securing the proposed goal. There were two completely different legal techniques to achieve the goal of recognition or protection of human rights:

a) The public act of sovereignty, under a law or regulation, which seemed to more conveniently organize the statement or recognition of the status of free man, which was conclusive and applicable in general, of public order and immediate, apparently including the simultaneous derogation of any other status to the contrary.

Though even at that time the negro traffic was forbidden, some years will pass before, by Decree of April 27, 1848 and promoted by Victor Schoelcher, the old status of house slave is finally prohibited by the public authority, thus returning “to humanity all master and slaves vilified by slavery.”

b) The consensual agreement, freely executed by the parties, implied the double existence of the arbitrary good intention of the master, on the one hand, and the breaking with the unilateral logic of the freeing act, on the other, due to reasons of parallel forms with the prior captivity act that necessarily preceded freedom.

Between these two forms, the notarial instrument was a way of reaching a middle ground: an instrument identical to the private contract, but drafted by a professional of law and endorsed by the royal seal, which provided it with authenticity, as in the case of the public act, and was equal to the individual and conclusive Certificate of Freedom.

Under these circumstances, it is not surprising that the notarial instrument was preferred over any other form, because its application was simple and it had numerous advantages.

Handwritten on a piece of paper, it may be assumed that it was drawn up by the Notary following the parties' will, after verifying their identity, capacity and the exact nature of their intentions.

The only question was the election of the most suitable legal instrument in order to satisfy the desire of the parties involved.

The agreement took the form of an *inter vivos* freeing instrument, was consensual and for no consideration.

It was executed between two parties with unequal influence, in the absence of the beneficiary's legal capacity.

On the other hand, we wonder if the presence of such beneficiary was needed in an univocal statement.

The notarial instrument of the unilateral statement was probably executed to establish or recognize, with or without retroactive effects, the freedom of a former prisoner.

Another legal form used by the notaries of that time was the abandonment or waiver of property that, in this case, applies to the right of freedom of the prisoner, with or without consideration.

Probably, none of such forms proved, with sufficient accuracy, the freeing intention of the donor or, above all, solemnly exalted the agreement with a magical or formative touch that could represent this access to or consecration of freedom.

The writer of that time, probably for being shy or afraid of being iconoclastic, would have preferred a transfer of rights (an *inter vivos* gift) instead of a statement, in order to recognize a situation that was concealed for some time.

On the other hand, it is possible that, following the great tradition of the notarial practice, this form of contract was not created by the then Court's Clerk-Notary, but rescued from a previous form applied in the colony of Senegal or probably the Antilles.

Our brief investigations made it impossible for us to accurately explain this issue.

Therefore, we will assume, notwithstanding subsequent investigations, that the transposition of the legal form was carried out in a very ingenious manner, as classical as possible, as an *inter vivos* gift of an advanced inheritance, as was the situation at that time.

Drawn up on a single page, which was as precise as moderate, this freedom document deserves some explanations to point out its perfectly molded characteristics.

2 - COMMENTS ON THE DOCUMENT

After the Public Official involved is identified and his university degree is mentioned, as well as his registration number, domicile, and the date of issuance of the document, the appearance of Ms. Sophie Mérée, the Donor, is stated.

Though her capacity as owner and her domicile in the Island of Gorée are perfectly indicated, there is no information on her status as married, single woman or widow, or on the place and date of birth or her status as indigenous (native of the country) or citizen.

We may assume that, for being an "inhabitant of Gorée," she had a status of citizen or "assimilated citizen", instead of indigenous, but illiterate and, as stated at the bottom of the document, "unable to sign." She is the only party effectively appearing for the act, since the Notary uses the phrase "she appeared" instead of "they appeared," which means that the donee, the "above mentioned Amarouba," who is

present during the reading of the document, only participates to “accept” and “express” his sincere gratitude.

The donor is probable single and of age, because there is no mention to her spouse’s presence or authorization, as it was the rule applicable at that time for similar cases.

Clearly to provide for any contingency, the instrument is issued as solemnly as required, in the office of the Court’s Clerk and in the presence of the two witnesses who signed together with the Notary and... the appearing party.

This statement does not contradict what is stated below, since it may be assumed that the writer, ignoring the Donor’s illiteracy, was misled, in turn, by her looks of prosperity and her condition as “Lady living in the island,” to later state her illiteracy at the bottom of the document.

The scant information on the donee reveals his condition as “prisoner,” his “presence” at the time of performing the act, his “participation” when “accepting,” and the fact that, despite “being grateful,” he is illiterate and unable to sign.

Before referring to the property subject matter of the gift, and regarding the possible difficulties of making an accurate qualification, mention is made to the fact that freedom is granted “for his good conduct” and to the specific goal, “She intends that, as from this date, he is declared free of any servitude and enjoys, under the laws, all benefits associated with a free man.”

This complex periphrasis is essential to accurately define the property subject matter of the gift and to set the limits that will guaranty its future protection.

Under the “Black Code” of 1685, the slave was a personal property and, consequently, the provisions of section 2279 of the 1804 Civil Code were applicable, as it stated “as regards personal property, the possession is equivalent to the title.”

In this text, however, no mention is made to the lack of justification of ownership, of proving accurately the right invoked by the Donor to dispose, without consideration, of a property allegedly owned by her, but without her producing any evidence as to her acquisition of such property, as required by law.

This omission does not result in serious consequences as regards the “Certificate of Freedom” of the Donee, despite the fact that no mention is made to the manner in which the Donor acquired her right, given that the property being transferred is a personal property.

The public instrument formally leaves aside any risk of repossession or adverse possession.

This debate will be finally concluded almost thirty years later, with the promulgation of the Decree of April 27, 1848, which definitely derogates house slavery in the Island of Gorée.

The use and enjoyment of this conveyed right is immediate, “as from this date,” and without restrictions, since the gift is qualified as “pure, simple and irrevocable.”

No “agreed return right” is mentioned and, on the other hand, it is not clear how its exercise could be materially instrumented in case of Donee’s death, once freedom has been conveyed to his descendants, since the donee could not be legally deprived from the right to take the gift benefit to the afterlife! There is no mention either to a revocatory action or to any taxes on such gift.

There is no indication either to whether the Donor made other donations in the past, or to the identity of the alleged heirs, in case her donation should have effects on her succession, after calculating the legitimate portion of inheritance and the available percentage. It may and must necessarily be assumed that this donation was made as an advanced inheritance and without hotchpot, since apparently the donee could not be included in the Donor’s succession given the lack of kinship.

Even stranger, and contrary to customs, is the fact that this document contains no reference to the value of the property conveyed as a gift.

Please note that the language is moderate and clear, without making reference to the charges and

conditions of the gift other than the typical reference for the “protection of laws,” that is, the general law, with a probable tacit reference to Republican-inspired constitutional liberties.

This Republican inspiration was somewhat limited around that time, which was the Restoration period. Consequently, it was then advisable to stick to the Certificate or Order that better suited the prevailing opinion at the time.

There is no form to establish domicile, or any reference to the party in charge of the expenses associated with the act or to compliance with any subsequent formalities. The record of the legal act only includes the items mentioned above; it is not sealed, registered and does not mention any fee collection, not even the delivery of an original or first certified copy.

However, we may assume that an executed copy was delivered to the Donee as evidence of the Certificate or personal private instrument evidencing his recent right of freedom.

3 - LEGAL LOGIC

This simple agreement that, according to its title, is a “freeing” instrument is not misleading as regards the legal nature of the inter vivos gift related to freedom.

The use of “his” before the word freedom makes you wonder about the nature of such possessive, as well as whether it is an attribute in itself or acquires such characteristic as a consequence of the meeting with the donee that is to be allegedly benefited.

Retrospectively, this might be considered as a way to assume a separation of the law, not regarding property but personal rights, given the passive and residual limitation of the “corpus” in Latin, on the one hand, and freedom as a projection of the “animus,” on the other.

Both attributes are brought together by the owner of the animus, when donating to her slave, the owner of this sole corpus, a material and transferable property, called FREEDOM.

The only thing left is to admire this legal construction, full of simplicity, hardly asking ourselves if the donee had enough legal capacity to accept such inter vivos gift.

Since the general concern of slavery was the deprivation of free will and decision, we may in effect wonder about the capacity of the Donee to accept the donation that was given to him, before such donation becomes effective, given that, under the Black Code, a slave could not “legally act” and, therefore, lack the capacity to be a party to a public instrument.

Hence the need to be assisted by certifying witnesses to accept, probably on his behalf, given his lack of capacity to accept, this freeing instrument, but without mentioning, in this case, by virtue of which power they were accepting the same.

On the other hand, we may also wonder about the legitimacy of the agreement since, as one of the attributes of the inalienable personal rights, even in the absence of a Civil Code during the colony, it could not be the subject matter of an agreement contrary to public order.

“The human being (or their parts) are excluded from trade”... regardless of the purpose of such trade, either disposal, transmission or retrocession.

The general prohibition to trade inalienable personal rights “results in that the holder thereof cannot be changed.”

Consequently, they are untransferable, except for the effect of mitigation by agreement, such as the Employment Contract, stating that, under the Civil Code, the life service agreement is prohibited, to secure protection of this attribute of inalienable personal rights.

In the spirit of the drafters of the 1804 Civil Code of Napoleonic inspiration, it was unconceivable “that a person has no right to life, to physical and intellectual freedom...”

It is the same principle of the philosophical school of natural law, which is further reaffirmed by the Declaration of Human Rights of 1789.

Then, there is the issue of the conformity of the agreement with the concept of legitimacy of a contract providing for a return contrary to the public order, by virtue of the proverb that says “inalienable personal rights cannot be separated from the person holding the same, because they are one item and constitute an element of the person” (professor Mazeaud).

Since our agreement must achieve the union of the attribute of the inalienable personal rights with its holder, it is assumed, as a metaphysic presumption, a prior illegal status with the logical consequence of its own illegality, due to the nullity by operation of law, both of the cause and the subject matter of the prior status that it is to be derogated.

The reader would probably already know that it is just a semantic exegesis!

CONCLUSION

To the question of which was the socioeconomic context at the time of issuing a slave freeing instrument in the Island of Gorée in 1817, as well as the idea that the main actors had of this, we tried to answer it by recreating the event in its historical context, before analyzing the secret plot, being fully aware of the privilege we have been given when being designated as custodians of exceptional files, in order to understand the history of humanity and the confrontation, sometimes violent, of cultures and people.

We took the opportunity, when the original document was uncovered, to share in these pages our enthusiasm for participating of such a big historical event, trying to immortalize the memory by spreading the same beyond the secrecy of our book of notarial records.

The reader must have already realized that we would have preferred to comment on a fresco, inspired by the preamble of the new Constitution of the then Republic of France, in the form of a declaration of rights, of all rights, of prisoner Amarouba, thereafter a free man, like all his fellow men, not benefited by his woman owner but for his condition as a human being, as a human being in itself, and not as a consequence of a donation, regarding which he is obliged, as if the fiction of his previous status as prisoner would have taken over, for one day, his conscience.

The specialist of law may rescue the text of an original instrument that served to satisfy, though unexpectedly, the goal pursued, simply and respecting the freedom of will, because that was, in our opinion, the essence of the exercise proposed by our remote ancestor and that he delivered with talent, through legal instruments of his own.

Daniel-Sédar SENGHOR

Notary for Dakar

Republic of Senegal, Saturday, April 2, 1994

In commemoration of the 177th anniversary of the annotated notarial instrument.



PUBLICATIONS

7

CHAPTER



Notary José Antonio Márquez González

7.1. "NOTARY LAW"

VOLUME I (2006), VOLUME II (2007), VOLUME III (2008), BY LEONARDO B. PÉREZ GALLARDO, ISIDORO LORA-TAMAYO RODRÍGUEZ, AND OTHER COLLABORATORS, EDITORIAL FÉLIX VARELA, HAVANA.

REVIEW BY NOTARY JOSÉ ANTONIO MÁRQUEZ GONZÁLEZ

Spain and Cuba have united in a great project on notarial science. The result is the excellent Notary Law, consisting of three volumes, which were coordinated by Leonardo B. Pérez Gallardo and Isidoro Lora-Tamayo Rodríguez, with the collaboration of Lázaro Corzo González, Rodolfo Hernández Fernández, Juan B. Vallet de Goytisolo, Juan Bolás Alfonso, Roberto Blanquer Uberos, Josefina China Guevara, Annette Estudillo Travieso and Ada M. León Irurzun in Volume I; Rafael Gómez-Ferrer Sapiña, Josefina China Guevara, Juan Francisco Delgado de Miguel, Teresa Delgado Vergara, Marta Fernández Martínez, Antonio Rodríguez Adrados, Lázaro Corzo González, Rodolfo Hernández Fernández, Naiví Chikoa Barreda and Jesús Gómez Taboada, in Volume II; and, finally, Josefina China Guevara, Javier Vinader Carracedo, Olga Mesa Castillo, Marta Fernández Martínez, Zenia Fernández Padrón, José Angel Martínez Sanchíz and Jesús Gómez Taboada in Volume III.

The first volume refers to the main principles of notary law, its scientific aspects and the nature and characteristics of the notarial function; the second volume, in turn, deals with non-contentious jurisdiction, notarial deontology and the public instrument, as well as the role of witnesses.

Finally, the third volume refers to notarial acts, with special reference to the determination of heirs by intestate succession, void documents, public trust in commercial and family matters, the Notary and Real Estate Law.

Just the collection of interesting topics and prestigious authors reveals the nature of the work, of which the number of copies printed, according to the colophon, is forty five thousand, which is without a doubt unusual compared to the modest number of copies issued in the rest of Latin American (this type of scientific work does not exceed two thousand copies, for example, in the prestigious Editorial Porrúa of Mexico).

The three volumes are presented in an attractive and modern manner, bearing the emblem of the Cuban Notary Association. Certainly, the quality of the Revolution paper pages falls short of our expectations, especially when one cherishes books and wants to keep them in the best possible conditions. As for the rest, this is a very careful edition by Niurka Casanovas Herrero. The format is homogeneous, with many quotes of doctrine and an excellent quality of essays, as the prestigious scientific tradition of both countries deserves.

7.2 - “SECURITY INTEREST LAW. REGISTRATON REGULATIONS AND SUPPLEMENTARY RULES,”

BY MARCO ANTONIO CORCUERA GARCÍA, EDITORIAL MARSOL, LIMA, 2006, 350 PAGES.

REVIEW BY NOTARY JOSÉ ANTONIO MÁRQUEZ GONZÁLEZ.

The young notary Marco Antonio Corcuera García, from Trujillo, has recently published his “Security Interest Law. Registration Regulations and Supplementary Rules,” in a great and very careful edition by Marsol. The book is a thorough description of Security Interest Law No. 28677, which regulates in a comprehensive manner pledge and security interest. Corcuera’s work includes the literal transcription of the text of the law, with a detailed description of antecedents, as well as their general and specific concordance in a rigorous alphabetical order and putting them together according to the relevant legislation.

Thus, the analysis turns out to be new and useful. It is new because of the recent promulgation of the Security Interest Law, which, as the author says, is one of the most important legislative events of the last years. It is also useful and specially valuable because of the scholarly information provided, which reveals the dedication and time devoted by Corcuera to such coordination.

The book further contemplates the Regulation of Registrations with the Registry of Contracts and its relation to the legal registration of personal property (Res number 142-2006-SUNARP-SN), the extent of which has demanded a more comprehensive study.

The book contains a series of annexes of legislative and case law matters, as well as related documents. It further includes a notarial practice appendix for the creation of security interest.

Such an elaborated and thoroughly detailed work demanded, of course, a glossary and analytical index. Both things, in effect, appear at the end of the book. The glossary is just a description of the concept, but the author added the necessary legislative reference. The analytical index, in turn, includes over 650 terms with the same careful addition of legislative reference, not only of the Security Interest Law, but of many other related laws (a useful abbreviation is included in the preliminary Warning). Without a doubt, the author has been very careful about details: at the end, as a gift to the reader, there is a chart of time limits under the Security Interest Law. Such chart refers to the relevant matter and the corresponding section.

Marco Antonio Corcuera proves with this last book his great dedication and deep interest that he has always had in civil law and notary law. Such characteristics caused him to become very recently (April 2008) a Member of the International Division of the prestigious Universidad Notarial Argentina (UNA) in Buenos Aires.