XXIInd
INTERNATIONAL CONGRESS
OF LATIN NOTARIES

BUENOS AIRES / ARGENTINA

27. 9. - 2. 10. 1998

Report of the german delegation

BNotK
BUNDESNOTARKAMMER
Burgmauer 53 - 50667 Köln

Table of Contents

Topic I

The role of the notary with regard to the State's requirements, principally in the fiscal and administrative sectors

Reported by:

Notary Dr. Peter Limmer, Würzburg

SUMMARY OF CONTENTS

List of Abreviations

a. a. O.	am angegebenen Ort
AgrarR	Agrarrecht
AO	Abgabenordnung
AWG	Außenwirtschaftsgesetz
BauGB	Baugesetzbuch
BeurkG	Beurkundungsgesetz
BFH	Bundesfinanzhof
BGB	Bürgerliches Gesetzbuch
BGBl	Bundesgesetzblatt
BNotO	Bundesnotarodnung
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BVerwG	Bundesverwaltungsgericht
DNotI-Report	Informationsdienst des Deutschen Notarinstituts
DNotZ	Deutsche Notar-Zeitschrift
DONot	Dienstordnung für Notare
DVBl	Deutsches Verwaltungsblatt (Zeitschrift)
ErbStG	Erbschaftsteuergesetz
EStG	Einkommensteuergesetz
FGG	Gesetz über die Anglegenheiten der Freiwilligen
GBO	Grundbuchordnung
	Gerichtsbarkeit
GrdstVG	Grundstücksverkehrsgesetz
GrEStG	Grunderwerbsteuergesetz
GVO	Grundstücksverkehrsordnung

h. M.	herrschende Meinung
KostO	Kostenordnung
MittBayNot	Mitteilungen des Bay. Notarvereins
MittRhNotK	Mitteilungen der Rheinischen Notarkammer
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
SachenRÄndG	Sachenrechtsänderungsgesetz
SachenRBerG	Sachenrechtsbereinigungsgesetz
VwVfG	Verwaltungsverfahrensgesetz
WährG	Währungsgesetz
WM	Wertpapier-Mitteilungen

Bibliography

App	Zweckwidrige Verwertung von Kaufvertragsurkunden durch Finanzämter, DNotZ 1988, 339
Arndt/Lerch/Sandkühler	BNotO, 3. Aufl. 1997
Becker	Das Wohnungsbindungsgesetz - Auswirkungen auf den Grundstücksverkehr für die notarielle Praxis, MittRhNotK 1980, 213
Beck'sches Notar-Handbuch	2. Aufl. 1997
Birk	Die neuen städtebaulichen Verträge, 2. Aufl. 1996
Boruttau/Vieskorf	GrEStG, 14. Aufl. 1997
Böhringer	Das deutsche Grundbuchsystem im internationalen Rechtsvergleich, BWNotZ 1987, 25
Dickard	Inhalt und Grenzen der staatlichen Aufsicht über Notare, MittBayNot 1995, 421
Dieterich	Baulandumlegung, 3. Aufl. 1996
Döhring	Verträge zur Erschließung von Bauland, NVwZ 1994, 853
Fischer	Die Rechtsstellung des deutschen Notars im Recht der Europäischen Wirtschaftsgemeinschaft, DNotZ 1989, 467
Grauel	Öffentlich-rechtliche Vorkaufsrechte, MittRhNotK 1998, 243
Grziwotz	Baulanderschließung, 1993
Grziwotz	Notarielle Auskünfte über Grundstückskaufverträge, CR 1991, 109
Grziwotz	Städtebauliche Verträge, DVBl 1994, 1048
Grziwotz	Änderungen des Baugesetzbuches und Vertragsgestaltung, DNotZ 1997, 916

Haegele/Schöner/Stöber Grundbuchrecht, 11. Aufl. 1997

Heidinger Müssen Treuhandverträge über GmbH-Anteile nach § 54 EStV dem Finanzamt gemeldet werden?, DStR 1996, 1353

Huhn/v. Schuckmann BeurkG, 3. Aufl. 1995

Jachmann Rechtliche Qualifikation und Zulässigkeit von Einheimischenmodellen als Beispiel für Verwaltungshandeln durch Vertrag, MittBayNot 1994, 93

Kahlke Zur Inbezugnahme landesrechtlicher Gebührenbefreiungsregelung, DNotZ 1983, 76

Keidel/Kuntze/Winkler Freiwillige Gerichtsbarkeit, Teil B, BeurkG, 13. Aufl. 1997

Klein/Prockmeyer AO, 6. Aufl. 1998

Kopp Verwaltungsverfahrensgesetz, 6. Aufl. 1996, 54

Limmer Vertragsgerechtigkeit notarieller Urkunden und europäischer Verbraucherschutz, Festschrift 200 Jahre Rheinischer Notarverein, erscheint 1998

Limmer Die Handelsregister in den Ländern der Europäischen Union, Notarius International 1997, 32

Mahnstein Der öffentlich-rechtliche Vertrag in der Praxis des Notars, MittRhNotK 1995, 1

Ottmann Der städtebauliche Vertrag, 1995

Örder Städtebaulicher Vertrag nach dem Bau- und Raumordnungsgesetz 1998, NVwZ 1997, 1190

Reithmann/Albrecht/Basty Handbuch der notariellen Vertragsgestaltung, 7. Aufl. 1995

Reithmann Vorsorgende Rechtspflege durch Notare und Gerichte, 1989

Seybold/Schippel BNotO, 6. Aufl. 1995

Scharner	Städtebauliche Verträge nach § 6 BauGBMaßnG, NVwZ 1995, 219
Schlegelberger	Handelsgesetzbuch, 5. Aufl. 1973
Scholz	GmbHG, 8. Aufl. 1993
Stuer	Der städtebauliche Vertrag, DVBl 1995, 649
Weingärtner	Notarrecht, 5. Aufl. 1997
Weingärtner/Schöttler	Kommentar zur Dienstordnung, 7. Aufl. 1995
Zipp/Auer	Vom Handelsregister zum Firmenbuch 1993

A. Basic Principles

I. Introduction

§ 1 of the BNotO (federal regulations governing the function of the notariate) defines the German notary as the independent holder of a public office for the authentication of legal procedures and other functions in the field of non-contentious administration of the law"[1]. Even this basic standard displays the special ambivalence of the profession of notary: independence from the parties involved, but also in respect of the state and as holder of a public office. The Bundesverfassungsgericht (German Federal Constitutional Court) deemed the office of notary to be a public office, as tasks on behalf of the state are carried out by it, "i.e. responsibilities which, in accordance with the legal regulations in force, must be carried out under sovereign authority"[2]. It is therefore no surprise that due to this sovereign nature of the profession of this holder of public office, the legislature has imposed a large number of public cum legal duties and tasks related to fiscal law, over and above the basic function of the execution and authentication of deeds. The state can do this, as the notary executes its, i.e public, functions. The nature of the office of notary is therefore, in its origins, a sovereignty-based function of the state. Nevertheless, there are limits placed on these additional functions imposed by the transfer of public/legal functions and the association of the notary with the state, limits imposed by the basic organisational legislation. The notary is not a civil servant, as is unambiguously stated in the wording of § 1 BNotO[3]. As the basic standards applied to the notariate show, one of its features - similarly to judges - is its independence in respect of the state. This independence is accompanied by a special relationship with the parties involved, dictated by the obligation to observe confidentiality, as stipulated in § 18 BNotO. This independence from the state and the obligation to observe confidentiality therefore postulate limits to involvement with the state and the transfer of obligations to provide information for the state in respect of the notary. This study is intended to illustrate the situation in Germany and the limits to the involvement with the state as these affect the office of notary.

II. Institutional conditions of state involvement

1. The notary as holder of a public office

According to § 1 BNotO, the notary is the holder of an public office bestowed on him by the state. According to the German doctrine, the notariate takes a different view of its office from that of other civil servants, who are defined by their comprehensive association with the state and an all-encompassing pub-

---

1 As in Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary). 1991, p. 1

2 BVerfGE (Federal Constitutional Act), 73, 280, 294 = DNotZ (German Notarial Gazette) 1987, 121, 122

3 BVerfGE 17, 371, 379 = DNotZ 1964, 424, 427; Arndt/Lerch/Sandkühler, BNotO, 3rd edition, § 1 marginal no. 6

lic/legal set of duties irrespective of the concrete function they fulfil. *Bohrer*[4] correctly points out that the professional activity of the notary and the execution of his office are one and the same thing. The notary acts always, and solely, in the execution of the office he holds. Accordingly, in the foreground stands primarily the execution of the office and, only as a secondar feature, any public cum involvement. It is only in the federal state of Baden-Württemberg that notaries are found in a public cum legal relationship as civil servants. In the rest of the federal territory, the situation is that the notary is not a civil servant[5]. In this connection, he is closer to the position of the judge, who likewise exercises an office and only stands in a public cum legal relationship as a servant as a secondary consideration[6]. However, the tendency identifiable in the relevant literature is for the notary not to be regarded as standing in a public cum legal relationship as a servant like a civil servant, but rather in a personal relationship on a public cum legal basis of trust[7]. The Federal Constitutional Court (BVerfG) decided that the notary has come to be close to the public service and it could not be denied that there are certain similarities with the status of the civil servant[8]. In the relevant literature, the position of the notary is largely equated with that of the judge. The position and activity of the notary are comparable with the office of the judge who likewise undertakes duties in the field of voluntary jurisdiction[9].

2. Commitment to legality

§ 14 Section 1 BNotO stipulates that the notary must execute his office faithfully, in accordance with the oath he has taken. He is not the representative of any party, but the impartial servant of the parties concerned. § 14 Section 2 BNotO demands that a notary must renounce his official activity if it cannot be reconciled with his official obligations, especially if his involvement is requested in dealings by means of which purposes which are not permitted or are in bad faith are identifiably being pursued. By means of this regulation, it is guaranteed that the notary will be completely obliged to observe legality and thus be tied into the entire body politic. This means that the notary is both obliged to uphold the regulations decreed by the constitution to which he also confirms by means of his oath of office (§ 13 Section 1 BNotO)[10].From this, it follows that, similarly to the judge and civil servants, the notary must execute his office within the spirit of the free and democratic constitutional system and must take active steps to uphold the constitution. Moreover, like the judge and

---

4 Das Berufsrecht der Notare (The Professional Law of the Notary), p. 4

5 BVerfGE 17, 371, 379 = DNotZ 1964, 424, 427

6 As correctly stated by Arndt/Lerch/Sandkühler, BNotO, 3rd edition § 1 marginal no. 6

7 As in BVerfGE 17, 371, 377; Arndt/Lerch/Sandkühler, loc. cit.

8 BVerfGE 17, 371, 379; BVerfGE 54, 237

9 Fischer, DNotZ 1989, 467, 473; Arndt/Lerch/Sandkühler, § 1 marginal no. 6; Dickardt, MittBayNot 1995, 421

10 Compare with Seybold/Schippel, BNotO, § 14 marginal no. 3; Arndt/Lerch/Sandkühler, § 14 BNotO marginal no. 8 f.

the civil servant, the notary is also tied to the statute and law. He must adhere to all standards which have been constituted by the legal state. Accordingly, the notary is obliged to observe not only the legal obligations imposed by his profession as set out in the BNotO, but also all other individual laws of relevance to notarial activity[11]. However, the notary is obliged to refuse any application from an involved party if the application is not in compliance with the law.

Over and above this, similarly to civil servants, notaries are also tied to the conditions imposed by the service regulations for notaries in the execution of their office. This allows the justice administration system to tie the notary in with the state by means of administrative regulations.

This obligation to observe legality makes it possible for the state, unlike the case with other professionals, such as a solicitor, for instance, to prescribe for the notary purely state-related obligations for the execution of his office, e.g. specified obligations to provide notification for state authorities.

3. State supervision of the notary

This obligation on the notary to fulfil state functions is made particularly clear by means of the supervision of the notary by the state. The notary is strictly bound by legal conditions. Due, in particular, to the lack of public cum legal involvement with the state, the obligation to observe the law is of particular significance for the office of notary. This is intended to guarantee that the notary pursues his activities in accordance with the existing regulations and to prevent any threat arising to the smooth transaction of official business due to the failure of an individual notary to fulfil his obligations[12]. The relevant literature correctly indicates that the execution aspect of public authority by private persons, and in any case the separation of original state-related duties from the direct body of the state, requires that the fulfilment of the obligation be monitored by the state[13]. In Germany, under the terms of § 92 BNotO, supervision of notaries is the responsibility of the president of the regional court, the president of the higher regional court and the state justice administration of the relevant federal state. According to § 93 Section 1 BNotO, the supervising authorities are bound to check and monitor notaries in the execution of their office. This supervision has both a preventative character (observation function)[14], and also the function of raising objections to any breach of obligations and to require the notary to make good the fault, where possible, and to avoid repeating it in future (the corrective function of supervision)[15].

---

11 Compare with Arndt/Lerch/Sandkühler, BNotO, § 14 marginal no. 14 ff.

12 BGH (Federal Court of Justice) DNotZ 1974, 372; Dickardt, MittBayNot 1995, 421,422

13 Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), p. 45; Dickardt, MittBayNot 1995, 422

14 Arndt/Lerch/Sandkühler, § 93 BNotO, marginal no. 5; Dickardt, MittBayNot 1995, 423

15 Arndt, loc. cit.; Dickardt, loc. cit.

4. The certification procedure as an approach to state supervision

German legislation has stipulated that notarial certification is required for specified legal transactions. So, for example, the contract for transfer real estate requires notarial authentication in accordance with § 313 BGB or in the field of company law, setting up a public limited company (§ 23 Section 1 AktG) or a limited liability company (§ GmbHG) or the contract of marriage needs notarial form. It is unanimously accepted that in such transactions execution and authentication by the notary serves primarily the interests of the parties involved. Notarial execution and authentication has a warning function, an function for the provision of evidence and also an instructional function with the aim that these will represent protection for the parties involved and the creation of the necessary contractual parity[16]. By the fact that the notary is tied into the state organisation, by means of state-imposed supervision and the strict obligation to statute and law, the legislation arrives at the situation in which specified legal transactions can be subjected to a reliable system of state control. For one thing, it is guaranteed that the involvement of the notary makes it possible for the legal transaction to be monitored by the relevant authority where this is forbidden on the basis of a variety of fiscal or other public cum legal interests[17]. If they wish to set up a legally valid transaction, the parties involved are obliged to consult the notary and have a notarial act drawn up. For his part, the notary is obliged by his office to observe the instructions of the state to provide notification. Basically, this means that the parties involved are forced, in connection with certain legal transactions, to notify the state or certain authorities about this legal transaction which represents the link with fiscal or public cum legal administrative procedures.

Notarial certification also serves the purpose of securing evidence. The formal requirement of notarial authentification calls for the clear identification of the legal transaction and its entire content and that the legal transaction should be declared, along with all side agreements, clearly, unambiguously and conclusively[18]. This means that there is a guarantee provided for the state authorities that all agreements are notified to them. If, for instance, there are certain side agreements which are not included in the notarial deed, then the danger exists that the entire contract is null and void. So the parties involved are likewise forced, by the sanction of having the contract invalidated, to include in the notarial deed all agreements of significance to them within the context of a legal transaction and in this way provide notification for the state. Accordingly, with

16 Compare with Keidel/Kuntze/Winkler, BeurkG (law on execution and authentication of deeds), Indent marginal no. 21; Keim, MittBayNot 1994, 2,5; Reithmann, The Administration of Non-Contentious Justice, p. 126; Limmer, Festschrift 200 Jahre Rheinischer Notarverein (publication in honour of 200 Years of the Rhenish Association of Notaries), published 1998.

17 Compare with Reithmann, Vorsorgende Rechtspflege durch Notare und Gerichte (The Administration of Non-Contentious Justice by Notaries and Courts), p. 129

18 Compare with Keidel/Kuntze/Winkler, BeurkG, Indent marginal no. 19, Reithmann, Vorsorgende Rechtspflege durch Notare und Gerichte (The Administration of Non-Contentious Justice by Notaries and Courts), p. 125

this sanction of invalidation, for example in the field of property purchase tax, it is guaranteed that the proper basis for rating is applied for the purposes of this property purchase tax. If, for instance, the parties involved state a lower purchase price, then the deed is null and void in accordance with the doctrines of German law (§ 125 BGB)[19]. This would see the involved parties acquiring an illegal tax advantage for themselves but with the considerable risk that their legal transaction would not be recognised before a court. To this extent, the sanction of invalidation and the requirement for certification in force in Germany represent a considerable means of exerting pressure to ensure that the statements made in the notarial deed actually correspond to the true situation. In practice, it is only relatively seldom that incorrect statements are made, as the sanction of invalidation can indeed have considerable effects and can represent a clear risk for the parties.

III. Institutional limits to integration with the state

1. Independence

The basic standard for the German notariate, § 1 BNotO, defines the notary as the independent holder of a public office. As with the judge, the independence of the notary is guaranteed by law and is defined as a right and entitlement[20]. As with the judge, the notary is accorded personal and professional independence. This personal independence is guaranteed by the fact that the notary is appointed for life (§ 3 BNotO), is not subject to transfer (§ 10 Section 1 BNotO) and cannot be relocated (§§ 47 ff. BNotO). However, § 1 BNotO also guarantees the professional independence of the notary. The monitoring authority has no right to involve itself in his professional activities. He is not subject to the instructions of any third party. Finally, this independence is completed by means of organisational independence guaranteed by the principle of the professional independence of the notary[21]. This principle forbids the justice administration from setting conditions or restrictions to the internal operation of the notariate, in personal, spatial or organisational terms, as long as no breach of the law has occurred. *Schippel*[22] has correctly pointed out that the notary is a free servant of the law. Independence is a characterising feature of the office of notary. And through this aspect in particular, a counter-position to the state is created. The law not only postulates the independence of the notary, but also imposes independence of action as an obligation on the office. Just as must a judge, so must the notary also defend himself against any state influence over and above the basic checks on legality within the context of supervision of his service. Accordingly, any attempts to exert political influence which would encroach upon the

---

19 Compare with BGH NJW 1976, 237; OLG (higher regional court) Munich NJW-RR 1986, 13

20 Arndt/Lerch/Sandkühler, § 1 marginal no. 7

21 Compare with Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 145, 307 ff.

22 In: Seybold, BNotO, § 14 marginal no. 29

professional competence of the notary are debarred by the guarantee of his independence. Despite this position of similarity to the civil servant, namely being integrated into the state, this postulation of independence guarantees a quite specific legal position providing protection for individual members of the public.

2. The obligation on the notary to observe confidentiality

Under the terms of § 18 Section 1 BNotO, unless otherwise specified, the notary must observe complete confidentiality in respect of everyone in connection with the matters of which he has gained knowledge in the execution of his professional activities. This obligation to observe confidentiality is only removed if the parties involved free the notary from its binding effect. This restriction has been imposed on the notary for the legal protection of the interests of the parties involved. If he is to be able to provide the parties involved in the procedure of execution and authentication properly, the notary must be aware of the content of the matter and all of the accompanying circumstances. The parties involved can only provide this degree of openness as required if they have complete trust in the notary[23]. For this reason, the obligation to observe confidentiality represents an important aspect of the professional duty of the notary[24]. The notary observers this obligation for confidentiality in respect of everyone. This includes not only private individuals, but also the state itself, as a basic principle. To provide further protection in respect of this obligation to observe confidentiality, the corresponding regulations properly envisage judicial procedures providing for a right to refuse a procedure of execution and authentication: § 65 Section 1 Administrative Procedures Act, § 102 No. 3b, Section 2 AO, §§ 53, Section 1 No. 3, 53 a StPO, § 383 Section 1 No. 6 ZPO. Under the terms of these, the notary is not only entitled, but in accordance with § 18 Section 1 BNotO also obliged, to apply this confidentiality[25]. Accordingly, even in connection with criminal proceedings, certain information and documents may not be requisitioned from the notary (§ 97 Section 1 StPO).

---

[23] OLG Koblenz (Coblence Higher Regional Court) DNotZ 1986, 423; Arndt/Lerch/Sandkühler, BNotO, § 18 marginal no. 2

[24] Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 114, Arndt/Lerch/Sandkühler, § 18 marginal no. 2

[25] Arndt/Lerch/Sandkühler, § 18 marginal no. 26

3. Data protection under constitutional law

The obligation to observe confidentiality is becoming more important within the context of various obligations imposed by the state demanding the provision of notification and information. This represents a particular source of tension in the relationship. It is generally agreed that other legal regulations, especially the legal regulations for notaries which form the basis for the obligations to report, inform, notify and assist, take precedence over the obligation to observe confidentiality[26]. The Federal Constitutional Court (BVerfG) has in its basic decisions covering the entire body politic, developed a basic right of the citizen of self-determination with respect to information[27]. In particular, under the conditions of the present agreement on data, the basic right of general personal protection guarantees the rights of the individual to decide, as a basic principle, on the surrender and use of his own individual details. Any restrictions on this right of "self-determination in terms of information" are therefore permissible only in the predominant general interest. In this connection, the Federal Constitutional Court has established that these exceptions require to be based on constitutional law which must correspond to the requirement of state law for clarity of legal rules. In addition, within the context of regulations which impose restrictions on this right, the legislation must take into account the basic principle of commensurability. Accordingly, the right of the notary to observe confidentiality will have to be regarded as part and parcel of the basic right to self-determination in terms of information[28]. To reflect this, in the area of the obligations imposed on the notary to observe confidentiality, great emphasis must also be placed on the obligations requiring reporting and notification. Just as in the case of general administration of the law, any exceptions to the obligation on the notary to observe confidentiality must have a basic legal foundation[29]. General administrative decrees or even individual instructions issued by the administration to the notary for the surrender of specific information are therefore not permissible and represent a breach of this obligation to observe confidentiality. Moreover, from this specific right to self-determination in respect of surrender of information as held by the individual citizen, it follows that any encroachment on the obligation of the notary to observe confidentiality is only permissible where this encroachment is absolutely necessary for the protection of the public interest, taking into account the basic principle of commensurability. So the legislation must always check, where it would justify any specific requirement for the notary to provide information, whether this breach of the obligation to observe confidentiality is actually necessary in the service of a specific public interest. Furthermore, it must check where this encroachment represents the least radical means at its disposal. In addition, it must also weigh up the

---

26 Compare with Arndt/Lerch/Sandkühler, BNotO, § 18 marginal no. 23; Seybold/Schippel, BNotO, § 18 marginal no. 9

27 Compare with BVerfG NJW 1984, 419

28 As also in Arndt/Lerch/Sandkühler, BNotO, § 18 marginal no. 5

29 Compare with Seybold/Schippel, BNotO, § 18 marginal no. 9

various legal assets - the obligation to observe confidentiality and the public interest - against each other. The result of this is the drawing of clear limits to the integration of the notary into general procedures of public administration.

4. Limits to the integration of the notary in relation to constitutional law

Unlike a judge or a civil servant, by the basic conception of the BNotO, the notary acts within a framework of free responsibility. The relevant legal literature speaks of the notary exercising "an activity similar to that of the liberal professions". This independent professional aspect is characterised by the fact that he operates at his own risk and can in commercial terms be compared with professionals in private practice insofar as he can make free use of the fees accruing to him within the context of the regulation charges and other rules, and that he also bears the risk involved in the execution of his office, including liability, himself[30]. Accordingly, the German Federal Constitutional Court (BVerfG) is also of the opinion that the basic right set out in the Grundgesetz (Constitution) allowing for freedom to pursue one's profession (Article 12 Section 1 GG) is also basically applicable for the state-related profession of the notary[31]. To this extent, this aspect of constitutional law supporting freedom to pursue one's profession likewise imposes clear limits on the imposition of public cum legal obligations. While it is true that given this kind of association with the state, as required by the public office of the notary, professional freedom can be subject to restrictions imposed by special regulations similar to those which form the basic principles for civil servants, i.e. to the extent that the profession approaches a public cum legal service relationship. However, the Federal Constitutional Court has decided that this does not apply where the professional activity differs from that featured in a public cum legal service relationship and the basic principles of freedom to pursue one's profession are called into question[32]. The court pointed out that while the state, in its role as employer, is obliged to ensure the welfare of the civil servant and his family within the context of a relationship of service and trust, the notary does not benefit from any such welfare service. He bears sole responsibility for earning his living and must therefore ensure that he does so by means of the exercise of his profession and the fees which this generates. To this extent, his professional activity corresponds to that of a liberal professional in private practice and is subject to the freedom to pursue one's profession provided along with the protection of the Constitution (Article 12 Constitution = GG). In the past, the Federal Constitutional Court has primarily had to come to a decision in questions of the extent to which the no-

30 Compare with Seybold/Schippel, BNotO, § 1 marginal no. 4

31 Compare with BVerfG DNotZ 1963, 621; BVerfG DNotZ 1964, 424; BVerfG DNotZ 1978, 412; BVerfG DNotZ 1985, 776

32 BVerfG DNotZ 1985, 775, 777

tary must reduce his fees for reasons based on social policy[33]. In this connection, the following basic principles have been developed: any restriction on the right of the notary to pursue his profession freely can only be compatible with Article 12 Section 1 of the Constitution if this restriction corresponds to the requirements of the regulations governing execution of the profession. The Federal Constitutional Court regarded as compatible with the Constitution the obligation on the notary to act for persons without financial resources under the poverty laws and, furthermore, to a certain extent, in circumstances in which it is justifiable to secure reduced charges within the context of social policy[34]. However, any demand for the provision of notarial services free of charge can only be deemed compatible, according to this jurisdiction, with Article 12 Section 1 of the Constitution, if it is based on considerations of the general good which outweigh the interests of the notary affected. In this context, the extent to which the professional activity of the notary is adversely affected is important for this judgement under constitutional law. By this, any legal regulation requiring the notary to dispense with his fees as recompense for his professional activity cannot be permitted when this would result in the notary being required to make an unjustified sacrifice.

Similar criteria must also be applied in connection with the imposition of public duties on the notary. As a basic principle, due to his public cum legal duties, unlike the situation with the solicitor, a variety of public cum legal and fiscal cum legal duties can be imposed on the notary. However, in this connection, the limitations stipulated by the Federal Constitutional Court which are themselves based on Article 12 of the Constitution (Grundgesetz), must be borne in mind. If the intention is to extend the application of the basic principles developed within the context of reducing charges to include the notary, something along the lines of the following criteria must be developed:

* Despite all of his public cum legal duties, the notary must still have enough time available to him to ensure he earns his own living and devotes the greatest part of his time to dealing with tasks related to execution and authentication of deeds and therefore also to the generation of fees. The effect of any extensive loading of the notary with public duties which result in his actual deed-based activities being adversely affected comes to the same thing as any excessive dispensing with fees on the basis of an obligation to operate free of charge.

* The limit is quite specifically exceeded when this would result in the notary being unjustifiably loaded.

* The tasks imposed on the notary within the context of public cum legal duties must be appropriate in their content and must be connected with his

---

[33] Compare with BVerfG DNotZ 1985, 776, also in this connection, Kahlke: Zur Inbezugnahme landesrechtlicher Gebührenbefreiungsregelungen (Taking account of rules governing the waiving of charges under state law), DNotZ 1983, 76

[34] BVerfG DNotZ 1978, 412

notarial activity, in particular that of the execution and authentication of deeds. It would represent an unjustifiable burden if the notary had imposed on him activities which were completely outwith the framework of his professional experience and the proper range of his activity based on the execution and authentication of deeds.

Public duties must be measured against this criterion, especially when the notary must carry them out in the interests of the state for no financial reward.

B. Obligations on the notary to provide information and notification

I. Fiscal administration

1. General

Unlike the situation in other countries, German law does not recognise the raising of taxes by the notary. The preparation and implementation of taxation is a matter of fiscal procedure carried out by the fiscal administration. According to § 88 AO, the fiscal authority handles this matter officially. According to § 93 Section 1 AO, the parties involved and other persons are obliged to provide the fiscal authority with the information necessary to establish the relevant situation for taxation purposes. In the first instance, the fiscal administration must itself approach the parties involved to establish the basic situation for taxation purposes. According to § 97 AO, the fiscal authority is entitled to demand the submission of books, records, business documents and other certificates from the parties involved and other persons.

Nor does German law recognise the gathering of taxes by the notary. According to German fiscal law, the setting and gathering of taxes is a matter for the fiscal authorities.

2. General obligation to provide information on fiscal matters and the obligation on the notary to observe confidentiality

As has already been indicated, in accordance with § 93 AO, even those persons whose involvement does not make them liable for taxation, must also provide the fiscal office with the necessary information. As a basic principle, notaries also number among those persons to whom this obligation to provide information applies[35]. However, to the extent that this obligation to observe confidentiality exists, in fiscal law the legislation also concedes a right of refusal to supply information to the notary (§ 102 Section 1 3b AO), and the notary must make use of this right in protection of his obligation to observe confidentiality, unless the parties involved have freed him from his obligation[36].

---

35 Compare with Seybold/Schippel, BNotO 6th edition, § 18 marginal no. 11

36 Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 115

3. Special obligations to provide assistance in the field of fiscal law

a) General

The legislature has indeed imposed a wide variety of specific obligations to provide notification and information on the German notary. As a result of this, restrictions are imposed on his obligation to observe confidentiality and also on his right to refuse to execute and authenticate deeds. § 18 Section 1 BNotO which represents the normative basis for the obligation to observe confidentiality demands that the notary must observe confidentiality in the absence of any other legal stipulation. From this it follows that specific obligations to provide information always require a legal basis as, in this case, purely administrative instructions are insufficient. It is necessary to differentiate between the specific obligations to provide assistance, whether these have to some extent the function of tax declaration and to set in motion a taxation procedure without any further action on the part of the persons due for taxation, as, for example, in the GrEStG legislation. Other obligations to provide notification within the fiscal context serve only as a check that the parties involved are fulfilling their fiscal obligations and therefore take precedence over protection of secrecy[37]. § 104 Section 2 AO also specifies that the right under fiscal law to refuse to execute and authenticate deeds does not extend to the inclusion of objects which are themselves subject to a legal obligation of notification[38].

b) Land property purchase tax (GrEStG)

In accordance with § 18 GrEStG, within the area covered by the GrEStG - that of transaction taxation relating to property transactions - the notary must provide the relevant fiscal office with notification, by means of an officially specified form, in respect of

* legal procedures which he has authenticated or in connection with which he has drafted a certificate and authorised it with his signature, where these legal procedures relate to property;

* applications for the updating of the property register which he has notarised or in respect of which he has drafted a deed and authenticated a signature, where the purpose of the application is to provide notification that ownership of the property has changed;

* supplementary amendments or connections in connection with one of the specified procedures.

Notification must be accompanied by an official copy of the deed. The obligation to provide notification also applies for procedures relating to the transfer of shares in companies where an item of property belongs to the company's assets

---

[37] Compare with Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 124 f.

[38] Compare with Klein/Prockmeier, AO, 6th edition 1998, § 104 Note 1

(§ 18 Section 2 GrEStG). This notification must be submitted within two weeks of the execution of the deed or authentication of signature.

The form serves to ensure that taxation takes place. The obligation to provide notification is intended to ensure that the tax office is aware that a purchase procedure subject to taxation has taken place, but it is also intended to provide notification of legal procedures which, in certain circumstances, are not subject to taxation, but which might be part of some other purchase procedure subject to taxation. It then becomes a matter for the tax office to come to a decision on whether tax is due. The obligation to provide notification also applies, even when no property purchase tax is due in accordance with the GrEStG rules[39]. It should be noted that the obligation of the notary to provide notification arises irrespective of the fact that he may have no knowledge of the obligation to provide notification. This obligation is not dependent on any subjective assessment of a party with an obligation[40].

The German legislation on property purchase ensures that taxes are raised in connection with contracts for the purchase of real estate property by stipulating that a purchaser of a property can only be entered in the land register once a certificate from the tax office is submitted, providing evidence that property purchase tax has been paid. Since, under German law, it is necessary for an entry to be made in the land register if the purchase of a property is to be ratified, this represents an effective way of ensuring that taxation takes place. This so-called clearance certificate from the tax office in respect of real estate property purchase tax has the effect of blocking access to the land register.

The obligation on the notary to provide notification is added to by means of what is referred to as a block on deeds. Deeds relating to any procedure which requires notification may only be distributed to the parties once this notification has been sent to be tax office (§ 21 GrEStG). A consequence of the obligation on the notary to provide notification is - as has already been illustrated - a restriction of the right to refuse authentication a deed in accordance with § 102 Section 4 p. 2. In accordance with these regulations, where an obligation to provide notification exists, notaries are also obliged to present deeds and to provide further information. Indeed, the German Federal Finance Court has indicated that no blanket obligation to provide information and submit documentation exists in respect of deeds, but that account must be taken of the obligation on the notary to observe confidentiality. Accordingly, the notary cannot be required to hand over his files en bloc[41]. The Federal Finance Court (BFH) made the following statement in this connection: *" § 102 AO is intended, on the one hand, to respond to the obligation on the notary to serve the ends of confidentiality, in accordance with § 18 BNotO. This forbids the notary to*

---

39 Compare with Boruttau/Viskorf GrEStG, 14th edition 1997, § 18 marginal no. 11

40 BFH (Federal Finance Court) decision of 25.03.1992, BStBl (federal fiscal gazette) II 1992, 680; FG Münster (Finance Court) decision of 19.05.1994, EFG 1995, 495

41 As in BFH BStBl. 1982, II 510

disclose completely the procedures connected with the conclusion of a contract executed and authenticated by him. On the other hand, § 18 BNotO allows for exceptions to this obligation to observe confidentiality and § 102 Section 4 AO, as such an exceptional rule, has the function of ensuring this purpose as envisaged by the obligation to provide notification. This identifiable purpose consists of providing the tax office with notification of procedures involving property transactions, and indeed, to at least the extent that the tax office is in a position to assess this procedure in terms of property purchase tax, at least in its basic aspects."

With this decision, the Federal Finance Court (BFH) was indicating that documents could indeed be included in with the files, although covered by professional confidentiality. Accordingly, the tax office can only demand the submission of individual documents which supplement or clarify the content of the notarial deeds. This example shows just how difficult it is to draw the line of demarcation between the requirements of fiscal administration for the greatest possible degree of knowledge of matters and the obligation on the notary to observe confidentiality.

c) Inheritance tax and tax on donations (ErbStG)

§ 34 Section 1 ErbStG (legislation on inheritance tax and tax on donations) stipulates that notaries are obliged to provide notification to the tax office responsible for inheritance tax in respect of deeds executed and authenticated which might be of relevance for fixing the level of inheritance tax. This legal stipulation is complemented by two regulations contained in the arrangements for application of the legislation on inheritance tax and tax on donations. According to § 12 of these arrangements for application of the legislation, courts and notaries are obliged to provide notification of any disputes arising in respect of inheritances. In accordance with § 13 of these same arrangements, notaries are obliged, in the course of executing and authenticating deeds in respect of donations and specific-purpose transfers between living persons, to provide instruction in respect of the possibility that tax is due, and to enquire about the personal relationship as a family relative of the receiver to the person making the donation and also about the value of the donation. In addition, notaries must forward to the responsible tax office an authenticated official copy of the deed relating to the donation or cession immediately after the deed has been executed and authenticated, at the same time providing notification of the specific details of the relationship as family relatives and the value of the cession. The value providing the basis for the calculation of notarial charges must also be notified. A note must be made on the deed specifying when and to which tax office the official copy has been forwarded. With this obligation to annotate, i.e. the obligation to confirm on the deed that notification has taken place, verification within the context of supervision should be guaranteed.

The range of transactions requiring notification is set out in some detail in the relevant literature and by the fiscal administration. In this it is stated that, for the purposes of making it possible for the tax office to check whether tax is due,

even those legal transactions should be notified for which there is only a suspicion that the matter concerns a donation; this applies particularly for the following legal transactions[42]:

* contracts for the transfer of land or the transfer of other items of property between spouses, parents and children or between other close family relatives,

* agreement of community of goods in respect of the enrichment of one of a married couple,

* settlements of inheritance brought forward and transactions based on the premature settlement of claims to legal portion or contingent rights to reversionary succession and compensation for refusal of reversionary succession or a legacy or in respect of waiving the right to an existing claim to legal portion or for any waiving of inheritance or the cession of contingent rights of reversionary heirs,

* the participation of close family relatives in a company (family company),

* the commissioning of mortgages or other liens upon property and cession of these in favour of close family relatives, where the basis of the debt is not completely transparent,

* settlements to close family relatives who, according to the information supplied by the parties involved, have provided services over a period of years in the business or household for either no or insufficient financial recompense,

* settlements of claims in accordance with the law on the settlement of unsettled questions of property.

d) Notification in connection with company law

Since 01.01.1996, a new obligation to provide notification has been in force in Germany. In accordance with § 54 EStDV (arrangements for the implementation of taxation on income), the notary is obliged to forward to the tax office an authorised official copy of all notarised or authenticated declarations relating to the setting up of joint-stock companies, increasing or reducing their capital, the conversion or dissolution of joint-stock companies or the disposal of shares in joint-stock companies. This official copy must be submitted within two weeks of the notarisation or authentication. Authenticated official copies or counterparts of these deeds may only be distributed once notification has been provided. In this connection, the legislation argued in justification that the stated documents would also represent an important basis for establishing the content of the mat-

[42] Compare with the notice on the duty of the notary to provide assistance with tax matters, issued by the regional revenue offices, note 2.1; Beck'sches Notar-Handbuch-Bernhard, 2nd edition 1997, marginal no. F 248; Zimmermann, in: Formularbuch und Praxis der FGG (Formulary and Practice of the FGG), 20th edition; marginal no. 10

ter for the purposes of taxation on income. What is particularly in question here is the identification of the necessary basic situation in connection with taxation in relation to profits made on disposal on the transfer of shares in a business[43]. Originally, the regulations contained in other laws stipulated that transactions under company law were to be notified to the tax authorities (§ 3 KStDV = arrangements for the implementation of capital transfer taxation). Once these tax-related obligations were lifted, there was an initial period of time in which the notary had absolutely no obligations of any kind in relation to company law. The fiscal administration clearly established that transactions under company law also have a major role to play in the calculation of taxation on income and, accordingly, reintroduced the obligations to provide notification as stated above for reasons based on the legislation on taxation on income[44].

4. The importance of the notarised deed within the context of tax assessment

Other obligations to provide notification in relation to taxation legislation are unknown under German law.

The legislature is always content to make use of the obligation on the notary to provide notification and information to allow it access to the greatest degree of information on tax-related matters. The above examples demonstrate that in the areas in which notarised deeds and authentications are required, there is also a wide variety of obligations to provide information. As a basic rule, the involvement of the notary for the purposes of clarifying tax-related obligations is legitimate, as the notary, as the holder of a public office, is placed in a position of trust not only in respect of the parties involved, but also fulfils obligations in respect of the state, thus serving the interests of the state. In this context, the function of executing and authenticating deeds also becomes clear, in that it guarantees that the basic position for taxation purposes is accurately established and notified to the responsible tax offices. Therefore, the process of executing and authenticating the deed not only has the function of protecting the parties involved but also serves a "conveyor belt" function for pursuing the fiscal interests of the state.

Accordingly, significance in respect of fiscal interests is also attached to the obligations imposed on the notary by the BeurkG to provide a complete description of the matter in hand, to provide authentication of genuine facts and to guarantee accuracy. In the case of providing an exact description of the matter, this means that not only are the interests of the parties involved guaranteed, but also those of the fiscal administration. Without this careful preparatory work

---

43 Compare with Heidinger: Müssen Treuhandverträge über GmbH-Anteile nach § 54 EStV dem Finanzamt gemeldet werden? (Must trustee contracts in respect of shares in public limited companies be declared to the tax office under the terms of § 54 EStV?), DStR 1996, 1353

44 In relation to setting limits, compare with Heidinger, loc. cit.; BMF-Schreiben (BMF correspondence) of 14.03.1997, DStR 1997, 822 where the question of whether trustee contracts must be declared is also settled.

put in by the notary, the task facing the fiscal administration would be made much more onerous.

Account must also be taken of the limits which must be drawn due to the obligation to observe confidentiality. In this connection, the particular question has arisen in practice questioning the extent to which the deeds supplied by the notary may also be used in connection with other procedures, whether the submission of deeds for the purposes of assessing property purchase tax may also be referred to and used by the tax office within the context of income taxation. The same applies for use within the context of enforcement of tax debts[45]. So it is clear that the offices responsible for income taxation within the tax office have a great interest in being kept fully in the picture in respect of disposals of property. In this way it can be ascertained whether incomes and property values previously kept secret have been applied. If, for example, the income tax office were to force the notary to disclose information, this would give rise to a right to refuse to provide information and the obligation to observe confidentiality. The question now poses itself as to whether this right to refuse to provide information can be circumvented because documents which have been supplied to the tax office within the context of other types of taxation may actually be used. The relevant literature correctly points out that use outwith the concrete taxation procedure is not covered by the will of the legislature and would also basically represent a practical instance of subversion of the right to refuse to provide information[46].

5. Tax collecting by notaries

Unlike the situation in other countries, German tax law has, until now, recognised no raising or collecting of taxes by notaries. In many countries, especially in the field of property purchase tax, this is not the case. There is currently a discussion taking place within the Federal Chamber of Notaries as to whether it should be suggested to the German legislature that, similarly to other countries, property purchase tax should be collected by the notary. The particular model being taken as an example for the collection of property purchase tax by the notary is that of Austria. Any such model for raising taxes by notaries on a voluntary basis would envisage that notaries would be able to undertake both the raising and the collection of taxes. This would have the particular advantage that it would achieve an acceleration of the fiscal process. On the other hand, the process should be only voluntary, so that, as a basic rule, the possibility of a taxation procedure based on fiscal administration law would still exist. However, in this connection there is general agreement that it should be left up to the notary to decide whether he should carry out the calculations himself. In this way, for one thing it would be guaranteed that in difficult cases he would not have to accept the risk of an incorrect legal estimation and would still be

[45] Compare here App, Zweckwidrige Verwertung von Kaufvertragsurkunden durch die Finanzämter (Inappropriate use of purchase contract deeds by the tax offices), DNotZ 1988, 339

[46] As in App, DNotZ 1988, 340; Arndt/Lerch/Sandkühler, BNotO, § 18 marginal no. 77

able to refer the parties involved to the fiscal administration. On the other hand, this would achieve the situation by which the notary, in those cases in which the payment of taxes cannot be guaranteed and where this might mean that he would be held liable for this failure to pay, will be entitled to refuse to assess and collect the taxes due. A procedure of this kind for the calculation and collection of property purchase tax, while it would reinforce the public cum legal position of the notary, would also represent for the parties involved a simplifying instrument by means of which they would be able to speed up the taxation process. To this extent, German notaries are not disinclined to adopt this kind of model. However, due to the lack of practical experience, any conclusive assessment of this model would be extremely difficult in Germany at present.

II. Obligations to provide information to other authorities

1. General

Besides the various obligations to provide notification and information, the German legislature has imposed a large number of additional obligations by which the notary must provide information and notification, and must submit documents. However, these are to be found scattered, to some extent randomly, throughout the widest range of legislation. These obligations to provide information take account of a continuous requirement for information on the part of the state in a large number of fields. In this context, the notary is obliged to supply the necessary information automatically, without any concrete request emanating from the state, or in some cases, to supply an official copy of the executed and authenticated deed. In some cases, the information serves the interests of the state alone, and in other cases, the obligation to supply notification is also imposed in the interests of the parties involved in the deed or in the interests of other third parties. It is difficult to draw up a standard set of rules in this connection. In this area, there also arises the basic problem of setting limits to the obligation on the notary to provide information and notification as this relates to the obligation on the notary to observe confidentiality. Here too, as is the case with the obligation to provide information to the fiscal administration, a narrow, means-oriented interpretation of the obligation to provide information should be assumed.

2. Disclosure of information to the registry office (Standesamt)

a) Notification in matters of inheritance

Notaries deal with a wide variety of declarations by which heritable succession is modified or established: e.g. wills, contracts of inheritance and also waivers of legal share and contracts based on family law which have an effect on statutory rights of inheritance. Accordingly, there is not only in the interests of the state but also, primarily, in the interests of heirs, an urgent requirement, in the event of a death, for the probate court with responsibility for execution of the probate proceedings to be aware of all of the declarations of the deceased with a bearing

on his succession. Accordingly, in §§ 2258 a, 2277, 2300 BGB, it is stipulated that notarial deeds containing arrangements to be applied in the event of death must be passed on without delay to the district court for the notary's province for official safekeeping. In the case of contracts of inheritance, under the terms of § 25 Section 2 BNotO, this special official safekeeping may be dispensed with. This means that the parties involved can stipulate that the deed should remain in the keeping of the notary. § 25 Section 2 BNotO stipulates accordingly, that in the event of a death, in these circumstances the notary must submit the deed to the probate court.

In addition, by means of an administrative regulation, an obligation has been imposed on the notary by which he must notify the registry office with responsibility for births in the event that he executes and authenticates a deed the content of which notifies inheritance succession[47]. This obligation to provide notification affects, for example, agreements to terminate a contract, notice of repudiation and contestation of contracts with a bearing on inheritance, contracts waiving inheritance, marriage contracts with effects on rights of inheritance and also agreements relating to advance settlement of rights of succession in respect of an illegitimate child. In the case of a joint will or inheritance contract, separate notification must be supplied for each individual testator. Full details of the testator must be supplied along with notification. Administrative regulations stipulate a special form for this notification. On the death of the testator, the notary must supply the probate court with any document in his keeping setting out arrangements to be applied in the event of death (§ 2259 Section 2 BGB). Subsequent to the general ruling relating to notification in probate matters, the notary must then proceed to notify the probate court by means of an officially notarised document, of the declarations contained in the deed, where the contents of such declarations apply changes to inheritance succession[48]. At the same time, it is the responsibility of the notary himself to check whether any deed in his keeping contains any dispositions or declarations with an effect on inheritance succession. If, on careful inspection, he is convinced that the deed in question contains no such disposition, then he may and must refrain from passing it on due to the obligation on him to observe confidentiality[49].

The problem with this obligation to provide notification in matters of probate is centred in the fact that there is no legal basis in existence, but only an administrative regulation. Accordingly, in the relevant literature it is generally accepted that an official regulation with no legal basis cannot restrict the obligation to

---

47 Compare with: The standard federal arrangements for notification in matters of inheritance, e.g. Bavaria: Bayerisches Justizministerialblatt (Bavarian Justice Ministerial Notice) 1979, 228, 1981, 150; 1984, 83; published in Weingärtner, Notarrecht (Notarial Law), 5th edition 1997, Nos. 270-1; DONot § 16 Section 2; compare with Seybold/Schippel/Kanzleiter, BNotO, § 16 DONot marginal no. 4

48 Compare with Seybold/Schippel, BNotO, § 18 marginal no. 50

49 Compare with Seybold/Schippel, loc. cit., BNotK, DNotZ 1972, 261

observe confidentiality under the terms of § 18 BNotO, meaning that the obligation to provide notification on the basis of the administrative regulation is only valid to the extent - in normal circumstances - that it coincides with the presumed will of the testator. In the presence of any instruction of the testator to the contrary, namely that notification should not be provided, notification takes place, in accordance with the predominant opinion as expressed in the relevant literature[50]. And in the interpretation of this obligation to provide notification, particular account must be taken of the obligation to observe confidentiality. In all cases, the notary must check his deeds so as to ascertain whether they contain any other dispositions and contractual declarations which would not affect any change in inheritance succession. If this is the case, all that must be submitted to the probate office is an official copy in extract form. Whether the content of the deed is of this kind or actually represents a contract of inheritance, thus invoking the obligation to provide information and notification, must be decided by the notary at his own discretion[51].

b) Notification of acknowledgement of paternity

In accordance with § 1600 e BGB, acknowledgement of paternity in relation to an illegitimate child must be "publicly recorded and authenticated". The same applies for the statement of agreement required of the child for the declaration of acknowledgement to be effective. The German legislature assumes that these declarations, which are of considerable importance for the legal status of the illegitimate child, are likewise subject to obligatory disclosure. § 29 Section 2 of the civil status act stipulates that an authenticated official copy of the declaration of acknowledgement must be provided for the registrar who officially recorded the birth of the child. In this way, it is established that it is not permissible for acknowledgement of paternity to be officially recorded in secrecy. The reason is that acknowledgement is of wide-ranging significance and the registrar must officially bring this to the attention of the father[52]. In this connection, the notary is obliged to supply with an authenticated official copy of the declaration of acknowledgement not only the registrar, but also the mother and the child (§ 1600 e Section 2 BGB).

c) Official bestowal of name

If the mother's husband or the father of an illegitimate child bestows his name on the child in accordance with § 1618 BGB, and if the relevant declaration of

---

50 As in Kanzleiter, DNotZ 1972, 519, 522; Kanzleiter DNotZ 1975, 26, 27; Seybold/Schippel/Kanzleiter, § 16 DONot marginal no. 4; Seybold/Schippel, § 18 marginal no. 40; Huhn/v. Schuckmann, BeurkG, 3rd edition, § 16 DONot marginal no. 5; Arndt/Lerch/Sandkühler, BNotO, § 18 marginal no. 69; and in more detail, Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 183, who holds only the actual will as the criterion. Opinion against taking the will of the involved parties into account is expressed in Weingärtner/Schöttler, DONot, 6th edition, § 16 marginal no. 237.

51 As in BNotK, DNotZ 1972, 261; Seybold/Schippel/Kanzleiter, § 16 DONot marginal no. 6

52 Compare with OLG Hamm DNotZ 1996, 428; Seybold/Schippel, BNotO, § 18 marginal no. 140; Firsching, DNotZ 1970, 463

the husband or the declaration of consent of the mother or the child is officially recorded or authenticated by a notary, these declarations must be submitted to the appropriate registrar in whose register the birth of the child was recorded (§ 30 Section 2, § 31 a PSDG).

3. Obligations to provide notification under the terms of the construction code (BauGB)

In accordance with § 195 Section 1 BauGB, every contract relating to the disposal of any real estate property for no financial recompense must be sent in the form of an official copy to the so-called "advisory committee" as set up within an autonomous town or city or the administrative district. Even those contracts relating to the transfer of real estate property in the form of an exchange or building lease in perpetuity must be submitted. It is part of the function of the advisory committee to draft certificates in relation to ownership of property and also to calculate the transaction value for land. By means of this notification, the intention is that the advisory committee should be provided with an overview of the development of the purchase price so as to put it in a position to issue valuation certificates in respect of other, comparable real estate properties.

4. Obligations to provide notification in accordance with the legislation on foreign trade (AWG)

The legislation on foreign trade represents the legal basis for the state control of imports and exports. It operates on the assumption of free foreign trade. However, the act provides the basis for authorisation for the imposition of bans and approval conditions in the form of statutory orders.

Notaries are also subject to obligations to declare and provide notification under the terms of the AWG[53]. In accordance with § 44 Section 1 AWG, the administrative authorities, the Federal German Bank (Bundesbank), the Federal Office for Economic Affairs (Bundeswirtschaftsministerium) and other authorities may request information, to the extent that this is required for monitoring that the AWG and the statutory orders decreed in connection with this act are being observed. To this end, they may request submission of commercial documents. According to § 44 Section 2 AWG, anyone involved directly or indirectly with foreign trade is required to provide such information. If the notary handles procedures for the execution and authentication of deeds relating to legal transactions or dealings in foreign trade, then in accordance with the local interpretation, under German law he is involved neither directly nor indirectly in foreign trade, nor is he obliged to provide information[54]. Within the context

---

53 Compare with Circular 4/1996 from the Federal Chamber of Notaries dated 17.01.1996, The obligation on notaries to provide information and notification in accordance with foreign trade legislation, published in Weingärtner, Notarrecht (Notarial Law), 5th edition, No. 344

54 Compare with Seybold/Schippel, BNotO, § 18 marginal no. 37; Bohrer, Das Berufsrecht der Notare (The Professional Law of the Notary), marginal no. 123

of executing deeds or in their authentication, the notary himself can become a participant in foreign trade, for instance in making or receiving payments in the form of securities or gold. In accordance with the local interpretation, in such cases he may not invoke the obligation to observe confidentiality, as his professional activity representing his own participation in foreign trade may not be kept secret from the office entitled to receive the relevant information on the strength of special regulations[55].

In accordance with § 59 of the regulations dealing with foreign trade, persons resident in the Federal Republic of Germany must declare payments which they receive from parties based abroad or on behalf of such parties from residents of Germany, or which they make to parties abroad or make on behalf of them, if the amount concerned should exceed 5000.00 DM.

5. The money-laundering act (GWG)

The legislation on tracing profits from serious criminal activities passed on 25.10.1993 (BGBl. I 1770) has been in force in Germany since 29.11.1993. The money-laundering act is related to the world-wide efforts being made to combat organised crime. The aim of the GWG is, on the one hand, to make it easier for the criminal prosecution authorities to identify and prove money-laundering transactions, and, on the other hand, it should stimulate commercial operations and professional groups generally involved in these financial transactions to take preventive measures to ensure that these are not misused for money-laundering purposes[56]. The GWG is targeted particularly at credit institutions and financial institutions, but also at persons who are involved in the administration of the property of others, e.g. lawyers and notaries. The GWG addresses the activity of the notary in two cases, in the receipt of money in cash and in the opening of a notarial trust within the context of retention in the role of trustee. Here, too, in accordance with local interpretation, there is general agreement that the notarial obligation to serve confidentiality is breached by these legal obligations[57]. In accepting money as cash to the value of 20,000.00 DM or more, the notary is obliged to identify the person appearing in front of him (§ 3 Section 1 p. 2 GWG), unless he is known to him personally. This obligation also exists where the money is transferred in a number of part payments. In these circumstances, the notary must establish on whose account the relevant person is dealing (§ 8 Section 1 GWG). Identification must take place before the sum of cash is accepted. The notary must ensure that the person's identification card or password is presented to him and must take a note of his name from the document. The relevant statements under § 3 Section 1 must be recorded by the

---

55 Compare with Seybold/Schippel, loc. cit.; Federal Chamber of Notaries circular

56 Compare with the government's justification of the legislation on money laundering, BtDrs. 12/2704, p. 1

57 Compare in detail Circular 5/1996 from the Federal Chamber of Notaries on the act covering the tracing of profits from serious crimes, published in Weingärtner, Notarrecht (Notarial Law), 5th edition, marginal no. 325 a; Arndt/Lerch/Sandkühler, BNotO, § 23 marginal no. 66

notary (§ 9 Section 1 GWG) and retained for six years. The purpose of this recording and retention is to make it possible for the criminal prosecution authorities to collect data which will allow them to act on specific criminal activities. Under the terms of § 8 Section 1 GWG, on the opening of a trustee account, those persons who are commercially entitled to the relevant account must be clearly identified. In this connection, the notary is obliged to disclose to the bank holding the account the identity of the person on whose behalf he is acting. This is another instance of the obligation on the notary to observe confidentiality being breached. So, for instance, if a trustee account is being set up for the purposes of a contract for the purchase of real estate property, the notary must inform both the seller and the purchaser appropriately, so as to ensure compliance with their obligation to provide identification.

6. Obligations to provide notification to the registry court

In accordance with § 125 a FGG, notaries are obliged to provide the registry court with notification of any instances of which they have become aware in their official capacity of any incorrect, incomplete or neglected entries required for the commercial register. The conversion of any partial mortgage, partial real estate mortgage or partial annuity charge document must be notified for inclusion in the property register which issued the original document.

C. Integration of the notary in the administrative process by means of statements of fact relating to approval and public cum legal pre-emptive rights

I. General

1. Statements of fact relating to approval

German law recognises a considerably more intensive degree of intermeshing between public cum legal requirements and notarial execution and authentication of deeds than is the case based on the obligations to provide notification alone. In the everyday practice of the notary, a significant role is played by a large number of duties relating to approval and public cum legal pre-emptive rights arising out of the widest variety of situations based on administrative law. On the basis of the widest range of public cum legal considerations, the legislature has introduced restrictions on authority with considerable effects on real estate property transactions. These public cum legal restrictions authority are rendered without force by the approvals issued by the responsible authorities. Right up until the point in time when it is finally established that an approval will be issued, the legal transaction subject to approval remains pending and without effect. Accordingly, the parties involved in the procedure require public cum legal approval for the implementation and execution of their legal transaction. Then, in the course of this approval procedure, the public cum legal stated objectives which it is intended to guarantee by means of this approval are checked by the responsible authority. If approval is granted, the legal transaction becomes effective retrospectively from the beginning of the procedure[58]. If approval is refused, the legal transaction is rendered definitively invalid.

The effect of these approvals and, accordingly, also the intermeshing of civil law and public law is great within the Federal Republic of Germany, as for the purposes of transferring ownership of a property, it is a constitutive requirement that an entry be made in the land register (§§ 873, 925 BGB). Ownership of a real estate property only comes into effect subsequent to declaration of a legal transaction (conveyance) and recording in the land register. The declaration of a legal transaction alone is insufficient, in contrast to the rights based on the principle of consensus, as applicable in France, for instance. The land registry office - the authority with responsibility for entries in the land register - must therefore check in respect of entries that all approvals required for the legal transaction have been obtained. Only when these public cum legal approvals required for legal effectiveness have been provided can the transfer of ownership in the land register actually take place. Accordingly, the parties involved are obliged to produce approval for the acquisition of property to become effective.

---

[58] Compare with BGH NJW 1995, 318, Haegele/Schöner/Stöber, Grundbuchrecht (Land Register Law), 11th edition, marginal no. 3805

2. Public cum legal pre-emptive rights

Use is being made to an increasing degree of a second instrument for the orientation of public cum legal objectives within German law. The public cum legal pre-emptive right has a considerable influence on property transactions. The most important pre-emptive right is found in the BauGB, but there are other federal laws and, in particular, regional laws which cater for public cum legal pre-emptive rights in a variety of connections. A pre-emptive right makes it possible for the party holding the pre-emptive right - normally a public cum legal corporate body or authority - to acquire the real estate property instead of the prospective purchaser. On the exercise of this pre-emptive right, a purchase contract is created between the selling party and the party with the pre-emptive right, under the terms of which the party with the pre-emptive right can demand that the real estate property be transferred over to himself. In many cases these public cum legal pre-emptive rights have a material effect, i.e. in cases of doubt, the party holding the pre-emptive right can enforce his right to purchase the real estate property even against the wishes of the selling party.

The primary purpose of these pre-emptive rights is to prevent real estate properties which are up for sale from being acquired by persons who are not in a position and have no wish to use the real estate properties in the way required to satisfy the public cum legal purpose in the protection of which the pre-emptive right was created[59]. Pre-emptive rights are also intended, in certain circumstances, to render unnecessary instances of compulsory purchase and to provide the public cum legal authorities with the opportunity to acquire land which they require for the execution of their duties. Pre-emptive rights represent a "central position between the free acquisition of real estate property on the one hand and sovereign forced intervention by means of expropriation on the other[60]". Indeed, statistical studies show that the administrative costs involved in pre-emptive rights for all parties involved bear no relationship to their actual importance. In under 1% of contracts notified, the pre-emptive right has been exercised in accordance with the BauGB, for example[61]. Nevertheless, in recent years there has been increasing use of pre-emptive right as a popular means of securing public cum legal objectives in the Federal Republic of Germany. It is clear that the legislature is working on the assumption that due to their wide-ranging market conformity, pre-emptive rights will be used as the most important instrument in determining the direction of town planning[62].

---

59 Compare with Haegele/Schöner/Stöber, marginal no. 3811

60 Compare with Grziwotz, Baulanderschließung (The Development of Building Land), 1993, 47

61 Compare with Grziwotz, loc. cit.

62 Compare with Rohs, in Brüggelmann, Kommentar zum Baugesetzbuch (Commentary on the Building Code), before § 24 marginal no. 2; Jäde, UPR 1993, 48, 51

3. The importance of the notary in connection with public cum legal approvals and pre-emptive rights

a) General

In practice, the notary has a considerable role to play in the handling of these instruments for the pursuit of public cum legal objectives. In the first instance, BeurkG stipulates the following in § 18: "*The notary should indicate to the parties involved the required legal or official approvals or confirmations or any existing reservations in this connection, and make the corresponding note in the document drafted.*"

§ 20 BeurkG stipulates:

"*If the notary authenticates the contract of transfer of real estate property, if a legal pre-emptive right might be involved, he must indicate this and make the corresponding note in the document drafted.*"

In the first instance, both regulations form the basis of obligations to provide instruction for the parties involved. In general terms, in accordance with § 17 BeurkG, under German law the notary is obliged to inform the parties involved of the legal implications of the transaction and to reflect its interpretations clearly and unambiguously in the document drafted. In so doing, he must ensure that errors and doubts are avoided, and also that any inexperienced and gullible parties involved are not disadvantaged. In accordance with this general stipulation, the notary is subject to a comprehensive obligation to check and instruct which finds concrete expression in the specific obligations to provide instruction in connection with public cum legal approvals and pre-emptive rights. In recent years in particular, as a result of the jurisdiction of the supreme German court, the Federal Court of Justice (BGH), on the liability of the notary, this instructional function has acquired significant importance and has in the meantime come to represent the most important formal function of the notarial process of authenticating deeds[63]. At the same time, this obligation to instruct is not a rigid instrument, but the extent of the obligation to instruct is determined "by the specific circumstances of each individual case"[64]. As decided by the Federal Court of Justice as recently as the judgement issued on 27.10.1994[65], the notary must address all of the aspects of the legal transaction subject to regulation, discover the wishes of the parties involved and provide the required instruction. In this way, the parties to the contract for the transaction being executed and authenticated by the notary will be placed in the position of being aware of all of the significant legal circumstances surrounding their intention. Particularly in

---

63 Compare with Reithmann, Vorsorgende Rechtspflege durch Notare und Gerichte (Non-Contentious Administration of the Law by Notaries and Courts), 1989, p. 125; Keidel/Kuntze/Winkler, BeurkG, indent marginal no. 21 ff.; Winkler, special issue DNotZ 1977, p. 113, 117.

64 As in BGH DNotZ 1963, 308

65 WM 1995, 118, 120

the area of public cum legal obligations to seek approval and pre-emptive rights, it is therefore of the greatest importance for the parties involved to be aware of all of the public cum legal facts of the matter relating to approval which might have an adverse effect on the validity of the legal transaction. And in the field of public cum legal pre-emptive rights, it is also of the greatest importance for the seller to be aware of whether there is any pre-emptive right in existence. The danger exists that it is not the prospective purchaser but a public cum legal entity which can acquire the real estate property on the basis of this pre-emptive right. For this reason, the BeurkG has postulated a specific obligation to provide instruction in connection with these specific public cum legal circumstances relating to real estate property transactions.

With reference to the obligation to seek approval, the applicable stipulation is that the notary must check whether there is any procedure requiring approval present; he must indicate every individual approval required, with a blanket indication being insufficient[66]. Therefore, in practice, to ensure that liability claims are avoided, it is recommended that all of the relevant applications for approval should be named and also listed in the actual deed[67]. Here, it is not sufficient to simply indicate the bald fact of approval, but the notary must also provide clarification about the validity, extent and consequences of this public cum legal approval or its refusal, as the case may be[68]. The obligations on the notary are similar in connection with the pre-emptive rights under the terms of § 20 BeurkG. However, here the situation as regards instruction is less extensive, as the notary is only obliged to indicate that there is a pre-emptive right to be taken into account. This results, in particular, from the fact that, as a rule, the notary does not have knowledge of the necessary circumstances to allow him to reach a reliable judgement as to whether any pre-emptive right exists and whether this will also be exercised, and here, all that can be asked of the notary is that he should provide a general indication of this possibility. However, in these circumstances the parties involved are also placed in the position of being aware of the necessary circumstances for them to declare their will, these circumstances possibly being unfamiliar to them as lay persons.

As a result of these express obligations to provide instruction, what is initially a public cum legal situation is transformed into a transaction under civil law. Here, the notary provides the necessary instruction required to place the parties involved in a position in which they are able to assess these public cum legal influences on the legal transaction under civil law, with which influences they are often unfamiliar. To this extent, with reference to the obligation to provide in-

66 Huhn/v. Schuckmann, BeurkG, 3rd edition § 18 marginal no. 1; Keidel/Kuntze/Winkler, BeurkG, § 17 marginal no. 1

67 As in Huhn/v. Schuckmann, loc. cit. § 18 marginal no. 1, Keidel/Kuntze/Winkler, BeurkG § 18 marginal no. 44; BGH NJW 1993, 648; Haug, Die Amtshaftung des Notars (The Liability of the Notary), 2nd edition 1997, marginal no. 502; Mecke/Lerch, BeurkG 2nd edition § 18 marginal no. 1

68 Compare with Keidel/Kuntze/Winkler, loc. cit.; Huhn/v. Schuckmann, loc. cit.

struction, the notary represents the "converter" of the multi-faceted and complicated combination of public cum legal purposes in relation to real estate property. Without this instruction from the notary, in many cases the party involved would be unaware of the concrete public cum legal approvals and pre-emptive rights actually in existence, which can have a considerable effect on the success of the planned legal transaction. Through the instrument of notarial execution and authentication and the linking of the validity of a legal transaction with the situation calling for public cum legal approval or with the creation of a public cum legal pre-emptive right, the legislature on the one hand provides instruments with public cum legal objectives for real estate property transactions under private law and, with the involvement of the notary, also guarantees that the parties involved will be informed at an early stage of these public cum legal objectives without which it is not possible for the parties involved to properly make up their minds on the matter. In this situation, the notary is the intermediary between public law and civil law.

b) Further functions of the notary in connection with requirements for public cum legal approvals

However, in notarial practice, the notary does not as a rule restrict his activity simply to instruction, which in many cases would be of little use to the party involved, as he would otherwise have to set about obtaining the required approvals himself or would have to turn to other groups of professionals, such as lawyers. In this connection, the German notariate recognised at an early stage that it is necessary for the involved parties to be properly supported by the notary in the handling of a purchase contract for a piece of real estate property in all of the legal aspects relating to this contract. This also includes the requirements for public cum legal approvals. § 31 DONot contains the following appropriate stipulation:

1. *If a transaction requires approval or confirmation by an authority or if the notary has doubts about the necessity of such approval or confirmation, in appropriate cases the notary can, with the agreement of the parties involved, submit to the responsible authority prior to execution and authentication of the deed, a draft of the significant conditions of the transaction accompanied by a request that the authority provide notification of any reservations it may have. Where it would seem to be appropriate, he should recommend this procedure to the party involved.*

2. *The notary should apply for the necessary approvals and confirmations as soon as possible and all at the same time."*

So, as a basic rule, obtaining approval is a matter for the parties involved[69]. However, since, unlike the other parties involved, the notary is fully familiar with dealing with the authorities, the accepted practice assumes that he will ob-

[69] BGH DNotZ 1954, 551

tain the approval for the involved parties. Accordingly, jurisdiction on liability has correctly established that a notary who, contrary to the general notarial practice, does not do this for the involved parties, must instruct the parties accordingly, otherwise he is guilty of a gross dereliction of duty[70]. Therefore, as a rule, the notary takes on, at the appropriate request of the parties involved, the task of obtaining the appropriate approvals from the responsible authorities on behalf of the parties involved[71]. This is generally expected by the parties involved and notarial practice also fulfils this expectation. The notary must then submit a special application with power of attorney. However, there is a series of public cum legal regulations which envisage the corresponding legal authorisation of the notary to obtain approval. In accordance with terms of § 31 Section 2 DONot, the notary must then apply for approvals as soon as possible and all at the same time. If, in the process of disposal of real estate property, the notary is commissioned to obtain one or a number of approvals, in accordance with § 146 of the schedule of fees (KostO), he shall receive a special executive fee.

c) Activities in relation to pre-emptive rights

Similarly, in connection with public cum legal pre-emptive rights, it is of considerable importance for the parties concerned to be aware of the problem and to clarify whether the right will be exercised. Many pre-emptive rights are technically secured by the law in that any entry in the land register and therefore acquisition of ownership of the real estate property is only possible if the responsible authority provides notification to the land registry office by means of a corresponding certificate, that the pre-emptive right does not exist or is not being exercised. So, for instance, § 28 Section 1 BauGB stipulates that, on the realisation of a change of ownership, the land registry office can only act in these circumstances.

Similarly to the situation with approvals, in German legal transactions it is normally expected by the parties involved, and also expected by the notary, that these public cum legal questions also be clarified by the notary and that he will deal with obtaining all the corresponding declarations in connection with the pre-emptive right. In this connection, the notary must instruct the prospective purchaser that any payment of the purchase price made prior to the appropriate declaration in relation to pre-emptive right represents a material risk.

70 As in BGH VersR 1959, 739

71 Compare with Reithmann/Albrecht/Basty, Handbuch der notariellen Vertragsgestaltung (Manual for the Drafting of the Notarial Contract), 7th edition, marginal no. 514; Haug, Die Amtshaftung des Notars (The Liability of the Notary), 2nd edition, marginal no. 505; Keidel/Kuntze/Winkler, BeurkG, § 18 marginal no. 48

4. Public cum legal requirements for approval and pre-emptive rights, and the obligation on the notary to observe confidentiality and data protection

In recent years, the question has arisen in Germany as to what extent the notary who has taken it upon himself to obtain approvals or certificates in connection with pre-emptive right may pass on the complete contract to the public authorities. In this connection, there are particular reservations in respect of the obligation on the notary to observe confidentiality along with aspects of data protection law[72]. Critics have submitted that in the vast majority of cases where the relevant purchase contract is passed on in its entirety, with all of the relevant data, this results in the authority being in possession of information which is not required for checking on the existence of any pre-emptive right or for the exercise of such right. The Federal Chamber of Notaries and the relevant literature recommend accordingly that to safeguard the obligation on the notary to observe confidentiality even in connection with public cum legal authorities, what is referred to as a two-stage procedure should be employed[73]. In a first stage of the procedure, the municipal body or the authority should only be informed of the facts surrounding the sale and the details of the real estate property. Only in the second stage should the municipal body or authority have the complete purchase contract passed on to it, namely when the municipal body provides notification that, in its assessment of the situation, there is a pre-emptive right in existence. Only then must the content of the contract be disclosed. In the opinion expressed the Federal Chamber of Notaries and in the relevant literature, by means of this specific procedure the requirements of data protection and the obligation on the notary to observe confidentiality will be most really satisfied.

II. Overview of individual public cum legal approval requirements

Presented below is a brief overview of the most important public cum legal approval requirements which the notary must take into account in his everyday work and which must be secured by the public cum legal interests and related objectives:

1. Approval requirements under construction law (BauGB)

a) Approval of division

Up to 1998, under the terms of § 19 BauGB, the procedure under civil law for the division of a real estate property under certain conditions called for approval, with these conditions normally being connected with the presence of a

---

72 Compare with Grziwotz's discussion of notarial information in respect of contracts for the purchase of real estate property, CR 1991, 109

73 Compare with Federal Chamber of Notaries Circular 16/1997 dated 12.06.1997 in connection with the requirements of data protection legislation in relation to notification under the terms of § 18 Section 1 p. 1 BauGB; Grziwotz, loc. cit.

specific situation in connection with the law on building planning[74]. The "declaration of division" which triggered the obligation to seek approval was frequently contained in a purchase contract for part of a plot of land or in an application for measurement of the part plot, so that in these cases in which a notarised deed was required as a declaration, approval was required. In terms of procedural law, the necessity for approval of division was ensured in that on the basis of a division requiring approval, the land registry office could only make an entry in the land register on submission of the approval notice. In accordance with standing jurisdiction, the notary must provide instruction on this element of declaration of division in connection with purchase contracts relating to real estate property[75]. This approval of division had an effect in terms of building planning law and served, on the one hand, to secure development planning, and, on the other hand, it was intended to provide protection for the party acquiring part of a real estate property from the possibility of acquiring a property, thus involving considerable expense for measuring and other costs, only for it to turn out at some time in the future that it is not permissible for building to take place on it in its own right[76]. By means of an amendment to the BauGB dated 01.01.1998, this approval of division has been partially restricted, so as to simplify the administrative procedure.

b) Obligation to seek approval for the creation of Apartment Ownership in areas with functions relating to tourism (§ 22 BauGB)

In accordance with § 22 BauGB, the construction or division of residential property or part properties in tourist localities requires approval, when the municipal body has designated the real estate properties in a statute for which approval is a condition[77]. With this requirement for approval, it is intended that tourist localities are provided with an instrument for the prevention of any excessive increase in the numbers of secondary dwellings which might have adverse effects on spa and tourist traffic. This obligation to seek approval was also guaranteed by a land register block: in areas in which obligations to seek approval applied, the land registry office can only make the stated entries if there is an approval or a clearance certificate present (§ 22 Section 7 p. 1 BauGB). The notary must therefore provide instruction on the possible obligation to seek approval in the course of executing and authenticating legal transactions with the construction of residential property as their objective. This applies not only to division into residential property, but also to executory contracts involving the obligation to construct residential property[78].

---

74 Compare in detail with Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law) marginal no. 3818 ff.; Grziwotz, Baulanderschließung (The Development of Building Land), p. 31 ff.

75 BGH NJW 1993, 648

76 BVerwG NJW 1985, 1354, Grziwotz, Baulanderschließung (The Development of Building Land), p. 31

77 Compare with Haegele/Schöner/Stöber, marginal no. 3852 a ff.; Grziwotz, Baulanderschließung (The Development of Building Land), p. 41 ff.

78 Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law) marginal no. 3852 f.

c) Obligation to seek approval for transfers of real estate property by the redistribution system

The purpose of a redistribution system is to reassign certain areas of built-up or non built-up real estate property for the purposes of reorganisation by distribution in such a way that real estate properties are formed, purpose-designed by situation, form and size. A redistribution system is initiated on the decision of the municipal body. At the end of the redistribution procedure, a completely new arrangement of the real estate properties and plot limits takes place in the relevant area. The regulations for this redistribution system are contained in §§ 45 ff. BauGB[79]. In accordance with § 51 Section 1 No. 1 BauGB, after publication of the redistribution resolution, disposals relating to real estate properties in the area for redistribution may only be carried out with the approval of the office responsible for redistribution. As a rule, there is a redistribution note entered in the land register. By this, approval must be sought for disposals of any kind, e.g. conveyances, encumbrances on real estate properties, mortgages and registered charges, contracts under the law of obligations relating to acquisition; the use or construction of a plot of real estate. By means of this obligation to seek approval, the intention is to prevent the procedure requiring approval from making the implementation of redistribution impossible or significantly more difficult (§ 51 Section 3 BauGB).

d) Approval in the expropriation procedure

In accordance with § 109 BauGB, from the announcement of the invocation of an expropriation procedure on, and in the course of the redistribution system, the disposals and other legal contracts relating to the acquisition and use of a real estate property require the written approval of the expropriating authority.

e) Approval in the redevelopment procedure

Redevelopment measures are measures by means of which a built-up area is to be considerably improved or redesigned to remedy poor conditions in terms of town planning[80]. This is primarily concerned with the redevelopment of old, outdated, built-up areas. When an area has been designated as an area for redevelopment, an obligation to seek approval comes into force. In accordance with § 144 BauGB, in a formally designated area for redevelopment, in certain circumstances, the disposal of real estate property by legal contract, the purchase of a building leased in perpetuity, the encumbrance of the property and also its contract under the law of obligation through which the basis would be provided for an obligation to the encumbrance or transfer of the real estate property, require approval by the redeveloping authority. Here, too, land registry offices may only make entries in the land register when an approval notice is present. And likewise, approval may only be refused when there are grounds for assum-

79 Compare with Dieterich, Baulandumlegung (Building Land Redistribution), 3rd edition 1996

80 Compare with Grziwotz, Baulanderschließung (The Development of Building Land), p. 382 ff.; Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law), marginal no. 3884 ff.

ing that the project requiring approval would make the redevelopment impossible or considerably more difficult and would run contrary to the objectives of the redevelopment (§ 145 Section 2 BauGB).

f) Approval for the creation of apartment ownership in accordance with § 172 BauGB

By means of an amendment to be BauGB, in § 172 of the act the legislature has envisaged that under certain conditions, the division of a plot of real estate into apartment ownership falls under the requirement for approval. In the first instance, this is conditional on the corresponding federal state having introduced this obligation to seek approval by means of legal regulations (§ 172 Section 1 p. 4 BauGB). This obligation to seek approval then applies for all areas for which the municipal body has issued a maintenance order for the preservation of the composition of the resident population (what is referred to as an environmental protection order[81]).

2. Restrictions on disposal in accordance with agricultural law (GrdstVG)

In the field of agriculture, approval under the terms of the GrdstVG legislation of 28.07.1961 (BGBl. 1961 I 1091) has a considerable role to play. Accordingly, under the terms of § 2 of the act, the disposal of a plot of agricultural and forestry land calls for approval: the same status is accorded to the disposal of a share in ownership and the transfer of part of an inheritance[82]. Approval is required for the material transfer of the property and also for the contract under the law of obligation (§ 2 Section 1 GrdstVG). By means of this obligation to seek approval, a system of agricultural land control is intended to be imposed. Therefore approval can be refused where there is an undesirable distribution of property and land, especially if the disposal contradicts measures for the improvement of the rural structure (§ 9 Section 2 GrdstVG). A similar reason for refusal is a grossly skewed relationship between the proceeds and the value of the real estate property. The tendency in the granting of such approvals is to maintain agricultural operations and to protect the interests of the rural structure, among other things. In this area, too, the land registry office may only enter a change of ownership in the land register once approval has been granted by the authority or if there is a clearance certificate present. The individual federal states can, and have, released certain less extensive areas from the obligation to seek approval (Bavaria, approval-free transfer of ownership of areas of up to one hectare in size).

The GrdstVG has provided the notary with a specific role. With the effect of law, the notary executing and authenticating a disposal contract requiring ap-

---

81 Compare also with Hertel, DNotI-Report 1997, 159

82 Compare in detail with Haegele/Schöner/Stöber, Grundbuchrecht (Land Register Law), marginal no. 3924 ff.; for the most recent jurisdiction Wenzel, Agrarrecht (Agrarian Law) 1995, 37 ff.

proval is authorised to apply for this approval. This is a case of legal power of attorney invested in the notary under the terms of § 6 GrdstVG.

3. Obligations to seek approval in the new federal states for the safeguarding of retransfer claims

With the reunification of Germany, specific obligations to seek approval have arisen in the new federal states to provide safeguards for retransfers. Under the terms of § 1 VermG, real estate properties expropriated in the GDR in the period from 1933 must, under specific conditions, be retransferred to the rightful owners. So as to prevent this so-called "restitution claim" from being lost, the legislature has included in the regulations covering real estate property transactions (GVO) an obligation to seek approval for disposal of a real estate property[83]. The GVO was originally a law of the former GDR and an instrument of socialist land husbandry. Subsequent to reunification, the protective purpose was completely altered and it now serves to provide protection for those entitled to restitution. Under the terms of § 2 Section 2 GVO, in cases where there is an obligation to seek approval, the land registry office may not make any entry in the land register without this approval. Approval is granted once it is established that there are no claims to restitution present and in the presence of certain under exceptional circumstances.

4. Miscellaneous obligations to seek approval

Besides these most important situations in which approval must be sought, in certain types of cases other obligations to seek approval must be taken into account. These can only be referred to briefly at this juncture: public cum legal bodies, e.g. municipal bodies, regularly require approval from the responsible supervising authority when they wish to dispose of real estate property; in some cases, churches require approval from the supervising ecclesiastical body. In accordance with the supervisory legislation on insurance, insurance companies require the agreement of the federal supervisory office for certain legal transactions. In addition, there are special obligations to seek approval which exist only in the relevant federal states and are based on a specific legal basis relating to that federal state; in Bavaria, for instance, the disposal of what are referred to as "upland pasture" properties[84].

III. Overview of individual public cum legal pre-emptive rights

1. Pre-emptive right under the terms of the BauGB

In § 24 and § 25 BauGB (last amended by the act of 18.08.1997, BGBl. I 2081), the municipal body has a pre-emptive right on the disposal of real estate

---

[83] Compare also with Haegele/Schöner/Stöber, Grundbuchrecht (Land Register Law), marginal no. 4227; Frenz DtZ 1994, 56; Wolf, MittBayNot 1995, 17 ff.

[84] Compare with Haegele/Schöner/Stöber, marginal no. 4102

property under certain conditions. The municipal body has a pre-emptive right to the purchase of properties when, among other things, they lie within the range of application of a development plan, where this refers to areas for which, according to the development plan, there is a use for public purposes or areas of significance for the protection of the environment, if the property is situated in an area for redistribution or if the property lies within a formally designated area for redevelopment. In addition, there are also other specific situations based on town planning law which provide a basis for the pre-emptive right. Moreover, under the terms of § 25 BauGB, a municipal authority can justify a bye-law for the area covered by a town planning scheme with reference to real estate properties with no building on them and in areas in which the municipal body is considering town-planning measures and a guarantee should be provided in this way to secure properly organised town-planning development. Under the terms of § 27 a BauGB, the municipal body may also exercise the pre-emptive right in favour of a third party, under certain conditions. As a basic rule, in exercising the pre-emptive right, the purchase price agreed in the purchase contract should be paid. Under the terms of § 28 Section 3 BauGB, however, the municipal body can set the amount to be paid to reflect the market value of the property if the agreed purchase price clearly exceeds this market value. In this case, however, the seller is entitled to pull out of the contract. This most important pre-emptive right is also guaranteed in terms of land register law in that, under the terms of § 28 Section 1 BauGB, in connection with purchase contracts a land registry office may only enter the purchaser as owner in the land register when it has been provided with evidence that a pre-emptive right is either not being exercised or does not exist.

In practice, this municipal pre-emptive right has a considerable role to play, as each purchase contract requires that a corresponding request be made to the municipal body. Both the notary and also the land registry office cannot reliably know or check whether a real estate property is subject to a pre-emptive right, whether it is located within a town-planning scheme, whether it is intended for use for public purposes, or whether it has buildings on it or not. For this reason, for each purchase contract their must be a clearance certificate produced and submitted to the land registry office.

There is no power of attorney for the notary to obtain this clearance certificate from the municipal body. In practice, powers of attorney are regularly included in the contract for the purchase of the property, to allow him to clarify the question of pre-emptive right and the clearance certificate for the parties involved.

2. Pre-emptive right under the German Housing Development Act (Reichssiedlungsgesetz)

In accordance with § 4 of the German Housing Development Act of 11.08.1919 (German Law Gazette 1919, 1419 = BGBl. III 2.-2331/1), the public housing

company has a pre-emptive right in respect of agricultural properties greater than 2 hectares in size[85]. A pre-emptive right exists only if the disposal requires approval under the terms of the GrdstVG, and this approval would be refused. The authority with the power of approval to which the application for approval under the terms of the GrdstVG is submitted presents the purchase contact to the housing authority which provides notification to the housing company.

Under this procedure, all that is required is that the notary obtains a corresponding approval under the terms of the GrdstVG. Within the context of this procedure, the question of pre-emptive right under housing legislation is clarified.

3. Pre-emptive right of the tenant under the terms of the Housing Commitment Act (Wohnungsbindungsgesetz)

In accordance with § 2 of the Housing Commitment Act (BGBl. 1994, I 2167), on the sale of rented accommodation subsidised by public funds where this accommodation has been or is to be converted over to owner-occupation, there exists a pre-emptive right for the sitting tenant under civil law[86].

4. Pre-emptive right of the tenant on conversion

Since 1.9.1993 there has been introduced a pre-emptive right under civil law in favour of tenants (compare with BGBl. 1993, I 1257, 1260). This covers cases in which rented accommodation is being converted over to owner-occupation under the terms of the Accommodation Ownership Act (WohnEigG). Here, the legislature has identified a need for specific protection for tenants and grants the latter a pre-emptive right in the event of sale after conversion under the terms of § 570 b BGB[87].

5. Other public-cum legal pre-emptive rights

In a series of further acts, the German legislature has created special pre-emptive rights to safeguard specific public cum legal objectives. Accordingly, in connection with the railways, there is a pre-emptive right under the terms of § 19 Section 3 of the AEG railways legislation (BGBl. I 1993, 2378). And within the context of the federal trunk route planning scheme there is a pre-emptive right under the terms of § 9 a Section 6 FstrG (BGBl. I 1993, 854, n.F. BGBl. I 1994, 859). Under the terms of § 15 Section 3 WaStrG (legislation on water-

---

85 Compare with Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law), marginal no. 4137 ff.; Keidel/Kuntze/Winkler, BeurkG, § 20 marginal no. 18

86 Compare also with Becker, Das Wohnungsbindungsgesetz - Auswirkungen auf den Grundstücksverkehr für die notarielle Praxis (The Accommodation Commitment Act - effects on the property transaction with significance for notarial practice), MittRhNotK (Central Rhineland Chamber of Notaries) 1980, 213; MittRhNotK 1982, 12 and MittRhNotK 1985, 209

87 Compare also with Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law), marginal no. 4181; Langhein, DNotZ 1993, 650

ways), the Federation has a pre-emptive right in respect of those areas required for the extension or new construction of federal waterways. Under the terms of § 8 a Section 3 LuftVG (legislation on air traffic - BGBl. I 1993, 2130), there exists a pre-emptive right when airports or landing strips are to be established or modified. In addition, there is a pre-emptive right under the terms of the PBefG legislation (§ 28 Section 3 PBefG, BGBl. I 1993, 2132). For the purposes of the installation of a magnetic monorail system, there was a pre-emptive right created under the terms of § 4 Section 3 of the magnetic monorail planning legislation of 23.11.1994 (BGBl. I, 3486).

In addition, there are specific pre-emptive rights in existence for the safeguarding of special reconveyancing problems in the new federal states arising out of reunification and a large number of pre-emptive rights specific to individual federal states covered by local state laws. As one example, in most of the federal states in Germany there are pre-emptive rights in connection with the legislation providing protection for monuments. By means of these, municipal bodies and also other public cum legal holders of rights are provided with the opportunity to acquire buildings with protected status as monuments through the pre-emptive right[88]. Likewise regulated under local state law are pre-emptive rights in the field of the protection of nature and the legislation on forestry. There are frequent instances in the local state legislations on woodland of pre-emptive rights in relation to areas of wooded real estate. The same applies to some extent under the legislation on fisheries or the laws for the protection of nature.

D. The notary and the execution and authentication of deeds as a key factor in the handling of major projects under administrative law based on co-operative action, in particular in the identification and provision of areas for building

I. Introduction

While, in the past, in all areas the administration created regulations primarily by means of sovereign acts, in recent years in response to the pressure applied by ever decreasing resources, new theories for the privatisation of public cum legal functions along with the creation of citizen-oriented administrations in connection with the fulfilment of public cum legal functions, the co-operative contract has found increasing application. In §§ 54 ff. of the VwVfG legislation, the administrative contract is expressly permitted as a consensual, co-operative arrangement with citizens clearly separate from the one-sided sovereign administrative act. In this connection, the administrative contract is characterised in that in the field of public law there are legal relationships created without the otherwise typical presence of the function of supremacy and subordination;

[88] Compare in detail with Haegele/Schöner/Stöber, Grundbuchrecht (Property Register Law), marginal no. 4187; Grauel, MittRhNotK 1998, 243; and MittRhNotK 1994, 150; MittRhNotK 1995, 363

what exists is a situation featuring a co-operative arrangement[89]. In comparison with the one-sided sovereign act of the administration by means of administrative act, it is generally considered that a public cum legal contract has many advantages to offer, but many risks as well[90]. The advantage of a public cum legal contract is found in the fact that the municipal body can apply regulations over and above the remaining canon of admissible and legal measures, which they could not apply unilaterally on a sovereign basis. Conversely, the citizen can be brought into the decision-making process for the municipal body at an early stage, with the contract which, as there is no administrative law protection established against it, carries a much higher guarantee for continuity of operations at present levels and for the rapid implementation of regulations than an administrative act which may be subject to checking over the course of a legal procedure lasting for years, one which can result in its implementation being considerably delayed. The acceptance of the solution identified is clearly increased in the co-operative sector. Problems can arise due to the fact that in the area of public cum legal contracts, unlike the situation with private contracts, no full contractual freedom exists, but the situation is overlaid with public cum legal conditions which have a direct influence on the effectiveness of the contract.

Moreover, contracts in the area of the fulfilment of public cum legal functions are also easily tainted with the "odour" of the sell-out of sovereign rights; *Grziwotz*[91] is therefore right in assuming that the administrative contract fluctuates between co-operation and corruption. To provide a safeguard against any sell-out of sovereign rights, the jurisdiction of the administrative courts has drawn a few important lines of demarcation for co-operative administrative dealings.

The most significant area of co-operative administrative activity is what is referred to as the town planning contract, the objectives and areas of application of which are many and varied. However, they are generally characterised by the objective of marrying together the planning sovereignty of municipal bodies with the building intentions of private individuals by reducing bureaucratic restrictions, as a response to the increasing scarcity of building land and the reduced degree of leeway available to municipal bodies due to empty public coffers. With recourse to contractual arrangements, real estate properties should be made available, developed and be ready for construction more rapidly and easily[92]. In the handling of town planning contracts, notaries often have a key role

---

89 Compare with Kopp, VwVfG, 6th edition 1996, § 54 marginal no. 6; Mahnstein, The Public cum Legal Contract in Notarial Practice, MittRhNotK 1995, 1,2

90 Compare with Mahnstein, MittRhNotK 1995, 1; Grziwotz, Baulanderschließung (The Development of Building Land), p. 159 ff., and Städtebauliche Verträge (Town Planning Contracts), DVBl. 1994, 1048, 1049 f.; Stuer, Der städtebauliche Vertrag (The Town Planning Contract), DVBl. 1995, 649 ff.; Ottmann, Der städtebauliche Vertrag (The Town Planning Contract), 1995, p. 20 ff.

91 In: DVBl. 1995, 1050

92 Compare with Grziwotz, Baulanderschließung (The Development of Building Land), p. 161 ff.; Stuer, DVBl. 1995, 649; Döhring, NVWZ 1994, 853; Birk, The New Städtebauliche Verträge (Town Planning Contracts), 2nd edition 1996, Scharner, Städtebauliche Verträge nach § 6

to play. In particular, where real estate property transfers are linked together with the town planning contract, under the terms of § 313 BGB, there is an obligation for notarial execution and authentication, with this extending to the entire contract and not only the transfer of the actual property. In this way, the notary is an integral part of the overall conception and the process of execution and authentication of the town planning contract. Accordingly, recent years in Germany have seen a significant increase in the importance of town planning contracts for the notary.

II. Overview of the law pertaining to town planning contracts under the terms of the BauGB legislation

1. Basic situation

In promulgating the BauGB as long ago as 1986, the legislature was pointing out that in basic terms, the possibility existed of concluding a town planning contract. The objective of this contract was to take into account the increased demand for residential building ground caused by an increase in the demand for accommodation and the reduction in the designation of new building land by municipal bodies. In the opinion of the federal legislature, application of a town planning contract was an effective means by which it would be possible to marry together the planning sovereignty of the municipal bodies with the building intentions of those active in the market[93]. Along with reunification, there was a more extensive legal basis created which has now found its own independent basis in law in § 11 of the version of the BauGB which has been in force since 1.1.1998. This regulation stipulates that municipal bodies can conclude town planning contracts, with it being possible for the following, in particular, to be the subject of a town planning contract:

* the preparation or execution of town planning measures by the partners to the contract at their own cost; this including the reassignment of relationships in connection with real estate property, ground redevelopment and other preparatory measures, etc.
* the promotion and safeguarding of the objectives pursued with the town planning office, in particular the use to which property is put, the execution of countervailing measures for reasons based on nature conservation law, etc.
* the transfer of costs or other expenses which arise or have arisen for the municipal body in connection with town planning measures and which are a precondition for the results of the planned project; among these features the provision of areas of real estate property.

BauGBMaßnG (Town Planning Contracts under the terms of § 6 BauGBMaßnG = building code implementation act), NVWZ 1995, 219

93 Compare with Ottmann, Der städtebauliche Vertrag (The Town Planning Contract), p. 20

In § 11 Section 2 BauGB, the legislature has also stipulated that the town planning contract can clearly distance itself from the compulsory legal conditions in force and is simply obliged to observe the basic principle of commensurability; the agreed services must be commensurate with the general circumstances. Agreement on a service to be provided by the partner to the contract is not permissible if he were to have a claim for the reciprocal service, even in the absence of the service[94]. Accordingly, in § 11 the legislature has taken into account the actual situation as it has been in the past, by which, in practice, a wide area of application was identified for town planning contracts. Town planning contracts can be included under the widest range of public cum legal objectives.

2. Important town planning contracts in notarial practice

a) The development contract

The regulations covering the development contract are provided in § 11 Section 1 No. 1 and § 124 Section 2 BauGB[95]. Development is incumbent on the municipal bodies as a function of autonomous administration and includes all of the measures required to ensure that the property can be built on. Development includes the creation of the necessary streets, paths and open areas, parking areas, landscaped areas, systems for the supply of water, heat, electricity, gas and telephone services etc., i.e. all of the necessary measures for general infrastructure. As a basic principle, a municipal body wishing to designate land for construction must carry out this development. However, in § 124 BauGB, the legislature has provided municipal bodies with the opportunity to transfer the development of individual real estate properties or complete areas for construction over to third parties on a contractual basis. The third party then installs the development complex under its own name and at its own cost and subsequently transfers it over to the municipal body[96]. In many cases, the contractor is also the owner of the property for development, which he then wishes to sell on to purchasers in due course. His interest in the development contract lies in the fact that a rapid development can be carried out under his own responsibility, as otherwise, he would be dependent on the municipal body to carry out the development.

b) The prefinancing contract

---

94 Compare generally with the town planning contract under the new rules, Örder, Städtebaulicher Vertrag nach dem Bau- und Raumordnungsgesetz 1998 (The Town Planning Contract under the terms of the Building and Regional Planning Legislation of 1998), NVWZ 1997, 1190; Grziwotz, Änderung des BauGB und Vertragsgestaltung (Amendment of the Building Code and Contract Drafting), DNotZ 1997, 916

95 Compare with Birk, The New Städtebauliche Verträge (Town Planning Contracts), p. 15 ff.; Grziwotz, Baulanderschließung (The Development of Building Land), p. 318 ff.; Mahnstein, MittRhNotK 1995, 8

96 Compare with sample development contract presented in Grziwotz, Baulanderschließung (The Development of Building Land), p. 330

By means of a prefinancing contract which is also referred to as a "false" development contract, the contractor accepts the costs for the development to be carried out by himself on a temporary basis only[97]. With this contract, the contractor then has the costs for the development he is to carry out refunded to him by the municipal body.

c) Voluntary redistribution

§§ 45 ff. BauGB envisages what is referred to as an official redistribution process, by which land properties can be restructured by sovereign act. Voluntary redistribution is characterised in that the owners of the property undertake to bind themselves contractually to an appropriate restructuring of their properties and to make use of the instruments of civil law in the process[98]. One particular area of dispute here relates to whether in the overall distribution of land the municipal body may accept surrender of a specific area of land.

d) Local model

Especially within the context of conurbations and in attractive areas of the countryside used for leisure purposes, attempts have been made by municipal bodies to give priority to covering the requirement of the local population for accommodation by means of what is referred to as the local model[99]. It is the objective of these various local models, by means of exerting influence on the structure of property ownership in area to be designated for building in the future, to create accommodation space for locals and to avoid having the area covered by the municipal body given over to outsiders to an excessive degree[100]. For this purpose, municipal bodies have developed a variety of strategies which are to some extent based on the conclusion of town planning contracts. Some municipal bodies make designation as building land dependent on the owners of the relevant real estate properties selling their properties to the municipal body in advance. In many cases, the owners are granted the opportunity to buy back a part of the developed building land. The parts of the building land which remain for the municipal body are then often allocated to locals on a preferential basis (what is referred to as the intermediate purchase model)[101]. As it is passing on land to locals, the municipal body often agrees building bye-laws to ensure that its objective of moving locals into the relevant planning area is actually achieved.

---

97 Compare with Grziwotz, Baulanderschließung (The Development of Building Land), p. 326; Döhring, Contracts for Baulanderschließung (The Development of Building Land), NVWZ 1994, 853, 855

98 Compare with Dieterich, Baulandumlegung (Building Land Redistribution), 3rd edition marginal no. 494, Grziwotz, Baulanderschließung (The Development of Building Land), p. 234

99 Compare with Local Models, Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court) NVWZ 1990, 979; BVerwG DNotZ 1994, 63; Jachmann, Legal Qualification and Acceptability of Local Models as examples of Administrative Dealings based on Contract, MittBayNot 1994, 93

100 BVerwG DNotZ 1994, 63

101 Compare with Jachmann, loc. cit.

Another model is what is referred to as the contractual model. In this model, also known as the Weilheim model, the municipal body makes the production of a building plan dependent on the condition that the owner or owners of the real estate property make the municipal body an offer for the sale of their properties, this offer being valid for a limited period and executed and authenticated by a notary. The owners also authorise the entry of a corresponding note in the land register as a safeguard. The municipal body can only accept the purchase offer if the owner of the property sells it to an outsider. Jurisdiction has widely approved this kind of model[102].

e) Contracts making provisions for follow-up costs

The regulations covering the contract making provisions for follow-up costs are contained in § 11 Section 1 No. 3 BauGB. These are contracts in which the party wishing to undertake building binds itself contractually in conjunction with the municipal body to accept the costs and other expenditure arising for the municipal body in connection with town planning projects, other town planning measures along with systems and installations for general use[103]. The amendment of the act also recognises a close link between the costs and the planned project. The precondition for a contract making provision for follow-up costs is that the costs arise in connection with measures representing a precondition or consequence of the planned project.

Particularly in the area of contracts making provision for follow-up costs, the problem has arisen, however, that municipal bodies were not allowed to commit themselves, this with reference to their planning sovereignty. At an early stage, jurisdiction established that there is no claim for exemption from a building plan.

III. Integration of the notary into the co-operative administrative process based on the requirement for notarial execution and authentication

As a basic principle, town planning contracts do not require notarial execution and authentication. In accordance with § 11 Section 3, a town planning contract must be drafted in writing. However, regulation itself stipulates that this only applies to the extent that there is no other form stipulated on the basis of other formal regulations. As it is often the case that the conclusion of a town planning contract is linked in with obligations to acquire or dispose of real estate property, under the terms of § 313 BGB, there is an obligation to have this officially executed and authenticated[104]. Accordingly, in many cases, with town planning contracts of the above-mentioned type, the obligation exists for official

---

102 BVerwG DNotZ 1994, 63

103 Grziwotz, Baulanderschließung (The Development of Building Land), p. 170 ff.; Stuer, DVBl. 1995, 649, 654; Battis/Krautzberger/Löhr, NVWZ 1997, 1145, 1157

104 Compare with the question of the extent of the procedure of execution and authentication, OVG Koblenz (higher adminstrative court) DÖV 1978, 444

execution and authentication, i.e. the notary becomes of necessity involved in the drafting of the contract and its execution. Correspondingly, he is at the same time subject to the general obligations imposed on the notary during the drafting and execution of the contract. He is obliged to draft a legally effective contract, to discover the will of the parties involved, to clarify the subject matter and to instruct the parties involved of the legal implications of the transaction. In the case of public cum legal contracts, this means that the notary must provide instruction not only in connection with the effects under civil law, but, in particular, also the public cum legal matters involved. The problem with public cum legal contracts, however, lies in the fact that it is certainty of the law in this area which leaves something to be desired. In many cases it is not established until a basis is provided by a decision reached at the highest judicial level of the Federal Administrative Court that a practice which has in the past been accepted as admissible on all sides is deemed not to be in accordance with the law. The effects of civil law on the public cum legal contract are many and varied in the extreme, and set out in the widest variety of acts so that here, too, particularly difficult situations are created for the notary in connection with providing instruction. *Mahnstein*[105] correctly points out that exactly these public cum legal connections can easily be identified in the process of drafting the contract and it is exactly civil law, hostile to dispositions as it is, which carries with it risks imposing limits on the contractual agreement. Conversely, as demonstrated by decisions reached in recent years, in many cases civil courts are unaware of the public cum legal connections for these contracts and apply the categories appropriate under civil law, without differentiation, to contracts subject to overlapping public law and public cum legal objectives. So, for example, within the context of building obligations it has in practice in many cases been agreed that municipal bodies disposing of local real estate properties include building regulations in with the contract with the consequence that if no building has been erected within a specific period of time, an obligation exists to transfer back ownership of the property. The higher regional courts impose strict conditions on clauses of this kind without attaching any significance to the fact that public cum legal purposes are thus taken into account. A practice which is from the point of view of civil law stipulated, or at least motivated, is in this way declared unacceptable by the higher regional courts. These examples show that in this field there is considerably more uncertainty in the law than in the transaction of conventional contracts between private individuals under civil law.

However, to summarise, it must be stated that in the execution and conception of public cum legal contracts, the notary plays an ever greater role in relation to co-operative administrative dealings and in this also has the particular function of protecting the interests of the private individuals involved as parties to the contract, inexperienced in such matters as they often are. Here, the notary is an intermediary between the private and the public cum legal institution entering into the contract and is therefore serving to administer public law in categories

105 MittRhNotK 1995,20

of civil law. By means of the notarial deed in this area, public cum legal relationships are directly re-interpreted. In this, the notary has a particularly responsible function imposed on him. In many cases, contracts of this kind have an extremely wide area of application and often relate to entire areas for building covered by a municipal body and are accordingly of considerable importance for the continued development of the relevant community. Moreover, the narrow range between contractual freedom and public cum legal framework regulations must be taken into account, and it is not always easy to tease this out. It is the function of the notary to take account of both sides - the legal commitment of the state and the contractual freedom of the citizen - and to bring these together harmoniously. *Grziwotz*[106] correctly points out that the practical solution is not always simple, as the state is intent on the promotion of public interests and, as such, cannot be a "normal" party to the contract. In addition, the notary must ensure that in this area, too, the contract represents a means of satisfying the various interests in a balanced way, thus containing a degree of inherent contractual justice. This is only possible where, to this extent, there is an intellectual balance of power pertaining, which assumes that in the course of executing this kind of contract, the notary has also instructed the individual citizens about the difficult public cum legal consequences and legal implications. In this area it is also the task of the notary to create the same degree of negotiating strength between the parties involved. Of course, given the kind of imbalance of power as exists between private individuals and the state, this is considerably more difficult that for contracts between private individuals.

E. The notary as part of the public cum legal registration procedure

I. General

In German law the importance of certain registers for legal transactions is particularly extensive. In practice, what are probably the most important registers are the commercial register and the land register, with their also being similarly-structured registers in existence such as the partnerships register, the register of associations and the register of co-operative societies, as well as the marriage property register in the field of family law.

In the first instance, the importance of these registers lies in the fact that they serve the aspects of the security and simplicity of legal transactions. Registers are primarily means of publication which guarantee the security of legal transactions by the provision of important information which should be made available to everyone in the interests of transparency and also for the protection of those persons involved in commercial life[107]. In a society based on division of labour and on a free market economy, along with the land register, the commercial reg-

106 DVBl. 1994, 1051

107 Compare with the commercial register, Limmer, The Commercial Register in the Countries of the European Union, Notarius International 1997, 32

ister represents a facility providing information which has a significant role to play in connection with important business situations. The information contained in the commercial register forms the basis for entering into contracts and other important decisions facing investors, enterprises and consumers. Accordingly, it is in the public interest that the register should be guaranteed to be as accurate, complete and up-to-date as possible, and that it should be as accessible as possible[108]. Both in connection with real estate property and also with companies, there are legal relationships of considerable importance for the legal position of a third party undertaking a legal transaction in connection with the property or company. If they affect only the formative intent of the owner of the property or the owner of the company, these legal relationships can, for the most part, not be reliably identified. For this purpose the information of importance for the legal transaction is set out and published reliably and with the legal protection of bona fide in the various registers or land registers, and in this way it serves the public interest in the protection of transactions[109].

In the Federal Republic of Germany these registers, of the utmost importance for legal transactions, are maintained by the courts. Entries in the land register and the commercial register our carried out by a person invested with the sovereignty of the court and are accordingly public cum legal acts of sovereignty.

However, the German legislature has guaranteed by means of certain formal requirements - notarial execution or authentication - that notaries are also involved in the early stages in the registration system. As a rule, entries in a land register or commercial register require official authentication or even execution and authentication as a deed carried out by a notary. Accordingly, the legislature has stipulated a specific form of deed as a basic condition for entries to be made in these registers and in this way has transferred a part of the responsibility for the content of the register over to the notary. So the notaries represent a part of the uniform registration procedure and at the same time fulfil their own public functions which, in the final analysis, serve the purposes of entry in the registers and therefore the interests of the state at the same time.

II. Summary of entries in the land register and commercial register

1. Land register

---

108 Compare with Zipp/Auer, Vom Handelsregister zum Firmenbuch (From the Commercial Register to the List of Companies), Vienna 1993

109 Compare also with Reithmann, Vorsorgende Rechtspflege durch Notare und Gerichte (Non-Contentious Administration of the Law by Notaries and Courts), Cologne 1989, 56

In German law, the land register has a variety of functions[110]. The task of the land register is to indicate clearly the existing relationships relating to real estate property in terms of ownership and the law. In particular, this means that the land register clearly sets out the conditions relating to ownership of real estate properties, identifies material encumbrances and establishes their order of rank relative to each other. In this connection, it is possible to differentiate between the following functions:

* Constitutive function:
  Every legal change applying to real estate properties on the basis of a legal transaction (transfer of property and commissioning, transfer, alteration of the content of or waiving of limited material rights) requires, in addition to the agreement of the parties to the contract, to be entered in the land register (§§ 873, 875, 877 BGB). Entry in the land register also has a constitutive effect. Accordingly, entry in the land register entails material legal force.

* Presumptive effect:
  Entry in the land register justifies the presumption that the right so entered exists and the person registered is also the person holding the actual right (§ 891 Section 1 BGB). Conversely, in respect of a cancelled right, the presumption is that it does not exist (§ 891 Section 2 BGB).

* Bona fide function:
  In German law, there is even regulation for purchase from the non-entitled party in §§ 892, 893 BGB. The person entered in the land register as the entitled party can effectively dispose of the property even if, in reality, he is not the actual owner. The purchaser effectively makes the purchase from the owner on the basis of the bona fide function of the land register.

In particular, the legal conditions prevailing in the former eastern block states show the problems which arise where a land register fails to function property or their is indeed no land register in existence. Real estate property and mortgage transactions in particular require a reliable land registration system. Investment policy is particularly dependent on secured credit which must in turn be based on a properly functioning public cum legal registration system. But it is not only the requirements of secured credit which make a land register essential - public interests also call for the same[111]. Public construction projects, the use of real estate properties for specific purposes and the disposal of investments impose many demands for transparency in respect of the legal relationships pertaining to land and property.

---

110 Compare with Meikel/Böttcher, Grundbuchrecht (Property Register Law), 8th edition 1997, indent B 10 ff.; Böhringer, Das deutsche Grundbuchsystem im internationalen Rechtsvergleich (The German Property Registration System in an International Comparison of Legislation), Zeitschrift für das Notariat in Baden-Württemberg (Journal of the Notariate in Baden-Württemberg), 1987, 25 ff.

111 As, correctly, in Meikel/Böttcher, Grundbuchrecht (Property Register Law), indent B 8

The legislature has imposed specific requirements not only on the quality of the land registry office and its officials, but has also created increased legal security at an early stage on the basis of notarial execution or authentication. Under the terms of § 29 of the Land Registration Act (GBO), an entry in the land register may only the made when evidence is provided of the grant of consent for entry in the register or the other declarations required for an entry to be made by means of public or publicly authenticated deeds. For the purposes of this regulation, public and publicly authenticated deeds are, almost without exception, recorded by notaries in Germany, the latter having the exclusive authority in this connection, to a great degree.

This sees the notary integrated into the registration system and similarly active at an early stage in connection with registration. Accordingly, he has specific responsibilities in respect of the accuracy of the register. He is a component part of the public cum legal registration procedure. Accordingly, his notarial duties also have a direct effect on the registration procedure and at the same time install the execution and authentication procedure "upstream" from the registration procedure.

2. The commercial register

With the commercial register, too, § 12 of the commercial code (HGB) stipulates that an application for entry in the commercial register and signatures intended for lodging with the court must be submitted in officially authenticated form. Furthermore, in the field of private limited companies, in the legislation for the individual types of company there are regulations by which articles of association must be executed and authenticated by a notary (§ 2 of the companies act - GmbHG, § 23 1 AktG). There are other important procedures in the existence of a company which must be notarially executed and authenticated, e.g. mergers of companies (§ 6 of the transformation act - UmvG), the splitting up of companies (§§ 125 along with § 6 UmvG), a resolution on the transformation of a company into another legal form (§ 193 Section 3 UmwG). It is therefore a characterising feature of the German private limited company that for setting up a legal entity (public limited company, limited liability company and the like) there is a constitutive requirement for entry in the commercial register. Similarly to the land register transaction, the legal entity only possesses legal capacity once entry in the commercial register has taken place on the basis of a statute executed and authenticated by a notary. And in connection with entries in the commercial register, there also exists an obligation to check the commercial register[112]. The purpose of the commercial register, namely that of reliably informing the public of the significant facts deemed important by the legislature, is reinforced in that a material cum legal significance is assigned to these entries: the very act of public recording in the commercial register itself becomes the

[112] Compare with, for example, Scholz/Winter, GmbHG (public limited companies legislation), 8th edition, Cologne 1993, § 9 c marginal no. 4 ff.; Schlegelberger, The Commercial Code (HGB), 5th edition, Munich 1973, § 8 marginal no. 20 ff.

substantial constituent fact for certain legal consequences[113]. Only on entry does the legal entity possess legal capacity. Accordingly, as with the land register, entry has a constitutive effect. So the legislature has guaranteed the function of notification and public recording of the commercial register in that, for particularly important deeds, no kind of legal effect at all is in force until an entry has been made. If an entry is present, then, as a rule, it can be assumed that the corresponding legal effect is also present. Entries are also constitutive in these cases. In addition, all entries establish their validity in the face of doubts. The involvement of the notary in the early stages of the registration procedure is also guaranteed in German company law by means of two different regulatory mechanisms:

* For simple registrations, there must be at least one officially notarised authentication provided;

* In addition, in the field of setting up private limited companies and similar important operations in the existence of a company, execution and authentication by a notary is stipulated as an absolute necessity.

In this way, the legislature ensures that the notary is involved as a necessary element in the registration procedure.

III. The specific functions of notarial execution, authentication and certification in the registration and land registration procedures

The need to involve the notary in the early stages of making an entry in a register or land register has a wide range of effects:

1. Checking legality

In so far as, under the terms of § 14 Section 2 BNotO, the notary must refuse to undertake his official activities where they would be incompatible with the obligations of his office, especially if his involvement is required for dealings by means of which clearly prohibited or improper purposes are being pursued, it is already guaranteed in the events leading up to entry in the register and land register that no deeds may form the basis of entry in a register where they come into conflict with this basic principle of propriety and legality.

2. Securing evidence

The notarial deed and the requirement for formality serve the purposes of clearly identifying a legal transaction with its entire content and establishing the content of the matter including all side agreements unambiguously and conclusively, and thus clearly separating them from non-binding preliminary negotia-

[113] Compare with Schlegelberger, HGB (commercial code), indent to § 8, note 1

tions, etc.[114] This securing of evidence takes place firstly in the interests of the parties, so as to make the content of the contract reliably identifiable both for the parties concerned and also for third and also to subject it to more demanding rules of evidence. However, for the land register and registration, and therefore in the public interest, a specific degree of security of evidence is achieved[115]. To the extent that execution and authentication by a notary is required, the entire legal content is subjected to more demanding rules of evidence and is therefore presented for both registration and land register transactions as a reliable basis on which entries may be made. Where only notarial certification is prescribed, at least the matter is presented in written form and a specific assurance of identity is guaranteed by the notary.

3. Guarantee of deeds with legally valid contents

Under the terms of § 17 BeurkG, the notary is obliged to identify the intention of the parties involved, to clarify the subject matter and to instruct the parties involved about the legal implications of the transaction. Accordingly, the process of execution and authentication carried out by the notary makes clear to the parties involved the legal effects their declarations will have. This becomes more important in relation to the degree of complexity of the legal regulations and the degree to which the conceptions of the law held by the parties involved diverge from the regulations[116]. In this way, on the one hand the situation is created by which before the entry is made in the register the parties involved are fully aware of the significance of their declarations, so that subsequent grounds for contestation are minimised. Moreover, according to jurisdiction, the notary must instruct the parties involved about the legal effectiveness of their legal transaction and must, as a basic principle, ensure that the correspondingly effective deeds are drafted in response to legal requirements[117]. In this way, it is also guaranteed for the purposes of the register that in respect of the basic situation surrounding the making of the entry, at least in the field of execution and authentication by the notary, the matter is based on legal transactions for which the involvement of the notary guarantees that they are compatible with the relevant legal standards and also with the jurisdiction of the supreme court. In this way, a clearly higher guarantee of content and effectiveness is achieved than for legal transactions concluded without the participation of a notary.

4. Ensuring identity

---

114 Compare with Keidel/Kuntze/Winkler, BeurkG, indent marginal no. 19

115 Compare with Reithmann, Vorsorgende Rechtspflege durch Notare und Gerichte (Non-Contentious Administration of the Law by Notaries and Courts), p. 125; MünchKomm-Kanzleiter, BGB 3rd edition, § 313 marginal no. 1

116 Compare with Keidel/Kuntze/Winkler, BeurkG § 17 marginal no. 43

117 Compare with Keidel/Kuntze/Winkler, BeurkG § 17 marginal no. 44; Huhn/v. Schuckmann, BeurkG § 17 marginal no. 33

Both in the course of execution and authentication and in the certification procedure, the notary is obliged to reliably identify the identity of the parties involved in the registration and land registration procedure (§ 10, 40 BeurkG). In this way the registry office or land registry office is freed from the necessity of establishing identity for itself.

5. Lessening the burden on the courts

The existing guarantees in the lead up to the registration procedure provided by notarial execution and authentication or certification result in a clear lessening of the burdens placed on the courts. For one thing, this results in a highly effective guarantee of content and effectiveness resulting in the reliability and accuracy of the entry in the register being guaranteed. Deeds which are invalid or which might be contested at a later time, thus calling into question the accuracy of the relevant entry in the register, are considerably less frequently found in the field of notarial activity than in other fields. In this way, the reliability and accuracy of the register is clearly improved. Moreover, the various obligations on the notary to check and instruct guarantee that the parties involved will be fully informed of the basic situation regarding recording and therefore also about the entry in the register. This results in a clear lessening of the burden on the courts, as otherwise, all of the duties undertaken by a notary leading up to the registration procedure would have to be handled by the court and its officials within the context of the registration procedure. This involvement of the notary provides, on the one hand, the advantage that the parties involved locally are, therefore, not required to present themselves personally at the locations of the registers and land registers which are accessible only at specific central locations. The possibility also exists for central registration activities without the protection offered to the parties involved being adversely affected by excessive distances. On the other hand, the registration staff can restrict their activities to simply checking the entry, thus working on the assumption of reliable registration documentation which has already been checked. This sees the actual registration procedure being rendered clearly more efficiently as well as being slimmed down.

F. The notary within the context of settling conflicts as a component part of legal contentious proceedings - The example of Sachenrechtsbereinigung

A relative novelty in the Federal Republic of Germany is represented by a particular procedure for settling conflicts which was introduced in the new federal states after reunification. In these new federal states there was the problematical situation in which, due to socialist legal regulations, ownership of buildings and ownership of land was separate, and different persons could hold ownership. These principles do not correspond to the BGB, as this applied in the original federal states prior to reunification. Accordingly, in 1995, by means of the SachRBerG act dealing with the settlement of matters of property law, the legislature is attempting to clarify these legal relationships through a complex procedure of claims held by parties involved against each other. This means that the owner of a building has a claim against the owner of the ground for the purchase of the ground or for the provision of a building lease in perpetuity, and this for half of the current market value. Here we clearly find a considerable potential for conflict between the parties involved. Over 300,000 such cases are said to exist. A relatively complex set of reservations and conditions for claims results in a complex arrangement between the parties involved becoming necessary. In the light of the profits arising due to reunification as brought about by the increase in land value, it is understandable that the conflict centred on the purchase of land by building owners and users is highly emotive, and also particularly heated as a result of the economic situation pertaining.

To lessen the load on court procedures, in the SachRBerG the legislature has created a procedure of notarial mediation in §§ 87 ff. of the act. This procedure of notarial mediation is a precondition for a court procedure (§ 104 SachRBerG). No person can bring an action before a court before a procedure of notarial mediation of this kind has been carried out. The procedure is initiated by submission of an application to the notary. The notary must invite the parties involved to a meeting for negotiation and can, just like a court, require submission of evidence and certificates, particularly within the context of the procedure. After the pleas have been submitted, the notary makes a suggestion for mediation in the form of a draft contract which can even acquire legal effectiveness in respect of a party failing to appear on the basis of a specific default proceedings. If agreement cannot be reached, the notary records the result of the procedure under non-contested and contested points in a final protocol which serves the purpose of concentrating the contentious material in the course of the subsequent court procedure.

The object of this process of mediation by the notary is the settlement of the conflict completely outwith the courts, but at least, the restriction of the conflict to specific points which will then be decided by the court. If, subsequent to this notarial mediation, the parties are brought into agreement, the notary must then record the contract. If no procedure of notarial mediation were envisaged, the courts in the new federal states would be placed under an enormous load. Each of the potential procedures would be the subject of a highly complicated

legal relationship which, within the context of a civil suit, it would be practically impossible to address properly due to a large number of unresolved points of conflict.

In particular, it is the familiarity of the notary with real estate property law which allows this procedure to produce a high degree of efficiency and minimise conflict. Within the context of this mediation procedure, as an impartial mediator, the notary has the task of making the parties involved fully aware of their legal position, thus making it possible for them to make use of their negotiating position. With the authority to demand evidence and to have certificates submitted, the content of the affair is largely clarified, so that even in the case of court proceedings, all of the required information has already been prepared by the notary, particularly in respect of the value of the plot of land.

Previous experience shows that it is this particular requirement by which a procedure of notarial mediation must be carried out before court proceedings which results in a considerable reduction of the load on the courts. As a precondition ensuring its reliability, any complaint within the context of clarification of property law will have been preceded by a process of mediation carried out by the notary. This means that the parties involved are obliged to make an attempt to have the conflict settled by the notary operating with the effect of a court before deciding to proceed to submit the contentious issue to an actual court.

Experience of this mediation procedure has shown that in all cases, even when it has come to court proceedings, there are still considerable results produced in lessening the burden placed on the courts, as a number of contentious points have already been settled equitably and peacefully between the involved parties in a procedure as complex as this. The court must now come to a decision only on a few points and no longer has to settle all of the contentious points.

On the basis of the previous, positive experience, it is worth considering that at least in complex matters in which the notary is particularly experienced, a procedure of notarial mediation should be employed prior to court proceedings, with this mediation resulting either in complete settlement of the legal dispute or, at least, a considerable reduction in the load represented by the court proceedings. On the strength of the particular experience of the notary in this field, the following subjects would be suitable: family law, inheritance law, company law and real estate property law.

G. Summary of Conclusions

The following can be identified as the most significant results for the German notariate:

1. The notary is the holder of a public office conferred on him by the state, with this office representing a special public cum legal relationship as a servant of the state, similar to that of the judge. However, he is at the same time the impartial

servant of the parties involved and must also represent their interests vis-à-vis the state. The fact that he is monitored by the state and is in all respects bound to observe legality allow fiscal and state duties to be delegated to the notary.

2. The special relationship by which he protects the rights of the private citizen is secured by the independence of the notary's position vis-à-vis the state as stipulated by constitutional law. The limits to the involvement of the notary in the service of the state arise out of the obligation on him to observe confidentiality and the data protection legislation in force under constitutional law, along with the basic right to pursue his profession without restriction, as enshrined in constitutional law.

3. The imposition on the notary of duties on behalf of the state is only permissible where it can be guaranteed that the relevant matter is closely enough related to the other duties of the notary within the context of non-contentious application of the law and especially the process of execution and authentication of deeds. No extraneous fiscal or legal administrative tasks may be imposed on the notary. From the basic right to exercise one's profession, it follows that public and fiscal duties may only be imposed on the notary to the extent that he still has at his disposal enough time to secure his own livelihood through the execution of his activities in the field of executing and authenticating deeds. The limit here is clearly exceeded when this results in the notary being unfairly overloaded with work.

Furthermore, fiscal and legal administrative tasks must not represent such a heavy workload for the notary that his position of independence from the state, as guaranteed under constitutional law, is compromised.

4. Obligations on the notary to co-operate with and to provide information for the state can only be justified where, in individual cases, the obligation to observe confidentiality and, in particular, the basic right of the citizen to have his personal details protected, are not compromised. Accordingly, obligations to provide notification may only be imposed where they rest on a legal basis and the basic principle of commensurability is observed, taking into account the obligation on the notary to observe confidentiality.

5. As yet, German law makes no provision for any system of calculation and raising of taxes by the notary. Only a considerable set of duties to provide notification provides assistance for the fiscal administration in the calculation of taxation. For reasons based on speeding up and facilitating procedures, it would be desirable for a system of tax assessment by notaries to be introduced on a voluntary basis.

6. In the expanding field of co-operative administrative acts, the notary is also an important intermediary between citizen and administration. For reasons based on the protection of the citizen, it is desirable that public cum legal contracts by means of which projects subject to administrative legislation are converted into a form subject to civil law should require to be executed and au-

thenticated by a notary. In the Federal Republic of Germany this is often the case under the terms of § 313 BGB.

7. The involvement of the notary in public cum legal registration procedures calling for the public execution, authentication and certification of deeds lends a greater degree of legal security and reliability to the register on the one hand, while also offering protection to the parties involved against the possibility of incorrect entries being made in the register. For this reason, it is essential that the notary should be involved in the procedure leading up to registration.

8. The experiences gathered in the Federal Republic of Germany in connection with the settling of disputes by reference to the notary as a preliminary to legal proceedings have been extremely encouraging. The state should be urged to make early use of procedures based on notarial mediation in other areas so as to reduce the burden on the courts, especially in those areas of law in which the notary can offer particular practical experience and knowledge: real estate property law, company law and family and inheritance law.

Topic II

Human Rights and the Role of the Notary

Reported by:

Notary Dr. Hanns-Jakob Pützer, Bonn

Introduction

Part 1: History and Development of the Concept of Human Rights

1. Legal sources for the international protection of human rights

a) Universal Declaration of Human Rights of the United Nations General Assembly, 10 December 1948 (UN Charter)

b) UNO Human Rights Covenants from 19 December 1966 (Human Rights Covenants CCPR and CESCR)

c) European Convention on Human Rights, 4 November 1950 with first amendment 20 March 1952

d) Regional human rights agreements in other continents.

2. Human Rights Regulations from the point of view of the Notary

a) Universal Basic Principles

aa) Rechtsstaatlichkeit / Rule of Law / prééminence du droit
(Preamble Para 3 UN Charter; Preamble Para 5 ECHR)

bb) Social Progress
(Preamble Para 5 UN Charter; Article 11 (1.1) CESCR)

cc) Freedom, Equality and Fraternity
(UN Charter Article 1)

dd) Anerkennung als Rechtsperson / Recognition of Legal Personality / reconnaissance de la personnalité juridique
(Article.6 UN Charter; Article.16 CCPR)

ee) Principle of equality before the law
Article 7 UN Charter; Article 14 (1.1), Article 26 CCPR1)

b) Institutional, state and legal procedural demands

aa) Legal protection guarantee
(Article 8 UN Charter)

bb) Judicial procedural guarantees, right to legal hearing / Procedural Guarantees in Civil and Criminal Trials,
"due process of law" (Article 10 UN Charter; Article 6 (1) ECHR; Article 14 (1) CCPR)

(1) Civil rights and obligations:

(2) Independence and impartiality

(3) competent, law-based court

(4) Summary:

cc) Social Security
(Article 22 UN Charter; Article 9 CESCR)

[1] Art. 3 CCPR and Art. 3 CESCR also contain special equal treatment guarantees for men and women, which do not require any special representation in the present context.

c) Guarantee of direct material rights
   aa) Ehe und Familie / Marriage and Family / Mariage et Famille (Article 16 (1) UN Charter; Article 12 ECHR; Article 23 CCPR; Article 10 (1) CESCR)
   bb) Eigentum / Possessions / Propriété (Article 17 UN Charter; Article 1 of the First Additional Protocol to ECHR of 20.03.1952)
   cc) Vereinigungsfreiheit / Freedom of Association / Liberté d' association (Article 20 UN Charter, Article 11 ECHR, Article 22 (1) CCPR)
   dd) Social Security (Article 25 UN Charter; Article 24 CCPR; Article 10 CESCR)

Part II Concept and protection of human rights in the "Bonner" Basic Law for the Federal Republic of Germany of 23 May 1949

1. General human rights obligations
   a) Preamble
   b) Human dignity and human rights, Article 1 GG
   c) Guarantee of the intrinsic nature of basic rights, Article 19 GG
   d) Guarantee of the permanence of basic rights, Article 79 (3) GG

2. General basic principles

3. State-organisational principles and judicial procedural guarantees

4. Substantive basic rights
   a) General personal rights, Article 2 (I) GG
   b) Marriage and family, Article 6 (1) GG
   c) Freedom of association, Article 9 (1) GG
   d) Ownership and right of inheritance, Article 14 (I) GG

Part III: The notary as guarantor and mediator of human rights in private law

1. Notary's office as functionary of preventive jurisdiction.

2. Protection of private rights by professional law (BNotO)
   a) Institutionalised form of the office of notary157
   b) Suitability and quality assurance
   c) The guarantee of citizens' access to notarial services

157 as the formulation in Bohrer, loc.cit. Rn 87.

3. Protection of private law through procedural law (BeurkG)

4. Protection of private rights through formulations of civil law

Part IV: Protection of human rights by the notary on an international level

1. Extension of the external co-operation of the notary's office

2. Harmonisation and development of internal notarial structures and standard obligations

3. International further training in the science of the notary's office.

Introduction

On 10 December 1948 the United Nations General Assembly ratified the Universal Declaration of Human Rights. The fiftieth anniversary of this significant date in the development of a peaceful and humane world order falls this year.

On 2 October 1948 the International Union of Latin Notaries (U.I.N.L.) was established in Buenos Aires[2].

At the XXII International Congress which takes place from 27 September to the 2 October 1998, also in Buenos Aires, the Union will celebrate its fiftieth anniversary.

It is not just the fact that the anniversaries of the UN Human Rights Charter and the International Union of Latin Notaries coincide that provides the impetus to discuss "Human Rights and the Role of the Notary" at the XXII UINL Congress. Far more important for the scientific examination of this subject are the numerous inner links that exist between the human rights demanded by the UN General Assembly and the functions of Latin notaries. Former UINL president André Schwachtgen's words are a suitable introduction to this relationship:

"The notary contributes to social peace in the countries in which he operates by attempting to achieve agreement between parties who have called on him in an effort to avoid confrontation.

As contract lawyer and independent witness with the task of safeguarding freedom of intent, while respecting the basic rules of equality, he protects the weak by controlling the strong and the ignorant by controlling those with knowledge.

As an independent judge over conflicting interests the notary protects people's activities and property: personal rights and rights of ownership as essential elements of the freedom of those who are entitled to them.

In short, by guaranteeing the legality and legitimacy of contractual exchanges, he ensures human dignity and makes every effort to reach a free and impartial decision. In this way the notary takes on the role of protector of human rights and basic freedoms."[3]

Part 1: History and Development of the Concept of Human Rights

Human rights are in no way the invention of one nation or one constitution. Instead, through long historical development and broad intellectual maturing, the

2 See Art.1.3 U.N.I.L. Statutes

3 André Schwachtgen, Introduction to "The United Nations, its international organisations, human rights and the notary's office" by F de Tinguy du Pouet, Brussels 1995

idea and concept of human rights has become a general fundamental conviction of human communities.[4]

The historic dimension, historical roots and supranational nature of this concept have already been explained by Alain Moreau in a speech at the closing session of the XX1 UINL Congress in Berlin.[5]

This speech will be referred to later, but will not be examined here.

The national report in question does not deal with the historical development of human rights in Germany. Although such an account could begin with the Constitution signed in the Paulskirche in Frankfurt in 1849, and include the Bismarckian Imperial Constitution of 1871, the Weimar Imperial Constitution of 1919 and the Bonn Constitution of 1949[6], it would be inappropriately unwieldy and time-consuming to present a national report to an international conference.

To come as quickly as possible to the crux of this theme for a notaries' congress, the legal sources concerning international law and the law of nations are introduced first (no 1 below), then the aspects of these legal sources relevant to notaries are examined (no 2 below). Finally, the way human rights are protected in the current German Constitution, ratified in Bonn in 1949 (Part II), is discussed.

1. Legal sources for the international protection of human rights

a) Universal Declaration of Human Rights of the United Nations General Assembly, 10 December 1948 (UN Charter)

On a world-wide scale, the UN is the standard-bearer for the international protection of human rights. The Universal Declaration of Human Rights agreed by the UN General Assembly on 10 December 1948 documents the first attempt to create an international programme for the protection of human rights.[7]

The weakness of the UN Human Rights Charter lies in the fact that it was simply a political declaration carrying no direct legal obligation[8]. However it has served as a guideline for formulating definitions of basic rights in countless sub-

4 Alain Moreau, The office of notary and the protection of human rights, speech on the 2nd July 1945 at the closing session of the XXI UINL Congress in Berlin, p5 in sect 1

5 Alain Moreau, as above

6 on the development of human rights in the history of the German Constitution: Hesse, Handbuch des Verfassungsrechts (HdbVerfR) 1980, 80p; Kleinheyer, Grundrechte – zur Entwicklung eines Begriffs, 1977.

7 Wolfrum (editor) Handbuch der Vereinten Nationen, 2nd ed 1991; Kimminich, Human Rights, Failure and Hope 1973, P 93

8 Frowein/Peukert, European Convention on Human Rights, EMRK-Kommentar. 2nd ed 1996, preamble Rn 2

sequent international agreements[9] and national constitutions[10] and was therefore able to contribute to the creation of international common law.[11]

b) UNO Human Rights Covenants from 19 December 1966 (Human Rights Covenants CCPR and CESCR)

The two Human Rights Covenants agreed on 16 December 1966 by the United Nations General Assembly mark a significant step forwards in making the UN human rights catalogue obligatory and enforceable:

The Covenant on Civil and Political Rights (CCPR)[12] sets out in more concrete terms the classic "first generation" human rights, which essentially guarantee personal freedom "from the State"; the Covenant on Economic, Social and Cultural Rights (CCESCR)[13] formulated a "second generation" system of basic social freedoms which could only be achieved "through the State".[14]

Both covenants were signed in 1992 by 120 countries.[15] Therefore two-thirds of the international community at that time gave their written agreement to accept these covenants as a minimum standard of universal human rights, committed themselves to their implementation on a national basis and agreed to submit to UN observation.[16]

Nevertheless even the UN Human Rights Covenants show deficiencies in control and enforcement: the countries which signed have a duty of reporting (Article 40 (1) CCPR) and are allowed general comments to the Human Rights Committee (Article 40 Section 4 CCPR); but these contain no legal obligation. Individual petitions to the Human Rights Committee are only scheduled for the optional section of the CCPR and so far less than half of the signatory countries are bound by it.[17]

9 Magiera, in: Menzel/Ipsen, Voelkerrecht, 2nd ed 1979, p123; von Muench, Grundgesetz-Kommentar (GG), Vol 1, 4th ed 1992, Prel.rem. 1-19, Rn 76

10 See below, Part II 1.b

11 Ipsen, Völkerrecht, 3rd ed 1990, § 44 Rn 35; von Münch, loc.cit.

12 International source: UNTS Vol 999 p171; national source in Germany: BGB1 1973 II p1534; came into force in Germany on 03.01.1976, BGB1 1976 II 426

13 International source: UNTS Vol 992 p3; national source in Germany: BGB1 1973 II p1570; came into force in Germany on 03.01.1976, BGB1 1976 II 1068

14 according to Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 1993, Introduction pXVIII

15 how the covenants are working in Germany: Geiger, Grundgesetz und Voelkerrecht, 1985 §§ 82,84; Tomuschat, VN 1978, p1 ff

16 according to Nowak, CCPR Commentary, Preface XI, Introduction XVII

17 see v. Münch, GG, prel. rem. Art. 1 – 19, Rn 77 m.w.N.; Tomuschat, in: Berberich/Holl/Maass (ed.), Neue Entwicklungen in öffentlichen Recht, 1979, 9ff (20)

c) European Convention on Human Rights, 4 November 1950 with first amendment 20 March 1952

The efforts to formulate a specifically European Human Rights Charter began even before the adoption of the UN Human Rights Charter.[18] Of the 40 member states of the Council of Europe, 34 joined the European Human Rights Convention on 6 October 1996.[19]

In comparison to the UNO Human Rights system, the European Human Rights Convention has a smaller sphere of control, but is able to exert much more influence on domestic law.[20]

The European Human Rights Convention has the legal validity of an international agreement, and with the supplementary declarations and amendments has direct force of law in the signatory countries, in some cases as part of the constitution (Austria), as equivalent to the constitution (Switzerland), as above the constitution (Belgium, Luxembourg, Netherlands, France), or as domestic law (Germany, Italy, Greece, Turkey, Cyprus).[21]

The convention creates mutual obligations between the Member States and also personal rights for their citizens. With the setting up of the European Human Rights Commission and the European Court of Human Rights, institutions and processes were put in place which protected human rights against national law, without recourse to national courts and institutions[22]. The Council of Europe itself has the mission of protecting human rights – supported in law by the Convention with its amendments and strengthened politically through the influence and respect of its members, and this extends far beyond geographical boundaries and the sphere of international law, as was shown recently in the breakdown of the political system in Eastern Europe.

---

18 on the history and conception of the ECHR: Frowein/Peukert, EMRK-Kommentar, Intro Rn 1 ff; Oppermann, European Law, 1991, § 2; Robertson, The European Convention for the Protection of Human Rights, BYIL 27 (1950), 145-163.

19 Frowein/Peukert, EMRK, intro Rn 2; came into force in the Federal Republic of Germany on 03.09.1953, cf BGB1. 1952 II, 14, 686, last amendment BGB1 1989 II, 546; the Convention came into force in the former East Germany on reunification 03.10.1990

20 von Muench, GG, Prel. rem. Rn 78

21 cf Frowein/Peukert EMRK-Kommentar, Intro Rn 6; Polakiewictz/Jacob-Foltzer, The European Human Rights Convention in Domestic Law, HRLJ 1991, 65 ff and 125 ff; the position of the Convention in German domestic law, von Muench, GG, Prel.rem. Rn 80

22 von Muench, Basic Law Prel. Rem. Art 1 – 19, Rn 76-78; Frowein/Peukert, EMRK, intro Rn 3-5

d) Regional human rights agreements in other continents.

International human rights agreements based on the fundamental concept of the European Human Rights Convention have come into being in other continents.[23]

In America, following the American Declaration of Human Rights and Duties in 1948, the American Convention on Human Rights was signed on 22 November 1969. This came into force on 18 July 1978 and applied to 20 of the Member States of the Organisation of American States (OAS) [as at Spring 1992[24]]. The Inter-American Commission and the Inter-American Court were created, comparable to similar human rights bodies in Europe.[25]

The African Charter on Human and People's Rights (ACHPR 'Birgul Charter[26]) was signed by 40 of the 51 Member States of the Organisation for African Unity (OAU)

[as at Spring 1992[27]]. The Birgul Charter also contains so-called "third-dimension fundamental rights" (development, peace, environment)[28], but has only set up an international commission, not an international court.[29]

2. Human Rights Regulations from the point of view of the Notary

Confronted with the concept of human rights, most people think primarily of the protection of fundamental rights to life, freedom and safety, the banning of slavery and torture, protection from deliberate persecution, arrest or punishment, the protection of intellectual freedom (freedom of conscience and religion, opinion and information), as well as the right to vote freely and be eligible for political office. If one's interpretation is limited to these aspects, it is difficult to see a connection with the notary's duties.

Although these "spectacular" aspects indeed form the heart of the "first generation human rights", they cover only a part of the modern human rights catalogue and also only a part of the essence of a modern state constitution. The catalogue of international human rights calls for "second generation human rights",

---

23 comparison of the different continental human rights conventions: Konrad (editor), Grundrechte im Verwaltungsverfahren – Internationaler Menschenrechtsschutz, 1984 243 ff; Partsch, EuGRZ 1989, 1 ff

24 source: von Muench, GG, Prel.Rem. 1-19 Rn 85)

25 text: ILM 1970, 673 ff; German translation: EuGRZ 1980, 435 ff; details from Buergenthal/Norris/Shelton, Protecting Human Rights in the Americas, 2nd ed 1986; Ipsen, Voelkerrecht, 3rd ed 1991, § 45 III Rn 15 ff; Bartsch, NJW 1991,1390/1393

26 Birgul = capital of Gambia = location of draft of the charter

27 source: von Muench, GG, Prel.rem.1-19 Rn 85)

28 see Riedl, EuGRZ 1989, 9 ff

29 text: in ILM 1982, 59 ff; German translation: EuGRZ 1990, 348 ff; content: Ipsen, loc.cit., § 45 IV Rn 19 ff; Kunig/Benedek/Mahalu, Regional Protection of Human Rights: The Emerging African System, 1985

which demand very specific social and economic rights, and contain concrete demands under universal institutional principles for the organisation of a modern, democratic and socially aware State under the rule of law, in which people have an equal opportunity to share and develop their social and economic rights.

The problems posed for a lawful state and judicial system by this area of human rights can no longer be met by the classic branches of jurisdiction dealing with attacks or repression or deciding disputes, through criminal or civil jurisdiction. Now we are entering the field of preventive and voluntary jurisdiction, where the notary can take on a whole range of responsibilities.[30]

The examination of this area of the human rights catalogue reveals ways in which it is relevant to the brief and duties of the Latin notary. The statements which are relevant to the notary fall into three categories:

- commitment to the **universal basic principles** for the realisation of human rights [see a) below],
- principles on which **state, institutional and procedural** requirements are based[31] [see b) below],
- the **guarantee of substantive human rights**, for which the notary already has clearly defined jurisdiction [see c) below].

The following explanation of these aspects is arranged according to the subdivisions and content of the UN Human Rights Charter, since this forms a model for all later human rights catalogues and also represents the most comprehensive body of law covering the widest area. Where other human rights agreements over and above the UN Charter resolutions discussed at 2) are relevant to the notary, these are dealt with at the appropriate place.

a) Universal Basic Principles

aa) Rechtsstaatlichkeit / Rule of Law / prééminence du droit
(Preamble Para 3 UN Charter; Preamble Para 5 ECHR)

The preamble to the UN Charter commits itself in the most universal and fundamental sense to the rule of law, "because it is essential to protect human rights through the rule of law…". Paragraph 5 of the introduction to the ECHR binds the signatory countries to respect the supremacy of the law and also contains a collective guarantee of the rights contained therein.[32]

---

30 cf Topic 1 of the XX UINL Congress in Cartagena 1992: "Contribution of the Notary to Non-Contentious Jurisdiction" with the national reports and the report of the international coordinator.

31 cf Nowak, CCPR, Introduction Rn 4: "institutional protection by providing procedural guarantees and implanting specific legal institutions".

32 on the aspect of legal guarantees in the preamble: Frohwein/Peukert, EMRK, Preamble Rn 4,5

The rule of law, however, must not become a "domination by the law". The state must take care that people do not become simply objects of the authority of the state. The text of the German literature on fundamental rights and international law sees such treatment as an affront to human dignity ("the individual degraded to a mere legal object"). The state must ensure that the individual citizen remains a "living member of the lawful community", and does not become a "powerless subject".[33]

It is especially in developed countries with highly complex legal systems that one can see excessive demands made on the individual by legislation which he can no longer comprehend; this danger increases where supranational law – as in the European Union – is increasingly enforced on citizens of individual countries. The precautionary legal measures which the notary can take are the best way to ensure that the well-meaning "rule of law" does not turn into the opposite.

bb) Social Progress
(Preamble Para 5 UN Charter; Article 11 (1.1) CESCR)

Paragraph 5 of the preamble to the UN Charter with reference to " the dignity and worth of human beings…" calls for "the promotion of social progress and better living conditions in greater freedom…". The signatory countries to the International Covenant recognise economic, social and cultural rights in a much more material way.

In Article 11 (1) of the CESCR "…the right of every person to a reasonable standard of living for himself and his family…as well as a continual improvement in living conditions"; this is followed by an additional commitment that "the signatory countries…take steps to guarantee the realisation of this right…".

Human rights are therefore not restricted to a "guarantee to maintain the status quo", but call for sharing in further social and economic development to open up greater areas of freedom for people. This aspect is detailed more fully in Article 22 of the UN Charter and Article 9 of the CESCR, which deal particularly with social security.[34]

---

33 on German Constitutional Law: von Muench/Kunig, GG, Art 1 Rn 22,23; Duerig, Der Grundrechtssatz der Menschenwuerde, AoeR 81 (1956) 117/127; permanent administration of justice at the Federal Constitutional Court, especially BVerfGE 30, 1/25; 50, 166/175; from international w: Nowak, CCPR, Art 16 Rn 1

34 see b) and cc) below

cc) Freedom, Equality and Fraternity
(UN Charter Article 1)

Article 1 of the UN Charter puts freedom, equality and fraternity at the head of the catalogue of human rights. According to this, "all men are born free and with equal dignity and rights…and should meet each other in a spirit of fraternity".

Freedom means physical and intellectual freedom, and intellectual freedom means especially freedom of will and decision, which should be protected when looking after the legal interests of the individual. Part of the principle of equality is the demand for equal opportunity for individuals in respect of their rights. The concept of fraternity is linked to an understanding and balancing of interests.

The guarantee of legal freedom of will and decision, of equality of opportunity and the understanding and balancing of interests are key functions of the notary in dealing with legal matters. contribution the notary can make by creating a system of legal co-ordinates for people's everyday life has already been pointed out in the words of André Schwachtgen quoted in the introduction.[35] The mechanisms by which the notary's professional procedures deal with these demands in individual cases are detailed in Part III.

dd) Anerkennung als Rechtsperson / Recognition of Legal Personality / reconnaissance de la personnalité juridique
(Article.6 UN Charter; Article.16 CCPR)

According to Article 6 of the UN Charter "all people .... everywhere are entitled to recognition as legal personalities", and according to Article 16 CCPR "everyone has the right to be recognised as having legal capacity".

This formula is not explicitly recorded in the ECHR and the German constitution, but is derived from human dignity as a matter of course[36]. It includes the demand for protection and preservation of human "subject quality" ("legal subjectivity"[37]) as a "participating member of the legal community", which has already been mentioned above.[38]

ee) Principle of equality before the law
Article 7 UN Charter; Article 14 (1.1), Article 26 CCPR[39])

---

35 see Footnote 2 above

36 for ECHR: Nowak, CCPR, Art 16, Rn 1, mwN; for German constitution: see information in Fn. 31.

37 so Nowak, loc.cit.

38 see "Rule of law" under aa).

39 Art. 3 CCPR and Art. 3 CESCR also contain special equal treatment guarantees for men and women, which do not require any special representation in the present context.

In Article 2 (1) and (2) CCPR as well as in Article 2 (1) and (2) CESCR, the contracting States undertake "to guarantee" the rights acknowledged in these covenants "... to all persons in their region and subject to their rule ..." (in addition to further enumeration) "... without differentiation such as, in particular, ... social origin, assets ... or other status" and "... to take the legislative and other precautions, in accordance with their constitution, which are necessary to make these rights effective ...".

Article 7 of the UN Charter and, worded almost identically, Article 26 (1) CCPR put into concrete terms the principle of equality before law and legislation: "All people are equal before the law and are entitled without differentiation to equal protection by the law." According to Article 26 (2), CCPR has "... to guarantee equal and effective protection of the law to all people against all discrimination, particularly with regard to ... social origin, assets ... or other status ...".

Article 14 (1.1) CCPR contains, finally, a special guarantee of equal judicial treatment ("All people are equal before the law"), which is not to be found in any other human rights treaty[40] and going beyond the wording, it applies not only to courts in the narrower sense, but to all authorities with judicial competence in accordance with the respective right of domicile, who are obliged to be independent and impartial[41].

From existing guarantees, in addition to a general human rights decree, the State can be requested to create such institutions and mechanisms, which guarantee that people have equal legal protection and – like the notary's office – equal legal service. Consequently, this article also forms the transition to the second category of the aspects of the UN Human Rights Charter which is dealt with here.

b) Institutional, state and legal procedural demands

aa) Legal protection guarantee
(Article 8 UN Charter)

According to Article 8 of the UN Charter "everyone is entitled to effective legal protection before the competent domestic courts....".

In comparison with the article under consideration, the focus is not on "equality", but on "effectiveness", therefore on effective legal protection, which must be provided not only generally, by the law, but within the process of legal prosecution "before the competent domestic courts". As the remaining text of this article shows, what is meant by this is primarily the guarantee of legal protection in the area of "defence rights", since this legal protection should be di-

40 Nowak, CCPR, Art. 14 Rn 5.

41 Nowak, CCPR, Art. 14 Rn 8.

rected "towards" all dealings", which "violate the basic rights to which people are entitled according to the constitution or the law".

However, the relevant domestic jurisdiction also includes – as explained – preventive "voluntary jurisdiction", in which the documentary and legal services of the notary's office play a considerable part. The legal systems, which are familiar with the institution of voluntary jurisdiction, have recognised the notary's office as the most effective institution in the area of human civil rights protection, installing it as part of jurisdiction in the forefront of dispute jurisdiction. In the light of this, Article 8 of the UN Charter can also be understood as an appeal for the creation of such legal institutions, which prevent the violation of basic civil rights and aid their implementation[42].

bb) Judicial procedural guarantees, right to legal hearing / Procedural Guarantees in Civil and Criminal Trials,
"due process of law" (Article 10 UN Charter; Article 6 (1) ECHR; Article 14 (1) CCPR)

Article 10 of the UN Charter protects the right to legal hearing. As a result of the significance and leading role of this article, and also those principles which characterise the structures and procedures of the Latin notary's office, its wording is cited in full:

"Each person is entitled in full equality to equitable public proceedings before an independent and impartial court, which must decide on his rights and obligations or on any criminal accusation made against him".

(1) Civil rights and obligations:

The last part of this clause shows – not expressly, but in keeping with the sense - that the UN Human Rights Charter addresses not only criminal jurisdiction and legal protection against state sanction or repression, but all the categories of state jurisdiction, including those which serve the recognition and implementation of civil rights.

Much more clearly, Article 6 (1.1) ECHR and Article 14 (1.2) CCPR guarantee to each person an "... (only CCPR: "competent"), independent, impartial court based on law, which must decide on his civil rights and obligations (English and French version of the ECHR, as well as French version of the CCPR: "civil rights and obligations"/"droits et obligations de caractère civil"; the English version of the CCPR only talks about "rights and obligations") and on any criminal accusation brought against him".

42 cf. also the resolution by the "Union Internationale des Magistrats" at their congress in Macao of 23.-27.10.1989, Part IV.1.b); also the resolution made with the collaboration of the European Council on the occasion of the 2nd Notarial Colloquium in Keszthely, see Part IV.1.a).

Notwithstanding the different wordings and interpretations of the UN Charter, ECHR and CCPR, there is agreement in international literature as well as in the decision-making procedure of the competent human rights commissions and courts of justice, that all aforementioned human rights catalogues and treaties include and protect all conceivable rights, entitlements and obligations of civil law and also demand for them the judicial and procedural guarantees available[43].

(2) Independence and impartiality

In accordance with the definition of the European court, independence demands "... for the type of appointment and the period of office, the existence of guarantees against external influence ..." as well as, finally, that the holder of office "... can also be regarded as independent with regard to his outward appearance ("justice must not only be done, but it must also be seen to be done")..."[44]. In concrete terms, this means

- No influence by executive or legislative State bodies, parties or social groups[45],
- Freedom from instruction and absence of any accountability during exercise of office[46],
- A certain term of office, during which the holder of office cannot be removed from office for legal reasons or at least in effect[47].

Here, appointment by executive bodies following prior consultation with the interested circles on the basis of generally established selection criteria is considered to be a specific sign of the independence and impartiality of the appointed holder of office[48], a procedure by which, in a large number of countries with a civil rights system, notaries are also appointed, particularly in the Federal Republic of Germany[49].

Impartiality is functionally connected with "independence": the latter is a prerequisite for the former. Furthermore, impartiality does not refer to the relationship of the holder of the decision-making office to the appointment bodies and

---

43 e.g. Frowein/Peukert, ECHR, Art.6 Rn 1 mwN for UN Charter and the history of its origin, Rn 6, 15, 16; Nowak, CCPR, Art.14 Rn 3, 10-12; Matscher, The procedural guarantees of EMRK in civil rights matters, 1980 ÖZÖR 8.

44 "Campbell and Fell" GH 80 clause 76/78 = EuGRZ 1985,534; Frowein/Peukert, EMRK, Art.6 Rn 125.

45 Nowak, CCPR, Art.14 Rn 17; Frowein/Peukert, EMRK, Art.6 Rn 126; std. Rspr of GH, e.g "Ringeisen" GH 13,39 section 95; "Benthem" GH 97,17 section 40 = EuGRZ 1986,299.

46 Frowein/Peukert, loc.cit.; "Ringeisen" GH 13,39 section 95; "Schiesser" GH 34,12 section 29 = EuGRZ 1980,202.

47 Nowak, loc.cit.; Frowein/Peukert, EMRK, Art.6 Rn 126; "Campbell and Fell" GH 80 section 76/78 = EuGRZ 1985,534; "Engel et al" GH 22,27, section 68 = EuGRZ 1976,421.

48 Frowein/Peukert, EMRK, Art.6 Rn 126; "Lithgow et al" GH 102,73 section 201, 202 f.

49 See also Part III.

social forces in general, but to the subjective attitude to the parties in the proceedings. The judge – as well as the notary – should prevail over the parties without consideration of personality, and should lead the proceedings and make decisions to the best of his knowledge and belief[50].

(3) competent, law-based court

"Court" in the sense of human rights treaties ("tribunal") means not only the classic "courts exercising civil and criminal jurisdiction", but all judicial, independent and impartial bodies entitled to adjudicate, who decide in accordance with law and justice on the basis of a regulated procedure vested with appropriate guarantees[51].

The required legal principle also serves to protect independence and should at least regulate the entire organisational structure, the appointment of holders of office, and their substantive and territorial jurisdiction[52].

All the last-named prerequisites are given in the Latin notary's office, which is established here on the basis of the respective notarial laws, which contain all required regulations and act on the basis of authentication laws, which regulate in detail the procedures to be observed by the notary.

However, the only characteristic not given is that of an "adjudication body", that is, a court with a judgmental function, which makes decisions in disputed matters. This contradicts the origin of the notary as an institution of voluntary jurisdiction with the task of preventive legal service and avoidance of dispute, which is upstream of the courts' function of "decision-making to rule on the dispute".

(4) Summary:

Naturally, the establishment of a Latin-type notary's office cannot be assumed either from the UN Human Rights Charter in general or from this article. However, since all States with a Latin-German legal system, which is based on written rights, on the existence and recognition of conclusive and enforceable public documents and on the attestation of civil rights in public registers, have divided the protection of human rights in the area of civil law between preventive protection by institutions of voluntary jurisdiction and, in the event of conflict, their assertion and implementation in disputed jurisdiction[53], the recognition of the supporting characteristics of the Latin notary's office can be taken

---

50 Nowak, CCPR, Art.14 Rn 18; Frowein/Peukert, EMRK, Art.6 Rn 129; "Albert, Le Compte" GH 58,17 section 32 = EuGRZ 1983,190.

51 Constant adjudication practice of the European Court for Human Rights, e.g. "Belilos", "Campbell and Fell", "Ringeisen" loc.cit., further evidence with Frowein/Peukert, EMRK, Art.6 Rn 122 in Fn 512; Nowak, CCPR, Art.14 Rn 15.

52 Nowak, CCPR, Art.14 Rn 16; Frowein/Peukert, EMRK, Art.6 Rn 122.

53 For comparison of Civil Law Systems and "Common Law Systems: Pützer, Notary's office in the Civil Law System, in: Das moderne Notariat (ed: Federal Notaris' Chamber), Cologne 1993, p. 1 ff.

from the articles, examined here, of the UN Human Rights Charter, the European Human Rights Convention and the International Covenant of civil and political rights – which contain the most elementary **judicial institutional and procedural guarantees** for the protection of human rights:

Independence and **impartiality** also characterise the Latin notary's office and the notary's position in proximity to the judge. **Equality** and **fairness** also inform the procedures to be performed by the notary for the interested parties, particularly documentation procedures. Of course, these proceedings are not public in the sense that they are open to the public. In the documentation procedure, which serves to create individual legal and contractual relationships, publicity of the proceedings is suppressed by the dictates of confidentiality and silence, which for their part serve to protect the private sphere as part of the general right to live one's own life and of human dignity. However, the notarial proceedings are regulated and formulated by legal publication, and the **result of the proceedings**, being the notarial document, is recognised by the state as a **public document**, which has value as evidence in all state – official and judicial – proceedings. The private rights and entitlements established in the notarial document can – like court judgements – be provided by the notary with **power of enforcement**, which is seen as a decisive contribution to the effective implementation of the civil rights protected by the human rights catalogues.[54]

At the same time it can be established that the Latin notary's office, wherever it is used with its preventive functions and responsibilities as a preliminary to dispute decisions or where it is already used when making decisions regarding disputes, corresponds to the institutional and legal procedural requirements made by all human rights catalogues and treaties of international law. This is significant on the one hand, because the demarcation between the functions and responsibilities of voluntary ("preventive") and disputed ("civil and criminal") jurisdiction cannot be made "razor-sharp", as is shown, for example, by the granting of enforceable executions already allocated to the area of dispute or the declaration of enforceability of documents[55].On the other hand, this is of greater importance for the future of the Latin notary's office, because in those States with written civil law, appropriate responsibilities, which were previously assigned to the courts, are increasingly being transferred to the Latin notary's office as the provider of preventive legal service, to relieve state jurisdictions[56].

cc) Social Security (Article 22 UN Charter; Article 9 CESCR)

54 Frowein/Peukert, EMRK, Art.6 Rn 52 for the keyword "Compulsory enforcement procedure"; cf. "Sporrong u. Lönnroth" GH 52,29 section 80 = EuGRZ 1983,523.

55 Examples in Part III.1.

56 see also Part III. 1.

To conclude the category of "Institutional state requirements", Article 22 of the UN Charter and Article 9 CESCR are discussed, these being devoted to social security:

According to Article 22 of the UN Charter "each person.... as a member of society is entitled to social security; he is entitled, through internal measures and international collaboration and taking account of the organisation and aid of each state, to enjoy the economic rights that are indispensable to dignity and the free development of personality"[57]

No article shows more clearly that the Human Rights Charter and Treaties do not content themselves with creating rights of defence against the violation of fundamental values and freedoms or guaranteeing people a minimum existence level. The basic human rights also include the opportunity to participate in the economic social and cultural development of society. In the German precept of constitutional rights, participation in the "general increase in prosperity" is not just categorised as a "welfare state principle" but as part of human dignity.[58]

These internal connections between social and economic security and human dignity, as well as the general right to live one's life, are even expressed word-for-word in the second half of Article 22 of the UN Charter.

As the article does not only postulate social security as a material objective, but specifies the means to be used for its guarantee by the State ("internal measures", the "international collaboration" and use of the "state organisation"), the institutional and state-organisational character of this article becomes clear. The UN Charter therefore contains a concrete national **Organisation and Action Programme** for the creation of such institutions, which guarantee and accompany on a practical level the development of personality, economic rights and social security.

The notary's responsibilities in the area of voluntary jurisdiction are categorised in German law under the postulate of the welfare state in accordance with basic law Article 20 (1).[59]

According to this, the postulate of the welfare state requires that in private law there is a balancing of the disadvantages of private autonomy and contractual freedom, which, in the hands of a legally experienced and economically strong contractual partner, can lead to disadvantage, financial losses and, finally, to re-

---

57 Art. 9 CESCR is identical to the first part of the clause and, in addition, expressly includes the right to social security.

58 Von Münch/Kunig, GG, Art. 1 Rn 30 mwN; BVerwGE 14, 294 (296 f); 69, 146 (154); BverfGE 25, 307 (317 f).

59 cf. Reithmann, Vorsorgende Rechtspflege durch Notar und Gerichte, preface p. V., p. 1 ff, 123 ff; Langhein, Mitwirkung des Notars im Rahmen der nicht-streitigen (freiwilligen) Gerichtsbarkeit, German report in Theme I of the XX.U.I.N.L. Conference, Cartagena 1992, p. 1; Baumann, Die öffentlichen und sozialen Funktionen der Notariate in den Ländern der europäischen Union, Notarius International 1996, 20 (22, 26 f); International co-ordinator's overall report, Dr. Horst Heiner Helge in Theme I. of the XXI. U.I.N.L. Congress in Berlin, 1995, p. 17, 29 ff, 68 ff.

striction of freedom for the economically weaker and legally inexperienced contractual party. In this area of tension, the notary's function is as the provider of preventive legal service in ensuring a just, reliable and peaceful ordering of private legal relationships[60], in the impartial "exploration and prevention of conflict"[61], whereby social peace between private individuals as well as between private individuals and the State is ensured[62].

c) Guarantee of direct material rights

Finally, the human rights catalogues and treaties demand individual material human rights that are to be considered as particularly essential. A considerable number of these human rights lie within the Latin notary's central areas of activity. Thus, through their activities of support, consultation and documentation, the notaries make considerable contributions on a daily basis to the implementation, preservation and protection of these human rights:

aa) Ehe und Familie / Marriage and Family / Mariage et Famille (Article 16 (1) UN Charter; Article 12 ECHR; Article 23 CCPR; Article 10 (1) CESCR)

All the above-mentioned articles require, with the same orientation and to a large extent with identical wording, that men and women have the right "to **enter into marriage** and **establish a family"** and stress that "when entering into marriage, during the marriage and in the event of divorce, men and women have equal rights and obligations". Furthermore, the necessity of "free and full agreement of will" on the part of both future spouses to enter into the marriage is emphasised[63].

In addition, Article 16 (3) UN Charter, Article 23 (1) CCPR and Article 1 CESCR contain a special institutional guarantee[64] with regard to the **family**, which demands "as a natural and fundamental nucleus of society ... entitlement to protection and assistance from society and state". Entering into marriage and establishing a family materially represent two independent human rights, and the latter includes, in particular, the right to have and raise children[65].

Through entry into the status of marriage, all the regulations issued by civil legislation for marriage and family law come into force for the married couple, whilst at the same time the basic laws of inheritance change. Legislation has not

60 Römer, Notariatsverfassung und Grundgesetz, p. 43.

61 Bohrer, Das Berufsrecht der Notare, Munich 1991, p. 21 RZ 66

62 Baumann, The office of the notary – his public and social functions, communication by Rhenish Notaries' Chamber 1996, 1 (21).

63 Omitted in ECHR, but inherent to its regulatory purpose, cf. Frowein/Peukert, EMRK, Art.12 Rn 4.

64 Likewise Nowak, CCPR, Art.23 Rn 1.

65 Frowein/Peukert, EMRK, Art.12 Rn 6.

only standardised the legal conditions of marriage, but has also established all the legal determinants for the period of the marriage as well as the conditions and regulations for its annulment and the legal consequences of its annulment. These regulations and the legal and financial consequences of marriage and divorce are known to only a few of the couples entering into marriage.

The required "free and full agreement of will" of the future spouses includes not only the emotional and social prerequisites, but also the knowledge and assessment of the legal and financial consequences of marriage, as well as the legal marital possibilities of contractually adapting these consequences if necessary to the individual legal, financial and social situation.

Through marital, family and inheritance information, consultation and contract stipulation, the notary's office makes a substantial contribution to ensuring free decisions of intent by the participants, to legally safeguarding and protecting the marriage and protecting the married couple from undesired legal consequences, including those that may occur in the event of divorce. The most important instrument in this regard is the **marriage contract**[66].

Marriage contracts can (according to German civil law) be made **before marriage**, largely understood by the participants as a condition of marriage, **during marriage,** in order to adapt the legal and financial conditions of the marriage to the level of development that has taken place in the meantime, as a so-called "**separation agreement**" to preserve the legal and financial status quo during a marital crisis and to distribute fairly the consequences and risks of a final separation, which can quite possibly contribute towards stabilising the marriage, and finally as a "**consequences of divorce agreement**", to prepare a divorce that is actually imminent.

Possible subjects for regulation in marriage contracts are (according to German civil law) agreements regarding marital property status, "maintenance settlements" (distribution of old age provision claims arising during the marriage, particularly pension entitlements), spouse and child maintenance. Further subjects include, in divorces, the distribution of financial gain occurring during the marriage and the physical distribution and allocation of property, regulations concerning the marital home and proposals for the custody of children.

The "consequences of divorce agreement" deserve particular emphasis: German civil law makes available to those involved a simplified, accelerated and particularly low cost "**combined separation process"** (§ 630 a ZPO), whose implementation assumes the contractual settlement of the essential consequences of the divorce in a public document. No further decision about these matters is then required by the family court, whose function is restricted in this respect to control of morality and abuse. In practice, consequences of divorce agreements are prepared and documented so extensively by the notaries, that the family

66 Cf. in general Grziwotz, Marital and family law, marriage contracts, in: Beck`sches Notarhandbuch, 2nd edition, Munich 1997.

court only needs to perform the statement of divorce as such, and to decide on the custody of the children from the marriage and the distribution of support claims under public law.

The provision and documentation of marriage contracts is one of the legally, economically and socially most demanding tasks of the notary. In these cases, the development of contractual solutions is frequently overlaid with a particularly strong degree of emotion, and the notary often acts as a mediator between the parties. Through this activity, the notary's office contributes both to protecting the human rights of the marriage partners and to protecting the marriage and family as a social institution.

The notary's responsibilities in the area of family law also include, within the context of adoption procedures, documentation responsibilities for adoption applications, as well as the necessary statements of agreement by the relatives and spouses involved in the adoption procedure[67]. Investigations into the consequences of modern reproductive drugs[68] show that in the area of family law further fundamental responsibilities are being transferred to and performed by the notary's office.

bb) Eigentum / Possessions / Propriété
(Article 17 UN Charter; Article 1 of the First Additional Protocol to ECHR of 20.03.1952)

Article 17 of the UN Charter is dedicated to the protection of property, which the European Human Rights Convention first recorded in its first additional protocol[69].

One of the most important areas of application of the right of ownership is **land ownership and rights**[70]. The significance of land ownership for society is based on its inability to be increased, its value as a business resource for the economy and its further development, as well as its status as a means of securing credit[71].

The economic, corporate and social significance of land ownership has led to the fact that, in all countries with a codified civil law system, land ownership is registered in public registers or land registers, and any change in ownership, as well as the establishment and amendment of any rights in land ownership must be entered in the public registers and land registers. *Hoffmeister* has stated that it is possible to derive from the guarantee of ownership under international and constitutional law an organisational dictate to the State, to set up the land regis-

67 See Ott, Aufgaben des Notars im Familien- und Erbrecht in: Das moderne Notariat (ed. Federal Notaries' Chamber) 1993, p. 137 ff (140); Grziwotz, loc.cit. under: Annahme als Kind.

68 See international co-ordinator's overall report on Theme 3 of XXI. U.I.N.L. Conference in Berlin, 1995 "Modern reproductive drugs and their effects in family and inheritance law"

69 History of origin Frowein/Peukert, EMRK, Art.1 of 1.ZP Rn 1.

70 Cf. von Münch/Bryde, GG, Art.14 Rn 14

71 Cf. 4th Theme of XXI. U.I.N.L. Conference: "New ways of securing credit in notarial practice".

ters in a formal judicial manner under the jurisdiction of (preventive) civil jurisdiction. Only in this way, and not through land registration with the municipal authorities attached to the Administration, is the material guarantee of ownership, which is required by the human rights catalogues and treaties of international law, to be achieved [72].

In these legal systems, the **procedural law** valid for registration in the property and land registers prescribes notarial certification of all applications made to these registers. As a result, the **material civil law** of numerous countries requires notarial certification or authentication for the effectiveness of legal transactions concerning the establishment and amendment of land ownership of rights. In some civil law systems such contracts are already notarially documented, but only contain an obligation to transfer land ownership.

Therefore, the notary's office has a key role in guaranteeing the correctness of land registers, as well as in providing advice and legal protection for the parties involved. The social function of this notarial responsibility is seen most clearly in the documentation of purchase contracts, in which the purchaser acquires land ownership to cover personal and family accommodation requirements. Hardly any other contract results in more far-reaching obligations, financially and temporally, in the life of an ordinary citizen. With the preparation, documentation and handling of property purchasing contracts, as well as the mortgage liens required for securing credit, the notary's office undertakes important protective functions for all parties concerned – vendor, purchaser, former creditors of the vendor who must be redeemed and new creditors of the purchaser who are financing the purchase price - but the notary is the indispensable guide to the purchaser in this arrangement, which is of crucial importance for the latter's personal, social and financial development.

Of equally high status within ownership rights to real estate, is ownership of **commercial enterprises** or **companies** as well as an interest in these[73]. The civil law systems in the countries with a Latin notary's office assign to the notary a similar key role in the establishment, amendment and transfer of companies as in the area of property law. Applications for registration in the commercial and company registers again require notarial authentication from a legal procedural point of view. The material responsibilities of the notary in commercial and company law begin with consultation regarding selection of the appropriate legal form and extend – particularly on the basis of the documentation obligations in joint-stock company law – from the subsequent documentation relating to the establishment of the company, including the changes and restructuring in the process of corporate development and company succession, particularly in connection with changes in family generations, through to the sale

---

72 Hoffmeister, Das moderne Grundbuch, Wien 1992, p. 24 ff; also Adamovich, ÖNotZ 1992, 39; Behrens in: Das moderne Notariat, p. 89.

73 Von Münch/Bryde, GG, Art.14 Rn 18 f, 22.

of the company or the dissolution and deletion of the company from the register[74].

In 1993 the German notary's office experienced a significant growth in responsibilities through the introduction of the new transfer and transfer tax law, which enables the legal form of the company to change without a change in identity of the corporate object, so that transfers of individual assets and changes to existing contractual relationships with third parties are not required, and there are no fiscal disadvantages involved in the transfer of companies or assets or the dissolution of the company. According to the new legal regulation, the contracts and declarations necessary for changing the legal corporate form usually require notarial documentation for their effectiveness[75].

The notary's office thus also performs a key role in commercial, corporate and company law, on the one hand, in the representation of rights of ownership for the formation and management of companies, and on the other hand, in the protection and preservation of entrepreneurial ownership as a corporate institution.

In the articles of the UN Charter and the ECHR devoted to ownership protection, no express mention is made of **inheritance law**, which must be guaranteed equally for the testator - as a special form of decree over his property – and for the heir. However, according to concurrent opinion in international law and national constitutional law, inheritance law is included in general ownership law and protected by the relevant regulations of international or national constitutional law[76].

The contribution also made by the notary's office in this area to the implementation of human rights is shown in documentary responsibilities for wills and testamentary contracts, applications for the issue of inheritance and executions certificates, the preparation of inventories and, finally, in the settlement of the estate, in the documentation of the transfer or purchase of inheritance shares, as well as of declarations of renunciation of inheritance or renunciation of legitimate portions.[77]

cc) Vereinigungsfreiheit / Freedom of Association / Liberté d' association (Article 20 UN Charter, Article 11 ECHR, Article 22 (1) CCPR)

The aforementioned articles are dedicated to freedom of association, amongst other things, which is guaranteed to each person "... for peaceful purposes".

Private-law associations, which as registered associations have the quality of civil-law legal entities and must be entered in public registers of association in

74 See Böse, Das Handelsregister, in: Das moderne Notariat, p. 109 ff.

75 Overview in Limmer, Transformation and transformation tax law, 1993

76 Frowein/Peukert, EMRK Art.1 of 1.ZP Rn 9; "Marckx" GH 31,21 Ziff 50 = EuGRZ 1979, 454 (460 f); von Münch/Bryde, GG, Art.14 Rn 45.

77 Cf. Ott, loc.cit. p. 140 ff, also see below Part III. 5.

order to be established, make a relatively significant contribution to the social and cultural development of society.

As procedural law also prescribes publicly certified application for all entries in the register of association, the notary's office is once again best placed for consultation and for the formulation of Articles of Association for the establishment of associations, for ensuring that the association register is correct and for the legal handling of all changes to be entered into the register of association during the existence of the association until its dissolution[78].

dd) Social Security
(Article 25 UN Charter; Article 24 CCPR; Article 10 CESCR)

Article 25 of the UN Charter specifies the particular claims that people may make to social security. According to Article 25 (1.2), this heading covers such things as the right to welfare payments in the event of illness, invalidity, becoming widowed and old age. Article 25 (2) is dedicated to mother and child, who are "entitled to special help and support", and also legitimate and illegitimate children, who "enjoy equal social protection".

Article 24 CCPR and Article 10 (3) CESCR contain comparable guarantees for children, whilst Article 10 (2) CESCR also demands legal protection socially and at work for mothers before and after childbirth.

Under the generic term "social security", the entitlement to a guaranteed minimum subsistence level within the framework of social security naturally comes first; however, the "right to security, aid and protection" once again involves concrete responsibilities for the notary's office:

As far as the right to welfare payments in the event of illness, invalidity and old age is concerned, in Germany, with the 1992 reform of the law of guardianship and care of aged persons ("Law of Care"), the preparation the "**power of attorney"** has become an almost daily task for the notary. Through this, a person in a position of trust is granted legal authority to take care of all legal, financial and personal areas of life (including decisions about medical treatment, as well as admission to hospital or a nursing home) and the continuation of the power of attorney in the event of illness, legal incapacity and death. This power of attorney is protected by documented binding instructions regarding conduct by the grantor of the authority with regard to the holder of the power of attorney.

The reasons for the attractiveness of these powers of attorney under civil law lies in the fact that, according to the newly introduced § 1896 para. 2 BGB, the appointment by the court of a person dealing with matters of guardianship or care for a person handicapped by illness, invalidity or old age cannot take place

[78] For the notary's responsibilities in German law of association, cf. Kersten/Bühling, Formularbuch und Praxis der freiwilligen Gerichtsbarkeit.

if the affected person has a power of attorney. Although the law does not prescribe any special form for the power of attorney, the advantages of a written and notarially documented form of the power of attorney are indicated[79], and notarial documentation or authentication is essential if property is included in the assets of the person granting the power of attorney.

Insurance in the event of old age, illness and invalidity has also been provided since time immemorial by so-called "**retirement contracts"** or "**care contracts"**, by means of which parents or a widowed parent in advanced age contractually protect their individual living requirements by a notarial instrument regarding the transfer of assets – usually house ownership – to relatives of the next generation, generally one or more children. This occurs through the establishment of contractual care entitlements, as well as, if appropriate, a pension, reservation of rights of use in the transferred property – either usufruct in the whole property or the right to live in individual rooms – as well as, finally, retransfer entitlements for the parents in particular risk situations. Usually the parents' reservation rights and counterclaims are recorded in the land registers[80].

Finally, the risks of becoming widowed have been protected by notaries since time immemorial in **wills and inheritance contracts**, which are used to manage either the transfer of assets to the widowed spouse or the establishment of entitlements to succession to protect the widowed spouse with regard to heirs named elsewhere. A special mention should be made here, with reference to the protection of the rights of children, of the option afforded by German inheritance and family law for parents to determine the **guardian or the person entitled to care for assets** through their last will and testament; in addition, the care and administration of estate assets by competent persons in a position of trust can be arranged by an **execution** order in the interests of the children.

Part II Concept and protection of human rights in the "Bonner" Basic Law for the Federal Republic of Germany of 23 May 1949

The Bonner Basic Law is only five months younger than the UN Human Rights Charter and must therefore be the first western constitution to enter into force after its adoption[81]. Influenced by the horrors of the Third Reich and the Second World War, human rights were embodied and protected particularly clearly in the Bonner Basic Law[82].

---

79 See Cypionka, Die Auswirkungen des Betreuungsgesetzes auf die Praxis des Notars, DNotZ 1991, 571 ff (573), Law establishment, Bundestag printed matter 11/4528, p. 122.

80 See in this regard the comparative legal study by the study group "Task Force U.I.N.L./Law Society": Lifetime transfer of real estate, 1998 (to be published by I.R.E.N.E., Luxembourg)

81 See Münch/Kunig, GG, Art. 1 Rn 43

82 Pieroth/Schlink, Grundrechte, Staatsrecht II, Heidelberg 1985, Rn 397.

After the preamble, Section I of the Basic Law is dedicated to basic rights. Articles 1 to 19 of this section contain the catalogue of basic rights protected by constitutional law.

The institutional requirements for legal care are independently embodied in Section IX of the Basic Law, Article 92 ff GG.

Those standards are firstly set out below, containing **general human rights obligations** (1.), followed by those articles which implement the **general basic principles** of international human rights protection treaties discussed in Part I within the national constitution (2.). There follows a description of the **state-organisational principles and judicial procedural guarantees** which are of significance for the notary's office (3.), and finally those of **individual rights**, a contribution to the practical implementation of these rights being carried out by the notary's office (4.).

1. General human rights obligations

a) Preamble

According to the preamble, "the German people have adopted this basic law .... in the awareness of their responsibility before God and mankind, inspired by the desire to serve world peace as an equal member of a united Europe".

Through the declaration of **responsibility before God and mankind** the positive associations of the law are strengthened and a lasting rejection is given to any absolute state authority as well as to any totalitarian state model[83]. The second half of the preamble emphasises the way in which the state drawn up by the basic law is incorporated into the international legal structure[84], with the German constitution at the same time declaring its belief in the political and economic integration of a united Europe[85].

b) Human dignity and human rights, Article 1 GG

The very first article of the German constitution expressly covers human rights and binds all State powers to a respect for human dignity:

According to Article 1 (1), "human dignity is inviolable and it is the duty of all State powers to respect and protect it".

In (2) "the German people declare their belief in inviolable and inalienable human rights as the basis of peace and justice in the world for every human community".

---

83 von Münch, GG, Preamble Rn 8.

84 von Münch, GG, Preamble Rn 12.

85 von Münch, GG, Preamble Rn 13.

With the proclaimed declaration of belief in **human rights**, the basic law starts first of all from models of eighteenth century German documents on the protection of human rights[86]; whilst at the same time the change of direction to the basic values of the community under international law, referred to as a "highly modern, European-Atlantic inheritance" of the founders of the constitution, created shortly before by the United Nations with the **UN Human Rights Charter**, becomes clear[87]. This obligation of the German constitution to human rights is not just limited to the "status quo" of 1948, but is understood as a **dynamic and continuing reference** to the future development of human rights ideas[88].

The protection of **human dignity**, from the point of view of constitutional law, is not only derived from Article 1, which is devoted expressly to this, but also from the basic constitutional decisions regarding the principle of the legal state, welfare state and the precept of equality[89], whose connections to the notary's office have already been shown in Part I. With regard to the nature and extent of the protection of human dignity, firstly general reference is made to philosophical values which have been handed down, namely from *Kant* and the *christliche Naturrechtslehre*[90], and it is also emphasised that it is the individual himself who determines the quality of his dignity. Under this aspect the **human capacity for independent self-volition** is decisive for the protection of human dignity [91].

For the **role of the notary** it is significant that the constitution protects human dignity not only against diminishment by state power, but also against threat from other parties, particularly private people and powers[92]. The preventive education and information provided to the citizen by the State is seen as a primary instrument of protection against this, from which an "information principle" is derived[93]. Finally, it is interesting that human dignity also represents the intellectual root of legal procedural guarantees, resulting in the need to establish procedural rules, which provide the individual with the possibility of actually exercising his human rights[94].

The connections between human dignity and notarial responsibility are therefore obvious. The notary, through the preventive education, information and advice for which he is responsible and by means of conduct laid down by the

86 Cf. Pieroth/Schlink, Basic rights, Rn 32-44.

87 von Münch/Kunig, GG, Art.1 Rn 43 mwN.

88 Podlich, Alternative commentary on basic law (AK-GG), Art.1 Rn 11; von Münch/Kunig, GG, Art. 1 Rn 44.

89 Podlich, AK-GG, Art.1 para.1 Rn 17 ff; Pieroth/Schlink, Basic rights, Rn 401, 406-410.

90 Cf. Nipperdrey, Basic rights II, p. 1; Vitzthum, JZ 1985, 201/205 f; Denninger, JZ 1982, 225.

91 Luhmann, Basic righst as an institution, 1965, p.53 ff; Pieroth/Schlink, Basic rights, Rn 401.

92 Dürig in: Maunz/Dürig/Herzog, Basic law, Art.1 Rn 3; BVerfGE 1,97(104)

93 Cf. von Münch/Kunig, GG, Art.1 Rn 31.

94 Pieroth/Schlink, Basic rights, Rn 409.

State through the law of the profession and documentation, helps people in private law to recognise and weigh up the decision-making principles which are significant for the personal exercise of their contractual freedom in specific cases. At the same time, the notary's impartiality ensures equality of opportunity against stronger contractual partners and protects the human rights in question against pressure from third parties.

c) Guarantee of the intrinsic nature of basic rights, Article 19 GG

In addition to the material protection of basic rights, Article 19 (1) specifies that basic rights "... can… only be restricted by law or on the basis of law". Article 19 (2) specifies that "the intrinsic nature of a basic right must not be violated under any circumstances".

Article 19 (2) contains a guarantee of intrinsic nature, which is applied not only if a basic right is actually infringed but also in all cases where a basic right is threatened[95]. The guarantee of intrinsic nature, which binds all State powers, forms part of a protection system which has been established by legislation in addition to individual basic rights, in order to prevent a diminution of basic rights on a permanent basis..

d) Guarantee of the permanence of basic rights, Article 79 (3) GG

Under constitutional law, an extremely important protection of the inviolability of human rights is provided by the so-called "Guarantee of permanence" in Article 79 (3):

According to this guarantee, "a change in the basic law, which… affects the principles established in Articles 1 and 20 is inadmissible." Therefore, the protection of human dignity and human rights embodied in Article 1 and also the principle of the State founded on the rule of law and the principle of the welfare state and democracy in Article 20, shall not be affected by any constitutional change, irrespective of the majority. In accordance with the wishes of the founders of the constitution, this regulation should permanently prevent a legal eradication of the constitution following the pattern of 1933, and opponents of the constitution should be moved outside the law. Neither in the history of the German constitution nor in the constitutional law of other countries do there exist similar models or parallels for such a strong protection of human rights and the basic principles of state structure[96].

2. General basic principles

95 von Münch/Krebs, GG, Art. 19 Rn 19

96 Evers, Bonner Commentary on Basic Law (2nd treatment), Art.79 Rn 23 ff, 26 ff; Bryde, Constitutional Development, 1982, p. 49 ff.

a) The validity of the principle of the state founded on the rule of law is generally derived in the German constitution from Article 20, of which Paragraph 1 guarantees the separation of powers and Paragraph 3 regulates the constitutional and legal relationship of all state powers[97].

b) The declaration of belief in social progress is found in Article 20 (1) of the Basic Law, which defines the Federal Republic of Germany as a democratic and social federal state. This social state definition is unprecedented in the history of the German constitution[98] and represents a rejection of the non-socialist-liberal state founded on the rule of law, which was to a large extent only a "state of legal protection" and only protected the existing distribution of property[99]. With the social state clause, legislation is now called upon actively to formulate the social order. Consequently, the provisions for citizens' living conditions (so-called "existence provision"[100]) and the creation of the essential prerequisites for the development of civil freedom have become the responsibility of the State, which must also ensure the removal of social injustice and the protection of those who are socially and economically weaker[101]. In more recent constitutional law texts, the "social state structuring of civil law" is specified as a new requirement of the welfare state[102].

c) The principle of equality embodied in Article 3 GG.

Of the dictates derived from the principle of equality, those that are of significance for the notary's office are **equality of defence** in civil actions, **equality of opportunity** and **equality of legal protection** when using jurisdiction.

Equality of defence in disputed civil proceedings is understood to mean the equal status of the parties before the judge. The latter must ensure the equal status of the parties through equal hearing, through objective and fair treatment, through impartiality to their presentation and their interests as well as through impartiality in the application of law[103]. These principles and obligations also apply without reservation for the notary during the performance of his role of preventive jurisdiction aimed at avoiding lawsuits.

The implementation of **equality of opportunity** requires very different mechanisms, depending on the sphere of life concerned:[104] Whilst in many areas of the state, it requires an absolutely formal and schematic equal treatment of citizens and forbids any corrective action - e.g. in commercial competition or in the or-

97 von Münch/Schnapp, GG, Art.20 Rn 21.

98 von Münch/Schnapp, GG, Art.20 Rn 16.

99 Maunz/Dürig, Commentary on Basic Law, Art.90 Rn 49.

100 Cf. Maunz/Zippelius, German constitutional law, § 13 I. 3.

101 Stern, Constitutional Law Volume I, § 21 I.4d; von Münch/Schnapp, GG, Art.20 Rn 17, 18, BVerfGE 5,85(198); 8,274(329); BSGE 10,97(100).

102 Cf. von Münch/Schnapp, GG, Art.20 Rn 18; Stern, Constitutional Law Volume I, § 21 II.3..

103 Basic BVerfGE 52,131; see von Münch/Gubelt, GG, Art.3 Rn 46.

104 Cf. in general the overview in von Münch/Gubelt, GG, Art. 3 Rn 65 ff.

ganisation and performance of state examinations -, in other areas, directing and supporting intervention, rather than schematic equal treatment, is actually imperative for equality of opportunity. The principle of equal treatment is thus amplified in constitutional law and corrected by the differentiation objectives of the principle of the welfare state; the principle of equality and the principle of the welfare state are therefore not mutually exclusive but complementary principles under constitutional law[105]. The principle of "socially fair differentiation and equalisation" attains particular significance in the realisation of civil legal positions in the process of state-organised jurisdiction:

In the area of disputed civil jurisdiction, the judge is obliged to respect the equality of opportunity in litigation of the legally less expert litigant, e.g. the party who is not represented by a solicitor as opposed to the party who is so represented, and to take him into account through increased instruction and procedural information. In the area of preventive legal care, therefore in the notarial area of responsibility, the clarification and equalisation of interests and the provision of supportive information to the weaker party becomes a predominant procedural dictate: only through its observance can the notary's responsibility be fulfilled[106]. In German documentation law this is expressed in § 17 BeurkG, according to which the notary must ensure that "inexperienced and inexpert parties are not disadvantaged"[107].

Finally, **equality of legal protection** requires that the costs of proceedings must not form an obstacle which deters financially weaker parties from using jurisdiction, either in disputed or preventive jurisdiction. Therefore, assistance with lawsuit costs or a reduction or remission in notarial procedural costs must be guaranteed to those who cannot finance procedural costs themselves[108].

105 von Münch/Gubelt, GG, Art.3 Rn 69; Schoch, The Equality Clause, DVBl. 1988, 863(869).

106 Huhn/v.Schuckmann, BeurkG, 2nd edition 1987, § 17 Rn 20; Keidel/Kuntze/Winkler, Voluntary Jurisdiction Part B, 13th edition 1997, BeurkG § 17 Rn 43; Jerschke, Die Wirklichkeit als Muster - der richtige Weg zum gerechten Vertrag DNotZ 1989 p.21 ff (23,26,31).

107 See also Part III.4.

108 See also Part III.3.c)cc).

3. State-organisational principles and judicial procedural guarantees

a) The entitlement to effective legal protection postulated in Article 8 of the UN Human Rights Charter is guaranteed in basic law by the guarantee of recourse to legal action in Article 19 (4) , according to which "...recourse to legal action is open to everyone...", whose "... rights have been violated through public power". In German constitutional theory the guarantee of recourse to legal **actionis** considered a genuine and independent basic right[109].

This guarantee contains a general state obligation to provide justice[110]. When formulating legal protection, legislation is free to direct it towards the requirements of the legal area concerned[111].

Effective legal protection also means timely legal protection. Therefore, its temporal moving forward through "**preventive legal protection"** is ordered by constitutional law, in situations where classic subsequent legal protection would come too late to prevent violations of the law and irreversible inroads into material interests which are protected by law[112].

From preventive to **precautionary legal protection** is barely another step: The notary's office begins its legal protection function – other than where there is an urgent legal need – considerably earlier. Admittedly, no definite model of legal protection can be derived from the guarantee of recourse to law in Article 19[113]. However, in a modern legal protection system oriented towards the welfare state, the notary's office is validated in constitutional law as the functional representative of a legal protection which is instigated early, in order to protect civil human rights well before legal disputes arise or to combat violations of the law which have already occurred. In order to achieve this objective of legal protection, the state is also entitled to compel the citizen to consult the notary, to acknowledge that particular types of contract are only legally effective with notarial authentication and to institute registration procedures in public registers only if the application is certified by a notary.

b) Article 92 GG contains the so-called judges' reservation. According to this, the power of administration of justice must be entrusted exclusively to judges, and the constitution also allows legislation to assign to the judge responsibilities outside the classic administration of justice, as has happened particularly through the transfer of a wide range of functions in the area of Voluntary Jurisdiction[114]. From the protection of the judge's function under constitutional law it is again derived that these further judicial tasks must be provided by legisla-

109 von Münch/Krätz, GG, Art.19 Rn 2.

110 Schmidt-Aßmann in: Maunz-Dürig-Herzog, GG, Art.19 Rn 16; BVerfGE 54,277(292)

111 Cf. Schenke, Bonner Commentary on Basic Law (BK), Art.19 Rn 58 f.

112 von Münch/Krebs, GG, Art.19 Rn 64; Schenke, BK, Art.19 Rn 422; Schmidt-Aßmann, loc.cit., Art.19 Rn 278.

113 Cf. von Münch/Krebs, loc.cit., also BVerfGE 150,268(285 f).

114 BVerfGE 21,189(144).

tion with all legal procedural guarantees under constitutional law.[115] Since legislation has assigned a large number of the responsibilities of voluntary jurisdiction to the notary, the status and obligations of the notary can again be assimilated to those of the judge[116].

c) Article 97 GG guarantees the independence of judges, who are "only subject to the law", and the same applies to notaries.

d) Article 103 (1) GG embodies the guarantee of legal hearing. Derived from this basic judicial right are the dictates of "objective and fair conduct of trial" ("fair trail"[117]), or "impartiality" and "impartial application of law", and "equality of defence in trial", which entails the "equal status of the parties in trial"[118]. These dictates are again directly connected with the protection of human dignity through Article 1 (1) GG, the dictate of the state founded on the rule of law, and the general principle of equality[119].

3. Substantive basic rights

a) General personal rights, Article 2 (I) GG

According to Article 2 (1) "everyone has the right to free development of their personality (insofar as they do not violate the rights of others and do not infringe the constitutional order or moral law)". The right to free development of personality, in conjunction with the guarantee of human dignity in Article 1 (1) GG[120] which has already been discussed above, has been collated by constitutional jurisdiction to an uncodified basic right, the "general right to live one's own life"[121], which is invoked as a "catch-all basic right" where there are omissions in the constitutional protection of basic rights[122].

Of significance for the notary's office is that, as one of the most important implementations of the general right to live one's own life, in Article 2 (1) GG **contractual freedom** is also protected under constitutional law[123]. By this is meant the right of the individual contractually to formulate the circumstances of his life on his own responsibility[124].

---

115 BVerfGE 25, 366 (345 f); see von Münch/Meyer, GG, Art.92 Rn 14.

116 Cf. in this regard Odersky, Gerichte und Notariat, DNotZ 1994, p.7 ff

117 Nowak, CCPR, Art.14 Rn 9619 ff; Frowein/Peukert, EMRK, Art.6 Rn 71 ff.

118 von Münch/Kunig, GG, Art.103 Rn 3, BVerfGE 52,31(156 f), also see above under 2.d).

119 Schmidt-Bleibtreu/Klein, GG, Art.103 Rn 2; von Münch/Kunig loc.cit.; BVerfGE 55,1(5 f); BGHZ 118,312(321).

120 See above under II. 1. b)

121 von Münch/Kunig, GG, Art.2 Rn. 1.

122 Permanent jurisdiction, cf. e.g. BVerfGE 1, 7/8; 6, 32 ff; 77, 84/118; 80, 37/157; re. Catch-all function and subsidiarity of this basic right, Jarass/Pieroth Rn. 2; Erichsen, loc.cit. § 152 Rn 1; Stern, Constitutional Law Volume III/1 1988 § 90 V 4 c.

123 Cf. BVerfGE 8, 274/328; 70, 115/123; von Münch/Kunig Art. 2 Rn. 16, 29.

124 Palandt/Heinrichs, BGB, Introduction before § 145 Rn. 7.

The State must prevent the diminution of general personal rights by third parties through legislative and administrative precautions[125]. This is achieved with regard to contractual freedom above all through civil law[126].

Although civil law for its part is dominated by the principle of contractual freedom as the main manifestation of personal autonomy, contractual freedom for its part is subordinate to the limits of constitutional order. This demands that social and economical inequality should be opposed, so that the self-determination of one person does not result in the limitation of the freedom of another. This legislative obligation is derived from the welfare state clause in the basic law[127]. Therefore, the dictate to guarantee **contractual fairness** is applied as a corrective to contractual freedom. Contractual fairness is considered to be particularly at risk in cases where one contractual partner is economically or intellectually more powerful than the other[128].

There are three mechanisms in civil law that ensure contractual fairness in a welfare state legal system:

Firstly, with the so-called **"Theory of the third-party effect of basic rights"** it has been generally acknowledged that via the general clauses of civil law, particularly the dictate to preserve morality and order (§ 138, 826 BGB) and via the general obligation to equity (§ 242 BGB), basic rights influence civil law and also govern contractual freedom in this context. This also results in the binding under basic law of civil persons involved in the contract and enables, in particular, control of the contractual content by a civil judge for compliance with basic rights[129]. Therefore, basic rights are also materially valid for precautionary contract formulation by the notary.

Secondly, civil legislation – both in the civil code as a "special contractual law" or in special laws – enacts **generally typifying regulations**, on which the contractual content is based in order to avoid the foreseeable conflicts of compulsory standards. Particular examples here are the AGB law (law to prevent the abuse of general terms of business), the labour law and the law of landlord and tenant, or – recently initiated by European legislation – the consumer credit law or the right of partial ownership.

The third mechanism is formed by the **civil law compulsory form** regulation, whereby notarial authentication must be provided for the effectiveness of cer-

125 Von Münch/Kunig Art. 2 Rn. 40 BverfGE 34, 269/281 f.; 83, 130/140.

126 von Münch/Kunig, GG, Art.2 Rn 31,40; the unlawful and culpable violation of this interest protected by law leads, according to § 823 BGB to compensation obligation, in this regard see e.g. BGH 13,334; 24,72/78; Palandt/Thomas, BGB, 54th edition 1995, § 823 Rn 175; for the development and interaction of civil and constitutional judicature: Schmitt/Glaeser, Handbook of Constitutional Law Volume VI, § 129 Rn 7

127 BVerfGE 8, 329; Palandt/Heinrichs loc.cit.

128 Palandt/Heinrichts, BGB, Introduction to § 145 Rn.14; Limbach, JuS 1985, 10.

129 Cf. in this regard Palandt/Heinrichts, BGB, § 242 Rn. 7; Canaris, JuS 1989, 161; Hermes, NJW 1990, 1764; BVerfGE 7,98; 34,280; BGH 13,338; 15,258; 26,354.

tain civil law contracts. In this way, civil law pursues the objective, (in addition to the functions of warning and evidence, which are also subject to private written form), of ensuring the equal, balanced and expert advice and instruction of contractual parties (advisory function) **even in individual cases** [130], before the occurrence of legal commitments.

b) Marriage and family, Article 6 (1) GG

According to Article 6 (1) GG "marriage and family are placed ... under the special protection of state order".

Marriage is understood under constitutional law to be the "permanently established cohabitation of man and woman in a comprehensive, on principle indissoluble long-term relationship"[131], whilst family is understood primarily as the coexistence of parents with their minor children, i.e. the modern nuclear family[132].

On the basis of modern sociological developments, the range of protection in Article 6 for the family is broad: In addition to the classic nuclear family with legitimate children, it includes the relationship of father and mother to illegitimate children, as well as to adopted children, step children and foster children, and also non-marital long-term relationships with joint children[133].

Non-marital long-term relationships do not enjoy any basic legal protection. As the constitution protects marriage and the family as social institutions, as well as providing individual protection of basic rights, and the latter also relates to the combating of unjustified equal treatment, civil jurisdiction may only narrowly extend the guidelines of actual marriage law by judicial analogy to non-marital long-term relationships[134].

The range of topics indicated above shows the broad area of responsibility which is entrusted to the notary in the implementation of the basic rights of "marriage and family" under civil law; as far as non-marital long-term relationships are concerned, the notary formulating the contract is not subject to the limits which are set for the judge; the notary is therefore in a position to provide the partners of a non-marital long-term relationship with legal certainty through an individual contractual model.

c) Freedom of association, Article 9 (1) GG

130 Palandt/Heinrichs, BGB, § 125 Rn 1.

131 BVerfGE 53, 224; von Münch, GG, Art. 6 Rn 4.

132 BVerfGE 48, 339; Pierson, Bonner Commentary on Basic Law, Art.6 Rn 21 ff.

133 von Münch, GG, Art.6 Rn 7; BVerfGE 18,97(105); 68,176(187); 79,256(267).

134 von Münch, loc.cit.

Article 9 (I). GG defines freedom of association as "the right to form associations and companies". The significance of this basic right under constitutional law is considerable: The right to pursue common aims through joining together with others is essentially part of the basic liberal-democratic ethos[135]. The Federal Constitutional Court has accordingly stressed the high "human rights content of freedom of association" [136].

The notary's contribution to the implementation of the freedom of association is made clear in the wording of Article 9 (I) GG, through the fact that the scope of the notary's office is not restricted to the legal form of the association in the narrower sense, as regulated by civil codes (in Germany § 54 ff BGB), but it covers all civil legal forms under corporate law[137], also including large public companies and concerns[138].

The basic right of freedom of association protects not only the individual members of the association, but also the established legally recognised association. The protection of association and members is, on the one hand, a vertical relationship as far as legislation is concerned, but on the other hand it also exists horizontally between association and members. The legislative structural conditions of association and corporate law manifest the content of the freedom of the association under constitutional law, on the one hand, and of its members on the other. The notary places the keystone for the horizontal balancing of the interests of freedom between association and members of the association through the formulation of the Articles of Association or Company Statutes. The legal requirements on the internal regulation of the association, the procedure of formulating objectives and the participation of the members in this, questions of admission applications, resignation procedure and expulsion of members, etc. are regulated in detail[139]. Only by finally determining the content of the freedom of association under constitutional law can people manage and understand this basic right.

135 von Münch/Loewe, GG, Art.9 Rn 2; Rinken, AK, Art.9 Rn 44.

136 BVerfGE 50, 290/253.

137 von Münch/Löwer, GG, Art. 9 Rn 14, 22.

138 See von Münch/Löwer, GG, Art. 9 Rn 28 m.w.N.; cf. BVerfGE 50, 290/356, 359.

139 See in detail von Münch/Löwer, GG, Art.9 Rn 23; Taupitz, loc.cit., p. 953 ff.

d) Ownership and right of inheritance, Article 14 (I) GG

In Article 14 (I) GG "The ownership and right of inheritance …. are guaranteed, and nature and limits determined … by law".

Within the overall structure of basic rights, the guarantee of ownership safeguards people's "area of freedom in the area of the legal asset"[140]. Constitutional theory and constitutional jurisdiction underline the close connection between ownership and development of personality[141] and consequently the connection between the guarantee of ownership and "general right to live one's own life" protected under constitutional law; in addition, the close relationship between the freedom-protection function of the guarantee of ownership and human dignity protected through Article 1 (2) GG is emphasised as a fundamental constitutional principle of basic law: it is precisely the "space of freedom in the legal asset area" that enables people to have self responsibility and keeps them from becoming "mere objects in the state"[142].

The scope of right of ownership indisputably extends to all asset-related rights of private law[143]. With the legal transactions implied through the material civil law of documentation obligation, the notary once again has a key role in the implementation of rights of ownership.

The procedural dimension of basic rights, according to which the State must also provide appropriate legal procedures to ensure the effective implementation and protection of basic rights, has been developed in German constitutional law on the basis of the guarantee of ownership in Article 14 GG[144]. Of fundamental importance here was a decision by the Federal Constitutional Court within the sphere of notarial activity, concerning legal constitutional requirements with regard to the procedure of forced sale of freehold property[145]. In this case, in addition to the interests of the creditor, the state must protect the right of ownership of the debtor and prevent this from being unduly diminished and, particularly, from being sold very cheaply; the difficult balancing of divergent interests must occur here through detailed procedural regulations[146].

Thus it becomes clear that the form-related requirements of civil law, which ensure the notary's participation in assisting the parties, the documentation law, with which the procedure used by the notary is legally established, and notarial professional law, which determines the notary's obligations and his organisa-

140 BVerfGE 24, 367/389; 50, 290/339.

141 e.g.: Meyer-Abisch, Der Schutzzweck der Eigentumsgarantie, 1980 p. 55 ff; BVerfGE 69,272/300 ff..

142 Münch/Bryde, GG, Art.14 Rn. 3.

143 Paper in: Maunz/Dürig/Herzog, GG, Rn.8; Kimminch, BK, Art.14, Rn. 8, 55 f.; Badura, Handbuch des Verfassungsrechts, p. 654; Pieroth/Schlink, Staatsrecht, Rn. 995.

144 von Münch/Bryde, GG, Art.14 Rn 37; Paper: loc.sit. Rn 43 ff.; Suhr, NJW 1979, 145 ff.; Goerlich, DVBl 1979, 362 ff.

145 BVerGE 46, 325/333 ff.

146 See von Münch/Bryde, GG, Art.14 Rn 37; also BVerfGE 49, 220/225; 51, 150/156; Suhr, loc.cit.

tional status, interact in a complex and expansive manner. It is only the interplay of these various regulations that ensures that the human rights entrusted to the notary are implemented under civil law and in conformity with the constitution [147].

The regulations and mechanisms of German notarial and documentation law, as well as those of the civil code, which are decisive for this functional connection, are described in the next chapter.

Part III: The notary as guarantor and mediator of human rights in private law

1. Notary's office as functionary of preventive jurisdiction.

In order to integrate the notary into obligations similar to those of the judge and to subject him to similar supervisory mechanisms, first of all his institutional integration into state – voluntary – jurisdiction is required. This results from the express stipulation of § 1 BNotO , according to which "Notaries are … appointed for the documentation of legal procedures and other tasks **in the area of precautionary legal service** …".

The integration of the German notary into preventive jurisdiction is particularly evident from his tasks and functions listed below:

- Drafting of public documents (§ para.1 and 2 BNotO),
- Value as evidence of notarial documents (§§ 415 and. 418 ZPO) [148]
- Execution of the notarDrial document (§ 794 para 1 no. 5 ZPO)
  - Voluntary auctioning (§ 20 para.3 BNotO)[149],
  - Notarial joint committee procedure (§ 20 para.4 and 5 FGG)[150]:
  - Division of descendant's estate, §§ 86 ff FGG,
  - Division of matrimonial joint estates, §§ 99 ff FGG;
  - Mediation according to the code for changing the law of property of 21.09.1994,

147 See also Frenz, Comments on the relationship of the objective of form, documentation procedure and professional law, in: Freundesgabe für Weichler (Publisher: Frenz/Pützer/Schmitz-Valckenberg) Cologne 1997, p. 175 ff; Hofmeister/Wolfsteiner, Legal certainy and consumer protection - form I national and European law, DNotZ 1993, 21*ff.

148 With exception of judicial notaries and public official notaries in Baden-Württemberg, who historically are appointed on the basis of a special federal state law.

149 Seybold/Reithmann, BNotO, § 20 Rn 44 ff.

150 according to FGG (law on voluntary jurisdiction) they are basically the task of the courts, but can be transferred to the notary by the state law, see: Seybold/Reithmann, BNotO, § 20 Rn 60.

- Administration of oaths and statements in lieu of an oath (§ 22 BNotO),
- Declaration of enforceability of law settlements (§ 1044 b para.2 ZPO)[151].

In the last mentioned task even the area of administration of justice is abandoned if it is a matter of one of the notary's genuine judicial activities in accordance with the procedural law of the ZPO/Code of Civil Procedure[152].

Notarial joint committee procedures deserve special emphasis: These do not only lead to a freeing up of the courts, but also to the very much more humane settlement of cases of conflict than decisions on disputes taken to court. By means of a notarial document, the affected rights and interests of those taking part can be taken into account much more strongly and individually than by the "decision" judgment of the judge.

This becomes particularly clear in the notarial joint committee procedure referring to the code for changing the law of property which serves the streamlining of the ownership structure in the new Federal States (former East Germany). There, because of the once valid law of the GDR, the ownership of a building differs in countless cases from the ownership of the land. At the same time the (non registered) right of use by tenants clashes with the interests of the owners. According to the law, the right to go through the courts of law is only permissible when the parties have gone through a formal notarial joint committee procedure first, without reaching agreement. The notary has in this case the judicial authority to clear up the matter and can impose default judgements against participants who fail to appear. In the case of non-agreement, the process ends with a notarial final transcript of the proceedings, in the case of an agreement with a notarial public document.

Recently in Germany, with a view to freeing up the courts, consideration has increasingly been given to allocating to the notary further tasks of voluntary jurisdiction which were previously carried out by the courts and also, even in the judicial range, tasks of intervening in contentious civil trial proceedings. It is therefore being suggested that for further areas of the civil process a notarial quality procedure be introduced as a prerequisite of a legal process to protect against the institution of legal proceedings[153]. Another suggestion establishes the judicial attempt at conciliation: According to § 279 ZPO the court is to aim for a conciliatory settlement of the legal dispute at every stage of the proceedings and can moreover refer the parties to a judge who has not previously been engaged on the case [154], for an attempt at conciliation in a divorce case or in a

---

151 Bohrer, loc.cit., Rn 86; Geimer, DNotZ 1991, 266.

152 Wolfsteiner, Die vollstreckbare Urkunde, 1978, Rn 33.2 f.; Geimer, loc.cit., p. 270/273.

153 experience to be gathered in minor cases first of all.

154 cf. in this regard Stürner, Tasks of the judge and lawyer in conciliatory settlements, JR 1979, 133; Wolf, Normative aspects of judicial conciliation activities, ZZP 1989, 260.

marriage guidance centre (§ 614 ZPO). In appropriate types of case an attempt at conciliation can also henceforth be referred to a notary [155].

2. Protection of private rights by professional law (BNotO)

In order to safeguard the functional capability of the notary for the protection of human rights in private law, professional law must guarantee the essential structural characteristics of the notary (following a), must guarantee the suitability of that professional person to look after civil human rights (following b) must guarantee and ensure the effective access of the citizen to the notary (following c). This is regulated in the Federal Republic of Germany by the Federal Notary Code (BNotO), the professional code of practice governing all German notaries.[156]

a) Institutionalised form of the office of notary[157]

According to § 1 BNotO "notaries … are appointed ... as **independent** bearers of a **public office** ...". None of these characteristic criteria can be given up without fundamentally changing the profession of the notary[158]:

aa) A public office is transferred to the notary. This is allocated to him as a personal office, he can not transfer his task and responsibility to others or share it with others. Therefore, in German notary law there exists neither the possibility of delegation of the Notary's Office nor of single notarial tasks to a third party, nor the possibility of "Sales of Practice"[159].

bb) The independence of the notary which is guaranteed in § 1 BnotO is a necessary consequence of the principle of **the rule of law** established in the Basic Law. The notary has freedom of judicial decision and is only subject to the law. Thus it is guaranteed that the notary can dedicate himself without any restrictions to the protection of civil human rights, free from directives from the State or those taking part[160]. There is no legal difference between the independence of the notary and that of the judge, guaranteed by Article 97 (1) GG[161].

---

155 see Wagner, Relief of administration of justice by the use of notaries – stock taking and perspectives -; Opening lecture at the 25th German Notaries Conference, Münster 1998 (publication planned in DNotZ-issue 12/1998).

156 with exception of judicial notaries and public official notaries in Baden-Württemberg, who historically are appointed on the basis of a special state law.

157 as the formulation in Bohrer, loc.cit. Rn 87.

158 Seybold/Schippel, BNotO, 6th ed. 1995, § 1 Rn 1; standard Römer, Notarial Consitution and Basic Law, 1963, p. 12 ff.

159 BGH DNotZ 1975,574; Seybold/Schippel, BNotO, § 1 Rn. 9.

160 Seybold/Schippel, BNotO, § 1 Rn 18 f.

161 Bohrer, loc.cit. Rn 140; Pfeiffer, The notary in our legal state, DNotZ 1981, 5; Seybold/Schippel, BNotO, § 1 Rn 16; for the principles relating to constitutional law, see above Partl II 3 b)bb).

cc) In relation to the parties, independence is supplemented and strengthened by the commitment of the notary to neutrality. The notary has to take an oath of office to neutrality (§ 13 BNotO), which is specially established as a characteristic professional obligation in § 14 (1) BNotO[162]: The notary is "not a representative of a party, but the neutral guardian of the participants".

Professional law sharpens this professional obligation through the fact that the notary has to avoid "even the **appearance of partiality**" (§ 1 .(2.3) Guidelines for the execution of the notary's profession, RLNot[163]) - corresponding to the principle developed in International Law "justice must also be seen to be done"[164].

Impartiality is totally assured by professionally legal **incompatibility regulations,** which prohibit any further activities which are incompatible with the office of notary (§ 8 BNotO), by **bans on participation** which are legally documented (§ 3 BeurkG) or **reasons for exclusion** (§§ 6, 7 BeurkG), whereby the notary may not participate in a documentation or the document is even inoperative if the documented matter touches on the personal interests of the notary or if people close to him are participants.

Impartiality also leads to particular demands on the **form of the documentation process**, which are laid down in documentation law [165].

b) Suitability and quality assurance

The notary can only guarantee civil human rights when the individual notary satisfies the institutional demands of his office. Prerequisites for this are:

aa) Professional suitability: German notary law requires the notary to have the "qualifications to be a judge according to the German law defining the functions and powers of judges," for which the passing of two law degrees and one judicial practical period in the responsibility of the state courts are necessary. The professional qualification specific for a notary is guaranteed by a notary recruitment service (in the notary's office alone) or proof of practical experience with an examination following on from it (in the legal notary's office) (§ 6 para.1 and 2 BNotO).

bb) Personal suitability requires that the notary's character is also suitable for his office. The public office which is bestowed upon him personally and his

162 see Bohrer, aaO, Rn 52; Seybold/Schippel, BNotO, § 1 Rn 19.

163 see Seybold/Schippel, BNotO, § 14 Rn 37

164 see above Part I.1.b)bb)(2), Proof in Fn 43, 44.

165 esp. § 17 BeurkG, on this Seybold/Schippel, BNotO, § 14 Rn 36 f; Bohrer, loc.cit., Rn 97.

position in legal life place demands on a notary which have always been compared with those of a judge[166].

cc) The so-called Numerus Clausus (entry restriction) is a structural characteristic of almost all Latin notary offices: According to § 4 BNotO as many notaries are appointed as correspond to the demands of a well-ordered administration of justice. This "examination based on needs" must on the one hand guarantee the provision of the law-seeking population with notarial services, but it must also on the other hand safeguard the economic viability of the notary position.

The notary can only carry out his task independently and impartially, working towards the most balanced and just form of legal relationship possible, if a minimum level of economic independence is guaranteed, this placing him in a position to resist economic pressure[167]. Furthermore, only by a certain minimum turnover in business for each notary can sufficient professional competence and experience be guaranteed for all notarially charged areas of the law[168].

Against this background information the Numerus Clausus is shown to be much more than a simple economic privilege of the notaries and is anything but a questionable monopoly. The state planning for the number of notary positions needed - in the whole public service, naturally - is an indisputable requirement for a notary's office to be able to function and dedicate itself responsibly to civil human rights.

dd) Disciplinary liability as well as professional and state supervision of the notary make sure that a check is made that the notary is keeping to the professional code of conduct and that any infringements of the professional rules are punished. The Federal notary code distributes the supervision authority between the regional professional chambers and the judiciary:

The regional notarial chambers have " to watch over the honour and reputation of their members and to support the supervisory authorities in their activities" (§ 67 para.1 sentence 2 BNotO). They have compulsory authority over their members (duty to give information and personal appearance, § 74 BNotO) as well as the right to issue disciplinary warnings for minor infringements (§ 78 BNotO).

State supervision is carried out in three courts by the president of the Federal State court, the president of the provincial high court and court of appeal and the Ministry of Justice (§ 92 BNotO). A notarial senate at the provincial high court and court of appeal is responsible in the first instance for the judicial review of disciplinary measures and in the second instance this responsibility

166 Feyock, DNotZ 1952,244; Seybold/Schippel, BNotO, § 6 Rn 4 m.w.N.; so also the Committee for Law and Civil Rights of the European Parliament in: Report on the "situation and organisation of the notarial profession in the twelve member states of the community" of 9.12.1993, Meeting paper of the European Parliament A3 - 0422/93, Ziff. 21, Parliamentary decision published in file no.C 44/36 of 14.2.1994 and ZNotP 1997, 58 ff.

167 Schollen, DNotZ 1969, 68 ff.; BVerfGE 17, 371.

168 Seybold/Vetter, BNotO § 4 Rn 1; standard Bohrer, DNotZ 1991, 3/7

passes to a notarial senate at the Federal Supreme Court (§§ 99 ff BNotO). The notarial senates consist of judges and notaries as observers (§§ 101 ff, 106 ff BNtO).

c) The guarantee of citizens' access to notarial services

A notary's office is only suitable for the security and guarantee of civil human rights if the lowest possible access thresholds exist, which could hinder and make it more difficult for citizens to consult the notary. The following structural elements and professional obligations of the German notary law are of particular importance here:

aa) Access threshold: A particular priority for the notary's office lies in the citizen's access to the notary not being hindered by any formalities or procedural thresholds. The notary combines the authority and trust of a judge with the immediacy and spontaneity of a freelance legal adviser.

bb) Duty to carry out office: According to § 15 BNotO the notary may "not refuse to produce a document without sufficient reason." If a notary refuses to produce a document a complaint can be lodged with the District Court.

This "obligation to guarantee to carry out office," which refers only to the production of documents and not to other tasks which are the responsibility of the notary, was already contained in the German Reich's Notarial Code of 1514[169]. The notary therefore has no right of refusal; the selection of clients or the exclusion of certain social groups is inadmissible. Corresponding with this, the citizen has a subjective entitlement under public law to the notary's activity[170]. The citizen consequently has the right to free choice of notary.

This claim by the citizen to a guarantee that the notary will carry out his office corresponds to the claim to a guarantee that the judge will administer justice. The judge can no more refuse to give a judgment on a case than a notary can refuse the request to undertake a document[171]. Both can be directly derived from the above described "judicial basic rights"[172].

cc) Fee system: The notary receives fees for his activity in accordance with § 17 para.1 BNotO, which are legally established in the cost code (KostO). This law regulates the fees of notaries and of the voluntary jurisdiction courts according to the same principles and – with regard to amount – on identical scales. The value fee principle prevails, according to which the amount of the fee depends

169 Schippel/Reithmann, BNotO § 15 Rn. 15

170 Seybold/Reithmann, BNotO, § 15 Rn 16.

171 Keidel/Kuntze/Winkler, Law of documentation, Intro. Rn 31.

172 Part II.2.a).

upon the commercial value of the matter undertaken[173]. According to § 140 para. 2 KostO, agreements on cost are without effect[174].

This fee system is a fundamental principle for the independent and impartial discharge of office. The choice of notary is only governed by the confidence of the law-seeking applicant: in the place of commercial competition based on "low price", competition is by confidence through professional quality[175]. Finally, the value fee ensures a social balance, as simple procedures with a high value subsidise work-intensive matters with a low value[176].

The above fee system is also required under constitutional law by the principle of equality in Article 3 GG. Since the notary performs a public office, all notaries' fees must be identical for the same activity for each citizen[177].

The social welfare aspect of notarial fees is emphasised by § 17 para. 2 BNotO, according to which the notary must grant the "right to legal aid" to an impecunious party, whereby he must provide his activity free of charge or for reduced fees[178].

dd) The obligation to secrecy (§ 18 BNotO) is a further element in the removal of access thresholds to the notary. The law-seeking citizen must be able to confide in the notary without reservation in his personal, family, economic and legal affairs. The obligation to secrecy forms a fundamental pillar for the regard and confidence in which the notary is held and for his ability to perform his role for the citizen[179].

ee) Official liability: If the notary knowingly infringes an official obligation incumbent upon him, then he is personally and unlimitedly liable to compensate the damage arising from this. This liability – as opposed to all other legal and economic advisory professions in Germany today – cannot be limited by agreement with the parties concerned. An obligation of the state is excluded for the notary. That would be incompatible with the notary's independence in relation to the state and with his obligation to secrecy[180].

The notary's personal liability is of considerable importance to the issue of confidence in the notary's office on the part of the law-seeking public[181] and forms

173 See Bengel, Draft of a fee code with comments in: Das moderne Notariat, loc.cit., p. 35 ff.

174 See Korinthenberg, Cost code, § 140 Rn 2.

175 Seybold/Vetter, BNotO, § 14 Rn 5.

176 Bengel, loc.cit., p. 35; also Seybold/Vetter, BNotO, § 17 Rn 3.

177 Cf. Seybold/Vetter, BNotO, § 17 Rn 3, 5.

178 In amplification, legal status statements of the Federal Notaries' Chamber apply, DNotZ 1976, 261; see Seybold/Vetter, BNotO, § 17 Rn 25 ff.; Korinthenberg/Bengel, KostO, Vor § 140 Rn 9 ff.

179 Seybold/Schippel, BNotO, § 18 Rn 1

180 Haug, The official liability of the notary, 1989, Rn 7.

181 Haug, loc.cit.

a prerequisite for opening unreserved access for people for the care of their civil-law interests by the notary.

ff) Insurance cover for a citizen prejudiced by the notary complements the basis of confidence formed by the personal liability of the notary. § 19 a BNotO obliges every notary to take out professional personal liability insurance. The minimum insurance sum is currently DM 500.000 and is being increased in the amendment of the Federal Notaries' Code to one million for more than four claims per year[182].

The individual insurance of each individual notary is supplemented by group insurance of the notarial chambers, which must provide backup cover for each individual notary for damage due to negligence (§ 67 para. 2 no. 3 BNotO) as well as for intentional damage. For damage with intent, the Notaries' Chamber in Germany also keeps a damage fund for settling damages not covered by legal regulation (§ 67 para. 3 clause 3 BNotO).

3. Protection of private law through procedural law (BeurkG)

Through the documentation law of 28.08.1969, the documentation responsibilities which until then had been distributed amongst a wide variety government and court officials – in addition to the notary - have been almost exclusively transferred to the notary. This followed the realisation that consultation and instruction are tasks which are essentially foreign to the nature of the courts and administrative authorities, and that the latter also usually lack the relevant experience[183]. Consequently, the documentation law represents a milestone in the history and development of the German notary's office.

The fundamental significance of the documentation law lies in the detailed regulation of procedures and obligations which the notary must observe during documentation and authentication, in order to ensure that the objective of his collaboration in formulating private rights is also achieved in accordance with procedures[184]. The notary's intervention should ensure that the parties involved only make their decision in the full knowledge of the consequences of the legal formulation[185].

The most important stipulation of the documentation law, in which the supportive function of the notary is expressed more clearly than ever, is § 17: This clause regulates and establishes the obligation to instruction in notarial documentation[186]. This stipulation is described as the "magna carta" of notarial activ-

---

182 The "Third amendment law of the federal notarial code" passed by Parliament in the meantime is to be published shortly.

183 Keidel/Kuntze/Winckler, BeurkG, Intro. Rn 25.

184 Keidel/Kuntze/Winckler, BeurkG, Intro. Rn 22.

185 Flume, DNotZ 1969, 33 ff*; Larenz, BGB General Part, § 21 I a 3; BGHZ 31, 79/86.

186 Keidel/Kuntze/Winckler, BeurkG, Intro. Rn. 24; Brambring NJW 1975, 1259.

ity[187]. Due to its significance for the protection of human rights in the area of civil law, the wording of this stipulation is given below:

> "§ 17 Principle
>
> (1) The notary shall find out the will of the parties, clarify the facts, instruct the parties concerning the legal consequences of the transaction and shall give their statements clearly and unambiguously in writing. When doing this he must ensure that errors and doubts are avoided, and that inexperienced and inexpert parties are not disadvantaged.
>
> (2) If there are doubts as to whether the transaction complies with the law or the true will of the parties, such doubts should be discussed with the parties. If the notary doubts the effectiveness of the transaction and the parties insist on the documentation, he must inform the parties in writing of the doubt and of the relevant explanations.
>
> (3) If foreign law is used, or if doubts exist concerning it, then the notary must point this out to the parties and confirm it in writing. He shall not be obliged to provide information on the content of foreign legal systems."

The notary's role and obligations with regard to documentation have been described as clearly as possible. Particular emphasis upon the themes discussed here is given in § 17 (1.2), according to which the notary must ensure that inexperienced and inexpert parties are not disadvantaged. This means that the notary must align the scope of his obligation to provide information with the party's personality[188]. Superficially, this obliges the notary to unequal treatment of parties with different backgrounds and experiences, which, however, ultimately leads to the balancing of strengths and to the production of the desired, balanced, non-contentious document in accordance with the parties' interests. The notary's role of protecting the weak from the strong in the sense of a social balancing of strength, which was cited at the beginning from Schwachtgen, can hardly be more clearly formulated under law.

The actual documentation procedure requires that the **document is read out**, approved by the parties and signed by the parties in their own hand.

Finally, mention should be made of the additional professional obligations regulated in the same section of the law, which ensure the **execution of the notarial document**:

The notary must point out, in accordance with § 18, the requirement of judicial and official approvals, in accordance with § 19, execution requirements under the tax laws and, in accordance with § 20, legal rights of first refusal in property sales, and note this in writing. In property transactions the notary is obliged, in

187 Schmitz-Valckenberg, DNotZ 1994, 496

188 Keidel/Kuntze/Winckler, BeurkG § 17 Rn. 30; for details see Keim, The notarial documentation procedure, 1990, Rn 124-136.

accordance with § 21 BeurkG, to consult the land register before documentation and to inform the parties of the relevant content.

For **disabled parties,** the documentation procedure ensures special protection through the notary: §§ 22 to 25 contain special procedural regulations which take account of the restrictions imposed upon deaf, dumb, blind and illiterate people, so that the objectives of notarial documentation are also achieved with regard to these people.

4. Protection of private rights through formulations of civil law

The last cornerstone in the simple statutory right to safeguard private rights is contained in the formulations of the Civil Code (BGB). This prescribes notarial documentation for legal transactions and contracts which are of particular legal or personal significance for the parties and for legal communication, and in which particularly far-reaching and important decisions have to be made. A legal transaction entered into without observing this prescribed form is without effect (§ 125 BGB).

Consequently, the notary's involvement as a provider of independent and impartial assistance is established – even enforced - as early on as possible: Without the notary's involvement, there would not even be any binding legal effects or entitlements. Whilst the notary can influence the formulation of the contract, citizens retain the freedom of decision concerning the formulation of their legal affairs without advance commitment, until the completion of the documentation by the notary[189].

The most important legal transactions, which require notarial documentation for their effectiveness, are listed below:

a) Law governing contractual obligations: promises of gift;

b) Property law: Property contracts, any order or amendment of property rights, especially mortgage liens, usufruct, powers;

c) Family law: Marriage contracts, adoption applications;

d) Inheritance law: Wills, inheritance contracts, transfer of shares of inheritance, renunciation of inheritance, renunciation of legitimate portion, applications for certificates of inheritance;

e) Corporate law: Establishment of joint-stock companies, amendments to Articles of Association of joint-stock companies, transfer of GmbH shares, company changes[190].

---

189 See Pützer, The notary in the civil law system, in: Das moderne Notariat, loc.cit. p. 14.

190 cf. Vollhardt, General status of the notary in: Das moderne Notariat, loc.cit., p. 17.

Consequently, German civil law relegates the most important legal transactions within the spheres of the "substantive human rights" described in Part I.2.c) to the form-determining responsibility of the notary.

Part IV: Protection of human rights by the notary on an international level

Since the establishment of the U.I.N.L., efficient structures have already been created and significant steps taken for the protection of human rights by the international notary's office. A glance at the membership statistics over the last 10 years shows the great political success that can be achieved in the field of human rights protection through the preventive function of the notary's office:

Whilst at the time of its XIX International Conference in Amsterdam in 1989 the U.I.N.L. had more than 29 member notary's offices, it has in the meantime achieved a status of 67 members. This does not just reflect the opening of the eastern European countries, but also a global development. At the last general meeting of the U.I.N.L. on 30/31 May 1997 in Santo Domingo, new notary's offices from Croatia, Romania, Slovenia, Indonesia and Panama became members, and during the Congress in Buenos Aires a decision is to be made about applications for admission by the Georgian notary's office and – representing a significant step towards the "Common Law" and "Civil Law Systems" – by the "Scrivener Notaries of London".

Large steps and further efforts are required in the future, not only in supporting young notary's offices, but also in continuing to develop the "old" notarial members, in order to be able to fulfil the notary's role in the protection of human rights on an international level. This plan of action for the international notary's office consists of three elements:

- Extension of the **external co-operation** of the notary's office (1.)
- Further development of the **internal structure of the notary's office and standard obligations** (2.)
- Strengthening of the **international further training and science** of the notary's office (3.)

1. Extension of the external co-operation of the notary's office

a) Collaboration with supranational organisations which serve to protect human rights is U.I.N.L.'s primary role. The Permanent Representatives of U.I.N.L. at UNO, UNESCO (Organisation des Nations Unies pour l'Education, la Science et la Culture), UNHCR (Haut-Commisariat des Nations Unies pour les Refugiés) or FAO (Organisation pour l'alimentation et l'agriculture) as well as – on

a European level – the Council of Europe [191] demonstrate the presence of the Union in these fields.

Special emphasis is due to the collaboration between U.I.N.L., in particular the Commission de Cooperation Notariale Internationale (C.C.N.I.), with the **Council of Europe**. Since the opening of the countries of eastern Europe, the Council of Europe, in collaboration with U.I.N.L., has conducted a large number of seminars within the framework of the "Themis Programme" on the development of a free Latin Notary's office in the reform states of the East. This programme is dedicated to the development of democratic legal structures in the reform states, for which a free Latin notary's office is considered essential[192].

The role of the Latin notary's office in achieving this objective has found lasting acknowledgement in the "Resolution of the Round Table of Keßthely/Hungary" of 15 November 1990, which was passed on the occasion of the "Second Notarial Colloquium of Central Europe" by high-ranking representatives of the Council of Europe and U.I.N.L., as well as of courts and notary's offices from thirteen participating countries in the East and West[193].

b) The continued development of collaboration with other professional organisations and associations will also strengthen the influence of the Latin notary's office on the protection of human rights. Through such collaboration new allies can be found for the role of the notary's office, and an understanding of those forces by society, commerce and politics, which have until now critically opposed the role of the notary's office, can be increased. Today, the union has already established relations with a considerable number of professional groups, particularly the legal profession and judiciary, trade associations, and specially finance and banking[194].

The Latin notary's office receives particular support from the **international judiciary**: At its Conference in Macao from 23 - 27.10.1989, the "Union Internationale des Magistrats", through the resolution of Commission II, publicly demanded that the function of the Latin notary's office be strengthened and that increased recourse be taken to the work of the notary in justice. Particular account was taken here of the institutional qualities of the notary's office through public office, impartiality, and the obligation to information and advice, which make the notary the champion of dispute prevention, as well as the quality of

---

191 Overeview in: U.I.N.L. Information, Bulletin du Secretatiat Permanent Europeen, Milan, no. 21 (December 1997), p. 94 ff.; on collaboration with these institutions: Tinguy du Pouet, loc.cit. (FN 2), p. 69(UNO), 73(UESCO), 82(FAO) and 91-98 (Court of Europe).

192 See Tinguy du Pouet, loc.cit., p. 98.

193 Likewise the report by the Committee for Law and Citizens' Rights of 9 December 1993, loc.cit. (Fn 165), clause 19, 20; in this regard: Pützer, Marinho Report and Resolution of the European Parliament on the situation and organisation of the notarial group in the European Union, in: Festgabe für Weichler, in: Freundesgabe für Weichler, Cologne 1997, p. 191/203 f.

194 Cf. the selection of U.I.N.L. representatives - in U.I.N.L. Info, loc.cit. (Fn 190), p. 96-98.

the public document, which simplifies the procedure of evidence in the event of legal disputes.

The collaboration of U.I.N.L. with Anglo-Saxon **legal professional** associations, particularly the American Bar Association (ABA) and the Society of Public Notaries of London, has publicised the professional aspects of the Latin notary's office and its standard obligations within the Anglo-Saxon legal circle, where the Latin notary has not existed until now, and stimulated comparable professional developments:

Concurrent demands for an "authentic public document" for electronic commerce are now being developed in joint commissions. The "ABA Task Force on International Notarial Issues" has in the meantime drafted the "Inter-American Guidelines on Recognition of Notarial Acts". These "Guidelines" are intended – as are expressly the "Considerations" – to close the gap[195] that exists due to the absence of the notarial document in Common Law, facilitate international trade and investment and comply with the standards required for service professions in Annex 1210.5 of the "North American Free Trade Agreement" ("NAFTA"). In the state of Florida a law was passed at the beginning of 1997 for the introduction of a "Florida International Notary"; clearly based on the professional model of the "Scrivener Notary"[196] existing in London, which introduces a professional qualification for attorneys similar to that of the notary, which is intended to provide a bridge to countries with a civil law system.

A future aim is the consolidation of collaboration with national and international **consumer protection associations**, whose interests correspond with those of the notary in many areas[197].

c) Finally, participation by the U.I.N.L. and its commissions in the development of International Legislation and Agreements under International Law is to be continued, as in the Brussels treaties concerning the acknowledgement and enforceability of public documents.

One of the greatest successes so far was recorded by the notary's office in the study "of the position and organisation of the notarial group in the twelve member states of the community" conducted by the **European Parliament**: The report generated by the Committee for Law and Civil Rights, as well as the resolution of the European Parliament[198] based on this, can be considered the most

---

195 Similarly, the Committee for Law and Civil Rights of the European Parliament, in: Report, loc.cit. (Fn 165), clauses 7-9.

196 See Baumann, Die öffentlichen und sozialen Funktionen der Notariate in den Ländern der Europäischen Union, Notarius International 1996, 20/28; Pützer in: Freundesgabe für Weichler, loc.cit., p. 191 (200, 203)

197 Cf. the first study meeting of 23rd German Notarial Conference in Hamburg 1993, on the theme "Rechtssicherheiten und Verbraucherschutz - Form in nationalen und europäischen Recht, DNotZ 1993, p. 21 ff; also the Symposium of the European Law Academy on "Consumer protection in civil law", Brüssels 1997.

198 Parliament resolution in: European Official Gazette No. C 44/36 of 14.2.1994; Report of 9 December 1993, Minutes of the European Parliament A3 - 0422/93, cf. also Fn 165.

significant official document that has been adopted to date concerning the Latin notary's office by a supranational office; the role and usefulness of the Latin notary's office for democratic legal structures and the protection of civil rights have found unlimited recognition in this document[199].

2. Harmonisation and development of internal notarial structures and standard obligations

The U.I.N.L. and their member notary's offices must continue to develop the existing standard and level of quality achieved so far in their work. The grouping of notaries' offices on an international level, the strengthening of their collaboration and the internationalisation of law shows the usefulness of the international presence of the Latin notary's office just as clearly as the existing differences between the member notary offices of the Union. The harmonisation and development of the self conception and standard obligations of the Latin notary's offices must therefore be given top priority.

a) The comparability and homogeneity of the Latin notary's offices have been ensured since 1948 by the establishment and existence of U.I.N.L. as a world organisation and the definition of the central elements of the Latin notary's office in the Union's Articles of Association (Article 1.2).

A further impulse to the harmonisation of self-conception has been provided with the "Principes fondamentaux du système de Notariat Latin" adopted by the U.I.N.L. Conseil Permanent in The Hague on 13.-15.3.1986, which contain considerably condensed criteria for the function and responsibilities of the notary, the notarial document and the professional organisation of the Latin notary's office with regard to the Articles of Association.

The statutes of the regional organisations and conferences of the Latin notary's offices, such as the "Conference Permanente des Notariats de l'Union Europeenne" (C.N.U.E.) have a similar harmonising effect. This conference defined the agreed characteristics of the notarial profession in Europe in its "Memorandum of Madrid" of 22/23 March 1990 and later adopted these features into the conference statutes.

b) The most important task lies in the further development of the international standard obligations of the Latin notary's office: Due to the centuries-long independent national legislation for the notary's office, the standard obligations of the Latin notary's offices are also different in an international respect. The variability of professional and assistance obligations can prove a hindrance to cross-border collaboration between notaries and also result in misdirection and disappointment for law-seeking citizens in international legal transactions. Therefore, the international notary's office is also called upon to assimilate the standards of notarial activity from the point of view of content.

---

199 See Pützer, Marinho Report, loc.cit. (Fn 192), p. 191 ff.

Without being assigned to international legislation, this could be achieved firstly by way of self-obligation of the notary's office through the adoption of "standards of service" on a regional or continental level or on the level of the U.I.N.L.. A **general standard of obligation** for all areas of notarial activity should include at least the general obligation to consultation before and during documentation, the obligation to assistance for handling the document, and an obligation to take out insurance for professional liability risks. **Area-specific service standards** for particular areas of notarial responsibility, e.g. in property law or corporate law, could then be developed and adopted.

An example of such standards of service is provided by the "Principles of collaboration in cross-border property transactions" adopted by the Conference of Notaries in the European Union (C.N.U.E.) on 20/21.1.1991 in Strasbourg.

After their resolution by the international notarial committees, such service standards could be converted by the member notary's offices into national professional law and then serve to stimulate legal regulations of the member states. This route has been taken by the Spanish notary's office, for example, resulting in the introduction at the beginning of the 90's of the obligation to provide consultation and the obligation of land register reference into national notarial law, where such regulations had previously been lacking.

c) Further development also requires cross-border co-operation between notaries. This entails defining the method and allocation of responsibilities for notarial collaboration in different countries in a cross-border service case. These issues are the subject of the "European Code of Professional Notarial Law", which was passed by the CNUE on 3./4. 2.1995 in Naples and was then ratified by all the member notary's offices in the European Union as their own professional law[200].

As a further step in converting this code, through the "Third Amendment Law to the Federal Notarial Code" passed on 10.7.1998, a new § 11 a has been inserted into the German notarial law", which regulates a specific notarial form of **cross-border official and legal assistance**. Under preservation of the sole competence of the national "local notary" for the documentation procedure, which takes account of the territoriality principle under international law, this regulation enables a foreign colleague to be called in for the documentation procedure, and vice versa the participation of a German notary in a documentation abroad, through the consultation and support of colleagues there[201].

---

200 published in DNotZ 1995, p. 329 ff., on this, Schippel, Der europäischen Codex des notariellen Standesrechtes, DNotZ 1995, p. 334 ff.

201 see Schippel, DNotZ 1995, p.336 f/341; Schippel, Das deutsche Notariat als Gegenstand europäischer Rechtssetzung, in: Festschrift für Lerche (editor Badura/Schulz) 1993 p. 500/509 ff.; Pützer in: Freundesgabe für Weichler, loc.cit. 191/211 f.

The African notary's office is currently following the European example and is developing an African code of professional notarial law in its regional commissions, particularly the "Commission des Affaires Africaines" (C.A.A.).

d) The opening up of the national notary and documentation law to enable foreign participants or international cases to be dealt with in the most effective way possible is a matter which must be pursued primarily by national notaries in their relevant legislative bodies[202].

This applies, firstly, to an opening up of the language used in documentation and trials. Human rights protection treaties under international law require for the area of disputes and in particular of criminal law, immediate information in a language known to the party[203], and also contact with an interpreter without charge if the party does not have mastery of the language of the court [204].

In many countries which have a Latin notary's office, documentation law requires the document to be in the national language. In other countries, as for example in the Federal Republic of Germany (§ 5 para. 2 BeurkG[205]), documentation is permissible in any language of which the notary has mastery. The process is alleviated further by § 16 BeurkG, which empowers the notary to swear in the interpreter[206], as well as § 50 BeurkG, according to which the notary can certify the accuracy and completeness of the German translation of a document compiled by him in a foreign language. In this case, the translation has full value as evidence[207].

A detachment of the document language from the language of the country in which it was compiled could break down the language barriers of international law. The character of the document as a public document of the state in which it was compiled would not be called into question by this.

d) The development of new documentary media will also contribute to the alleviation of notarial tasks in the international framework. The U.I.N.L., in its XX International Conference in Cartagena/Columbia of 22.4.-2.5.1992 on the theme "EDP documents and legal security", was the first association in the legal and economical world to point out the legal risks and opportunities of electronic legal transactions. Since then, the U.I.N.L., with its "Commission informatic et securite juridic", has taken overall charge of developing legal framework conditions for electronic legal transactions. The aim is an electronic

202 cf. also Stürner, Die notarielle Urkunde im europäischen Rechtsverkehr, DNotZ 1995, 343 ff.

203 z.B. Art.5 Abs. 2 ECHR, Art. 14 Abs. 3 CCPR.

204 Art.6 para. 3 e) ECHR; Art.14 para. 3 f) CCPR.

205 see Keidel/Kunzte/Winkler, BeurkG, § 5 Rn 6 ff.

206 in detail Keidel/Kuntze/Winkler, BeurkG § 16 Rn 1 ff.

207 cf. Keidel/Kuntze/Winker, BeurkG, § 50 Rn 3 ff.

notarial document which offers the parties legal security on a world wide basis comparable with the classic media.[208].

1. International further training in the science of the notary's office.

As an important agenda for strengthening international human rights protection through the notary's office, the intensification of the notary's further training in the science of the notary's office on an international level should be mentioned. In addition to the "classic" **world conferences** of the Latin notary's office – now enriched for the notarial practice by "**legal exchanges**[209] - and the increasing number of **regional notarial conferences**[210], an additional type of international notarial further training that should be considered is that of **bilateral further training seminars** involving neighbouring notary's offices, which dedicate themselves solely to the themes of international private law and the comparative law of both participating states[211].

The numerous **further training seminars** for notaries in the reform states organised by U.I.N.L. and the European Council deserve emphasis. Within the organisation of U.I.N.L., the work of the Commission des Affaires Europeennes et de la Mediterrannee (C.A.E.M.), which for the first time provides the young notaries of Eastern Europe with a forum for co-operation and exchange of experience, deserves special recognition. In order to make this co-operation useful for the individual notary, the plan pursued by U.I.N.L. to institutionalise this work in the area of further training by the foundation of an **International Notary's Office Academy,** is to be particularly welcomed.

The development and publication of further **international model documents** could close an important gap for notarial practice - on the model of international "power of attorney texts".

The scientific sector is served by the notary's office's own **institutes** (Institut de Recherches et d'etudes Notariales Europeen -IRENE-, Luxembourg; Fondation pour la Promotion de la Science Notariale, Amsterdam; Institut International D'Histoire du Notariat, Paris), as well as by the presence of representatives of the Union in numerous international scientific institutions (UNIDROIT, Rom;

---

208 for the status of legal and technical discussions in Germany, cf. conference report "Drittes Forum elektronischer Rechtsverkehr der Bundesnotarkammer" of 13.3.1997, DNotZ 1997, 434 ff.; also Malzer, Zivilrechtliche Form und protessuale Qualität der digitalen Signatur nach dem Signaturgesetz, DNotZ 1998, 96 ff.

209 on the legal exchanges of the XI U.I.N.L. Conference in Berlin: "Notarielle Fragen des internationalen Rechtsverkehrs" DNotI-Schriftenreihe Volume III/1(German) and 2(French), Würzburg 1995.

210 exemplary the "Notarial Seminars" in Keszthely, now continued in Budapest/Humgary, the "Land Register and Notarial Conferences" in Tallin/Estonia, the "European Conference" in Salzburg, recently the "Russian Notarial Conference" in Moscow.

211 cf.. the Symposium on Notarial Issues of German-Dutch Law, October 1996 in Münster; results published by the German Notarial Institute, Würzburg 1997.

Conférence de la Haye de Droit International Privé, The Hague; Europäische Rechtsakademie /Academie de Droit Europeen, Tier). The scientific **publication** of the notary's office has been reinforced in an exemplary way by the journal "Notarius International" published by Klüver in The Hague.

As a further step there is the publication of a **series of scientific papers by U.I.N.L.,** through which the contributions and results of U.I.N.L. congresses, for example, could be made available to a wider jurisprudence.

Thus the international notary's office has a large number of tools at its disposal, with which to harmonise and develop its structures and services single-handedly. The more decisively it can follow the path which it has chosen, the smaller will be the need for a levelling legislation, which would endanger the identity and individuality of its members. The most noble obligation of the Latin notary's office and the measure of its actions remains in this connection the deepening of its contribution to the protection of the human rights entrusted to it.

Topic III

The significance of the notarial code of professional conduct for clients, colleagues and the state

Reported by:

Solicitor and Notary Dr. Rolf Gaupp, Heilbronn

CONTENTS

* according to the notarial system under civil law

SECTION A

I. The notariate in Germany - basic situation

1. The notariate as part of the tradition of Roman law

"Notaries are appointed as independent holders of a public office for the authentication of legal procedures and other functions in the field of non-contentious administration of the law." "The notary has a duty to administer his office in accordance with the oath he has sworn. He is not the representative of any party, but the impartial servant of the parties involved."

§§ 1, 14 Section 1 of the federal regulations governing the function of the notariate (henceforth quoted in the German form of its abbreviation: BNotO).

These statements set out the basic structural principles for the German notariate.[1]

The German notariate is a notariate along the lines of the classical Roman legal tradition, and is, in fact, a particularly strict representative of it. According to German law, every notarial activity is governed by legal procedure. A definitive catalogue of areas of notarial competence is applicable.[2]

This sees the German notariate corresponding to the definition of the institution of the notariate of the Roman legal tradition, as this was presented in the joint memorandum of the Standing Conference of EU Notariates dated 23 March 1990.[3]

2. Forms of notariate

Notarial activity in Germany is carried out within a variety of types of notariate:[4]

The notary functioning exclusively as such , as has also been introduced into the new Federal States. The notary exercises his office as an exclusive profession. As a lawyer commissioned as a notary; the notary exercises his office parallel to his profession as a lawyer.

The office of the notary functioning exclusively as such and the function of lawyer commissioned as notary are exercised in private practice. The Federal State of Baden-Wurttemberg represents an exception here. Under the terms of the

1 Baumann, The German Notariate: Public Office and Social Function; Topic I of the XXI. International Congress of the Roman Notariate held in Berlin, 28.05 to 03.06.1995, reports of the German delegation, Topic I, passim, in particular 10 ff.

2 Baumann, loc.cit., 12 ff.

3 Memorandum of the Standing Conference of the EC Notariate (CNCE) held 23.03.1990 in Madrid (the "Madrid Memorandum")

4 Compare with Baumann's summary, loc.cit. 15 ff.

corresponding provisions in §§ 114, 115 BNotO, in Baden-Wurttemberg there are state notariates established to which are appointed "notaries in the service of the Federal State". These state notaries in Baden-Wurttemberg also undertake duties in connection with the guardianship court and the probate court. Within the area of the Karlsruhe Higher Regional Court (OLG), the office of state notary is the only form of notariate in existence.[5] In the area of the Stuttgart Higher Regional Court we find appointed all types, namely notaries in private practice, notaries operating exclusively as such and lawyers commissioned as notary.[6]

In the Karlsruhe Higher Regional Court area, these state notaries must be qualified as judges, while in the Stuttgart Higher Regional Court area they must be qualified for the office of regional notary, subsequent to special training at the Notarial Academy in Stuttgart. The BNotO does not apply to state notaries in Baden-Wurttemberg.[7] They are not directly integrated into the professional organisations of the State Chamber of Notaries and the Federal Chamber of Notaries.[8]

In numerical terms, the lawyer commissioned as notary predominates in Germany, however notaries operating exclusively as such account for the majority of authenticated legal procedures.[9]

3. The lawyer commissioned as notary

The position of the lawyer commissioned as notary is the result of a historical development in Germany. The situation was first created in Prussia by which it became possible to exercise the office of notary in parallel with the profession of lawyer.[10] Qualification as a notary functioning exclusively as such, as is the case for the a lawyer commissioned as notary, calls for qualification as a judge, § 5 BNotO. In addition, for the notary functioning exclusively as such there is also the condition imposed of at least three years' service on probation as a notary assessor. The applicant lawyer commissioned as notary must be qualified as a lawyer before the court for the area within which the office of notary to be fulfilled is located, and he must fulfil both the general and the local "probationary period" requirements.[11]

---

5 At the present time, the Justice Ministry is considering whether there should also be notaries in private practice appointed in the Karlsruhe Higher Regional Court area.

6 Compare with the overview in Bohrer, Beck'sches Notar-Handbuch, 2nd edition, 1997, Chap. 1, marginal no. 2.

7 § 114 I 1, § 115, 1 BNotO

8 Compare in detail the comments relating to §§ 114, 115 BNotO by Schippel, in Seybold-Schippel, Notes on the BNotO, 6th edition, 1995, marginal nos. 1 to 28

9 Statistics in the German Notariate, 1997 issue: 9031 lawyers commissioned as notary, 1657 notaries operating exclusively as such, 863 official state notaries

10 In relation to the "Constitution of the Notariate" in Germany, compare, especially in connection with historical aspects and the regional distribution of notaries operating exclusively as such and lawyers commissioned as notary, Bohrer loc.cit., marginal no. 11 ff.

11 As a summary of conditions for access to the profession, Bohrer, loc.cit., marginal no.46 ff.

The lawyer commissioned as notary differs from the notary functioning exclusively as such in that he is allowed to exercise two completely separate professions. Otherwise there is no functional difference between the notary functioning exclusively as such and the lawyer commissioned as notary; the areas of competence, procedural stipulations and requirements of professional legislation are identical for the lawyer commissioned as notary and the notary functioning exclusively as such; both fulfil **the same office.**

Nevertheless, the fact that the lawyer commissioned as notary is permitted to exercise two separate professions has a number of consequences. In accordance with § 9 BNotO, in Germany, the notary functioning exclusively as such may form a partnership only with another notary. Associations with other professional groups, in particular with a solicitor, are barred to him. Conversely, the lawyer commissioned as notary may form a partnership with a solicitor and exercise his profession jointly. The association thus permitted between lawyer commissioned as notary and solicitor is most widely practised in Germany. It is similarly permitted for the lawyer commissioned as notary to associate with a tax consultant.[12] Under the legal situation as it has been in the past, it has not been permissible for an association to be formed between a lawyer commissioned as notary and a chartered accountant. This is a disputed question which has still not been resolved.[13] It is in particular the opportunities available to the lawyer commissioned as notary in Germany to form associations, and this is perfectly clear, which have brought about changes in the external form of the notary's professional activities. Along with the notary operating exclusively as such, there are now positions for lawyers commissioned as notary in large partnerships, and also in "medium-sized" multiple practices, reflecting the trend within the professions providing legal advice towards practice units of greater size, and often on an international basis.[14] In this connection, it is possible for questions to arise which may actually prove to be based in constitutional law.[15] However, there is general consensus that these leave the elementary principle of **functional uniformity** between the notary functioning exclusively as such and the lawyer commissioned as notary unaffected. The profession of the notary is

12 Compare - representatively - Seybold-Schippel, loc.cit., marginal no.9 to § 9 BNotO

13 Compare - representatively - Schippel loc.cit., marginal no. 9a. The prohibition in place up to the present day on any association between a lawyer commissioned as notary and a chartered accountant is the subject of a procedure being undertaken by the Federal Constitutional Court, however it has yet to reach a decision.

14 In this connection, for example, the treatise by Zuck, The Notary - between Official Position and Liberal Profession, an anniversary publication in honour of Helmut Schippel, 1996, 818, in particular 832. - NJW 1997, Volume 29 LIX, employment advertisement for a major German solicitors' and notaries' practice with "offices in Berlin - Dusseldorf - Frankfurt am Main - Brussels - Budapest - Prague - New York"; the practice is advertising its requirement for staff for its notarial office "to consist of a number of notaries" to be assuming a "central position in our Berlin office".

15 As these very recent examples: Federal Constitutional Court Resolution of 24.07.1997, 1 BvR 1863/96. A "logo" on the letterhead of a solicitors' practice including lawyers commissioned as notary is deemed permissible; in terms of constitutional law, this is based on the aspect of the professional description by which an association between a lawyer commissioned as notary and solicitors is permitted.

the exercise of an **official function** for which there are standardised rules in force in Germany.[16]

II. The Notarial Code of Professional Conduct - general

1. The Code of Professional Conduct provides the model for the professional behaviour of the notary. It covers all of the significant official duties[17] imposed on the notary in the exercise of his profession.

Regulations dealing with the exercise of the profession of notary in accordance with the relevant duties are contained in statutory standards. It is primarily the BNotO and the legislation on authentication which contain such regulations, supplemented by the Service Regulations for Notaries (henceforth quoted in its abbreviated German form - DONot).[18]

Otherwise, the regulations dealing with the official duties of German notaries are set out not only in written statute, but also in the unwritten **code of professional ethics** which has, at least partially, come to have been accepted as binding on the profession.[19]

This code of professional ethics which has developed over time is binding on every notary public. § 14 Section 3 Clause 1 of the BNotO obliges the notary "to prove himself worthy of the respect and trust shown towards his profession". Accordingly, the dictates of professional propriety, "professional honour", are therefore imposed as formal duties on the office of notary.

2. Information about the Code of Professional Conduct in this connection is also provided by, in particular, the **guidelines** in which the notaries' associations have set out the basic principles of the Code of Professional Conduct to be applied.[20] These guidelines represent the most important source of information for the unwritten part of the Code of Professional Conduct. They bring together basic principles which have come to be generally accepted as part of the notary's profession.[21]

---

16 In connection with the description of the notary's profession as stipulated by the BNotO and circumscribed by its regulations, the summary of basic principles provided by Schippel in Seybold-Schippel, loc.cit., marginal no. 8 to § 14 BNotO.

17 Compare - representatively - Vetter, The Function and Development of the Notarial Code of Professional Conduct, special publication on "25 Years of the Federal Chamber of Notaries", DNotZ (German Notarial Gazette), 1986, 50*ff.

18 The DONot is a general administrative requirement issued by the Federal State Justice Administrations and standardised throughout the federal area. It is issued on the basis of its general right to supervise notaries in accordance with §§ 92 ff. BNotO; compare with Kanzleiter, in Seybold-Schippel, marginal no. 1, preliminary comments to the DONot.

19 Schippel, in Seybold-Schippel, marginal no. 5 to § 14 DNotZ 1963, 261,263, with additional evidence in each case

20 Schippel, in Seybold-Schippel, marginal no. 6 to § 14

21 Schippel, DNotZ 1963, 261,264

Accordingly, these guidelines have, to a great extent, been applied as standard practice, and through general recognition and the desire of those involved for this recognition to have the force of law, this practice has come to have the status of law in the form of **customary** law.[22]

§78 No. 5 of the BNotO charges the Federal Chamber of Notaries with the task of drawing up general guidelines for the professional practice of notaries by means of resolution passed by the assembly of representatives (= the assembly of representatives of all State Chambers of Notaries). Accordingly, the Federal Chamber of Notaries has drafted the basic principles of the Notarial Code of Professional Conduct in the "General Guidelines for the Professional Practice of Notaries" issued on 08.12.1962.[23] These guidelines are, as the "result of extensive experience

and an expression of carefully established legal conviction and practice, the most important sources of information on the Code of Professional Conduct" They "identify the requirements which notaries must fulfil to ensure that the general public can regard the notariate with trust". In the form of "a self-imposed code of professional conduct" they provide a concrete embodiment of the general provisions governing the duty of the notary to prove himself worthy of the general respect and trust shown to the profession of notary.[24] As individual aspects of the theoretical legal arrangements of the "General Guidelines" are disputed, we do not require to go into the subject any more deeply at this point.[25]

Some chambers of notaries have made amendments to the guidelines for their own areas in accordance with the authorisation contained in § 67 Section 1 BNotO. And older guidelines from earlier chambers of notaries continue to be of relevance, especially in connection with the interpretation of the guidelines of the Federal Chamber of Notaries.[26]

The BNotO is currently being reviewed in significant areas. As a consequence, the redrafted BNotO will embody in concrete terms and amend a variety of professional duties on the notary while underlining the position of the notary as the holder of a public office. So, for example, the prohibition on acting in such a way as to give rise to the appearance of biased behaviour has now been carried over into the BNotO. The same applies to advertising; the ban on having any part in the negotiation of transactions subject to authentication, the ban on any

---

22 Schippel, loc.cit.

23 Printed in DNotZ 1963, 130; Amendments dated 06.11.1970, DNotZ 1971, 3 and dated 02.10.1981, DNotZ 1981, 721

24 Schippel, in Seybold-Schippel, marginal no. 6 §14 et al..

25 Schippel, in Seybold-Schippel, RLNot (guidelines for notaries) Preamble, marginal no. 2 ff. especially in connection with the following possibilities: Substantive Law - collection of internal basic professional principles - concrete embodiment of generally accepted, unwritten law - expression of predominant perception of the profession , among other aspects.

26 Compare with Schippel, in Seybold-Schippel, marginal no. 6 to § 14, et al..

participation in a company incompatible with the office, the duty to continue with further training, the duty to charge a fee, the ban on charging less than the standard fee and the ban on any form of fee-splitting.[27]

In accordance with § 67 of the Federal Government's draft law on the revision of the BNotO, the chambers of notaries are obliged, by including them in guidelines, to more closely specify the duties of the office and other duties on their members within the context of the statutory regulations and the conditions imposed by statute on the basis of them. The Federal Chamber of Notaries must put forward its ideas for these guidelines in accordance with § 78 Section 1 No. 5 of the government draft, on the basis of a resolution of the assembly of representatives.

The guideline recommendations of the Federal Chamber of Notaries and the guidelines of the individual chambers of notaries should be finalised at about the same time as the reviewed law. The preparatory work for this is already under way.[28]

3. The diversification of legal activities and the increasing numbers of notarial documents with a foreign connection have moved **European** notaries to look into the terms of their mutual collaboration, so as to ensure support and advice is properly provided by the notary, even in matters of a cross-border nature.

For this reason, the European notariates have decided to submit a "common set of regulations".

This is found in the "European Code of Professional Conduct for Notaries", as passed by the Conferences of Notariates of the European Union on 03/04.02.1995 in Naples[29].

The professional legislation covering notaries in the member states of the European Union is to a large extent already in harmony. It has been largely stamped with the same Roman pattern. These existing common features were established at European level in the "Code", as the common practice of the member states of the union, with the aim of producing further harmonisation in the professional activities of the notary throughout Europe.[30]

---

27 BNotK Internal, published by the Federal Chamber of Notaries, issued May 1997, page 2.

28 "New Guidelines for the Professional Activities of Notaries", BNotK Internal, issued September 1997, page 1 f., summary of the initial suggestions for regulations in connection with the most important aspects of the contents of the guideline recommendations. Compare also with Hartmann, The Federal Chamber of Notaries and the State Chambers of Notaries; Anniversary publication in honour of Schippel, loc.cit., 645, 650

29 The bulletins of the Federal Chamber of Notaries, DNotZ 1995, 329 ff. provides a version of the text in German (original text drafted in French).

30 Schippel, The European Code of Professional Conduct for Notaries, DNotZ 1995, 334 ff., compare with the basic possibilities for regulation of the activities relating to document authentication in Europe, along with Stürner, The Authenticated Notarial Deed in Legal Transactions in Europe., DNotZ 1995, 343, 348 ff.

In the Code, the basic principles for exercising the office of notary within the European Union are set out in standardised fashion for all notariates, and linked into the unanimously accepted "Madrid Resolution" passed by these notariates in 1990.[31]

It was necessary to identify a solution which allows for cross-border cooperation between notaries in Europe without encroaching on the territorial borders of the state in which the particular notary is appointed and operating at the same time, with the international sovereignty of the state being affected by foreign notarial activity being compromised.[32]

The European Code of Professional Conduct for Notaries meets these requirements, and is also particularly aimed at achieving the following targets, namely[33]

- that those taking part in cross-border legal transactions and calling on the services of a notary within the EU are guaranteed, to as great a degree as possible, the same legal protection in cross-border legal transactions as they are used to benefitting from in connection with internal, domestic authentication procedures;
- that the cooperation between notariates of the EU member states should be facilitated in the matter of cross-border legal transactions by means of standardised regulations;
- that the notaries of each member state with a Roman-style notariate adhere to the **same minimum standard** in respect of regulations covering professional practice;[34]
- that in this way, the same legal security will be guaranteed, to a large extent.

The "European Code of Professional Conduct for Notaries" came into force on the first day of the month following the submission of the appropriate ratification documents at the head office of the Conference of Notariates of the European Union in Brussels by the first two notariates, namely on 01 May 1995.[35]

This codification of the Europe-wide code of practice for notaries as initially presented within the"European Code" (by means of establishing common standards for national notariates in respect of the code of professional conduct and general rules for support) represents a decisive contribution towards the har-

---

31 Compare with note 3 to this work.

32 Wehrens, Notarius International, Vol. 1, 1996, 93 f.

33 Wehrens, loc.cit., 94

34 Compare with the problem of "foreign authentication" representatively the Federal Supreme Court (BGH), e.g. BGHZ 80, 77/17 f., which identifies as significant criteria the "equivalence" of authentication procedures: the duty to check and inform, establishing the identity of participants, a written record of the transaction, reading out, approval, signature and stamping.

35 Wehrens, loc.cit., 93 - At present, the Code has been passed by Austria, Germany, Belgium, France, Luxembourg, the Netherlands, Italy and Portugal.

monisation of the notariate within the EU. In this way, a situation of co-ordinated legal equivalence has been created, on the basis of the past tradition of notarial law throughout Europe, without having any recourse to competences of the EU in connection with directives. This is clearly the preferable option .[36]

PART B

The Notarial Code of Professional Conduct, the "professional ethics of the notary", [37] finds expression and has an active role to play in the widest range of areas of and connections with notarial activity.

This present topic directs attention primarily to "clients", "colleagues" and "the state".

The international co-ordinator of the topic, the notary JUAN FRANCISCO DELGADO DE MIGUEL of Gijon in Spain, expressed these subjects in concrete form by means of questions contained in an overview. The questions and the sequence in which they were presented in this overview have been retained as the basis for the following comments.

I. The Notarial Code of Professional Conduct in connection with the Notary's Client

As the holder of an official position, the notary fulfils functions of state legal administration in the form of the administration of non-contentious law. He fulfils these duties in the service of the client. Viewed from this perspective, the Notarial Code of Professional Conduct represents the sum total of the rules of professional ethics designed to protect the interests of **clients** and all parties involved.[38]

As the most important duties on his office, the notary owes his client moral integrity in the execution of his office; impartiality and independence; trustworthiness and confidentiality; legal and technical competence.[39]

Individual rules arise out of these general rules. Some of these deserve further elucidation.

1. Professional secrecy

---

36 Compare with, in particular, Stürner, loc.cit., 354 f.

37 Compare with Limon, Professional Ethics in the Free Market, Anniversary publication in honour of Schippel, 741

38 Limon, loc.cit., 746. Schippel, in Seybold-Schippel, marginal no. 7 ff. to § 14 BNotO; Bernhard, in Beck'sches Notar-Handbuch, F, marginal no. 44 ff. Nos. 1.2.1, 1.2.2, 1.2.3 and 1.2.4 of the European Code of Professional Conduct for Notaries. § 14 Section 1-3 BNotO. - §1 RLNot (Guidelines for Notaries)

39 Nos. 1.2.1, 1.2.2, 1.2.3 and 1.2.4 of the European Code of Professional Conduct for Notaries. § 14 Section 1-3 BNotO. - §1 RLNot (Guidelines for Notaries)

a) The notary has a duty "... to observe complete confidentiality in respect of all matters of which he gains knowledge in the execution of his profession, and this in relation to all persons..." - §18 Section 1 Clause 1 BNotO.

The parties involved who call on the services of the notary must, in many respects, reveal their personal and family situations to him and provide him with an insight into their financial circumstances. This can only take place on the basis of **personal trust**, and for the notary, this gives rise to the duty to observe **complete confidentiality**.

The strict observation of this duty represents "one of the basic pillars on which rest the trust and respect which the notary enjoys".[40]

b) The duty to observe confidentiality is comprehensive.

It extends to all matters of which the notary gains knowledge in the execution of his office, to the entire contents of negotiations and to everything of which the notary gains knowledge in the process.[41]

Even the name of parties involved, and the **fact that** someone has called on the professional services of a notary are covered by the duty to observe confidentiality.[42] Whether they appear to be important or unimportant, or whether it is deemed to make no difference - all of these matters must be accorded confidentiality, as it has not been established that a party involved might not attach significance to them or that they might not come to be significant.[43]

Interestingly, the regulations applicable as far as who may request official copies of notarised documents is concerned have been expressed in concrete terms as part of the duty of the notary to observe confidentiality.[44] §51 Section 1 of the Authentication Legislation (BeurkG) regulates this matter within Germany (standardised throughout the country).[45] The regulations also apply to copies and the inspection of original notarised documents; §51 Section 3 BeurkG.

The duty to observe confidentiality applies **in respect of all persons**, even in respect of the closest relatives of the parties involved.[46]

Only in respect of the parties involved in the authentication process may the notary not invoke his duty to observe confidentiality.[47]

---

40 Schippel, in Seybold-Schippel, marginal no. 1 to §18 BNotO

41 Schippel, in Seybold-Schippel, marginal no. 6 to §18 BNotO

42 Schippel, loc.cit.

43 Schippel, loc.cit.

44 Schippel, loc.cit., marginal no. 8 to §18 BNotO

45 Huhn/ von Schuckmann, BeurkG, 2nd edition, 1987, marginal no. 1 to § 51. - Any person who has submitted a statement for notarial authentication is entitled to request official copies of the document; §51 Section 1 BeurkG

46 Schippel, loc.cit., marginal no. 7 to §18 BNotO

47 Schippel, loc.cit.

In the authentication process, it is not unusual for a contradiction to arise between the duty to inform involved parties and that to observe confidentiality. Knowledge of facts which the notary has gained in the execution of his office can prove to be of significance in connection with some other authentication process at a later date. May, or must the notary then disclose these facts? The only choice open to the notary is to have himself released from his duty to observe confidentiality by the supervising authority (§18 Section 1 Clause 2 BNotO) or to refuse to exercise his office in this situation (§15 Section 1 Clause 1, §16 Section 2 BNotO).[48]

c) The duty to observe confidentiality is imposed on the German notary with the force of law. It is a strict duty associated with the office. Should the notary commit an infringement of this duty, he can expect criminal proceedings to be taken against him (§ 203 Section 1 Clause 3 of the Criminal Code).

The same applies for substitute notaries, locum notaries[49], for probationer notaries (notary assessors, §7 Section 1 BNotO), and likewise for other professionally active "assistants" to the notary, as well as judicial service trainees (in their preparatory legal service between their first and second state examinations) and for trainees taking part in the professional activity of the notary for the purposes of their preparation for the position of notary's assistant.[50]

The notary must oblige any other "persons employed on his premises" to observe notarial confidentiality (§18 Section 1 Clause 1 BNotO with §6 DONot). This means, to take the solicitor commissioned as notary as an example, that he must oblige all persons employed on his premises to observe confidentiality, even where they are predominantly or exclusively concerned with the solicitor's side of the business.

2. Duties of care and duty to advise

a) After his appointment but before he takes up his position, the German notary takes his oath of office, swearing to uphold constitutional regulations and to conscientiously fulfil the duties imposed on the notary in a impartial fashion; §13 Section 1 BNotO. The notary must remain true to his oath in the administration of his office; §14 Section 1 Clause 1 BNotO.

In a general manner, these basic standards dictate the duties imposed on the notary, and, accordingly, also represent the duty to exercise all due care in the administration of the office.

---

48 Representatively, Bernhard, in Beck'sches Notar-Handbuch, F, marginal no. 48, et al.

49 The "locum notary" as specified by § 57 BNotO takes over the office of a notary for a limited period of time, especially in connection with illness affecting the notary or in the event of his death.

50 Schippel, loc.cit., marginal no. 4 to §18 BNotO

This duty is converted in concrete terms by means of legislation and service regulations.[51]

There are large areas in which the duties imposed on notaries are not unambiguously specified, nor can they be specified.[52] In borderline cases, they can only be determined by the relevant adjudication on professional liability.

In this connection, what is taken as assumed is the objective model of the experienced and conscientious "average notary" who is aware of his duties. What is required is **standard** knowledge and ability. Given the official position of the notary, the criterion for the level of care to be applied is **high**.[53]

The fact is that professional liability insurance as a tool for enforcing this duty has an intensifying effect, and may well represent the real situation in adjudications.[54] The tendency of adjudications to demand the highest standards in respect of duties imposed on the notary is certainly the case in Germany.[55]

The duty of care imposed on the German notary in document authentication covers **all aspects** of the matter. It is based on the entire legal extent of the document and its handling. This is the basic principle of the German notariate and applies per se on the basis of the general legal and professional duties imposed on the notary, as forming the subject matter of this report.[56]

b) The German notary has imposed on him the official duty to **advise** the parties involved of the legal conditions and legal effects of the deed. In the legal connection, this duty to advise is **mandatory** for the German notariate.[57]

The fundamental regulation in this connection is found in German law in §17 of the legislation on authentication (BeurkG). In accordance with §17 Section 1 Clause 1 BeurkG, the notary should "instruct the involved parties of the extent of the legal implications of the transaction." The duty to instruct and clarify thus arising has, in Germany, moved ever further into the foreground, moving

---

51 In particular, the service regulations as decreed in standard form by the Federal States in Germany and contained in the Service Regulations for Notaries (DONot). Should a notary commit any infringement of the DONot, he is infringing the duties imposed by his office at the same time.- Compare with Kanzleiter, in Seybold-Schippel, BNotO, marginal no. 9, Introduction to DONot.

52 Haug, in The Notary's Handbook, marginal no. 6f, J, notary's liability

53 Haug, in The Official Liability of the Notary, 2nd edition, 1997, marginal no. 67

54 Haug, loc.cit., marginal no. 68

55 Haug, loc.cit., Foreword; Note highlighting the more stringent requirements being imposed by adjudication on the duties imposed on the notary since the previous edition.

56 Basic legal principles, for example: BeurkG; DONot; the law on voluntary jurisdiction (FGG); the real estate registration act (GBO) and "other regulations which the notary must take into account", "countless duties which must be adhered to in the execution of the office" - Haug, in Beck'sches Notar-Handbuch, J, marginal no. 6

57 This similarly applies generally for the entire notariate to the common pattern found throughout continental Europe. Legal comparison: U.I.N.L./C.A.E.M., 1997 President Aart Heering. Subcommission "The duties to advise imposed on the notary in connection with real estate transactions"; Gaupp/Woschnak; Report issued 12 September 1997, presented at the C.A.E.M. conference held 09 October 1997 in Warsaw.

towards becoming the central function of the notary. The requirements this involves are increasing accordingly.[58] On the other hand, from the German point of view, there are clear limitations to this duty. From the official duty of the notary to be impartial, it ensues that the notary may not force his conception of a contract designed to be fairly balanced on the parties; the basic principle of private autonomy has precedence, along with freedom of contract.[59] In this, it is recognised principally that the German notary is under no obligation to provide advice relating to the commercial conditions and the commercial consequences surrounding the legal transaction for authentication. The German notary can also exclude advice on tax-related matters from his duty to advise along with any provision of advice on matters of foreign law.[60]

c) The protection of involved parties of weaker intellectual or commercial standing is expressly incorporated in statute in German legislation on notarial authentication. The notary must make sure that "no inexperienced and inept parties involved are disadvantaged", §17 Section 1 Clause 2.2, BeurkG. If any doubt should arise as to whether the transaction is in accordance with the law or the genuine will of the parties involved, these reservations should be expressed to the parties; §17 Section 1 Clause 2 BeurkG. Where participants are handicapped persons (especially those who are deaf, dumb or blind) there are special procedures prescribed for application, §§ 22 ff. BeurkG. In such circumstances, a witness or a second notary should be included in the process.[61]

d) In law, and by adjudication, the German notary is, as a rule, allowed only short processing times; observance of these processing times is an important aspect of the duties of the office.[62]

What is required is "speedy" completion i.e. completion "without any culpable delay" which, in the normal circumstances surrounding the general daily professional activities in an averagely well organized notariate, should probably mean a period of roughly four working days - especially for procedures relating to real estate.[63] In accordance with § 53 BeurkG, authenticated declarations to be submitted to the real estate registration office or the registration court must be presented "as soon as it is possible to submit the deed".

Quite particularly high requirements are imposed in connection with the speed of the procedure relating to the handling of notarised trustee accounts.[64] In the

---

58 Bernhard, in Beck'sches Notar-Handbuch, loc.cit., F., Authentication, marginal no. 50, with instances of evidence from adjudication - also, in this connection, Basty, The official duty of the notary to advise parties to the authentication process; Anniversary publication in honour of Schippel, 571 ff., in particular 580 f.

59 In this connection, representatively, Bernhard, loc.cit., marginal no. 46 f., Basty, loc.cit. 585 f.

60 Haug, in Seybold-Schippel, BNotO, marginal no. 79, to §19, et al..

61 Bernhard, in Beck'sches Notar-Handbuch, F, marginal no. 213 ff.

62 Haug, Beck'sches Notar-Handbuch, J, marginal no. 100; Haug, The official liability of the notary, marginal no. 643 ff., with much supporting evidence from adjudication on professional liability.

63 Haug, Liability, marginal no. 644, et al..

64 BHG, DNotZ 1995, 489 with comments by Haug

event of late out-going payments, professional liability claims may arise against the notary on the basis of interest which has either accrued or been debited.[65]

3. Fees

a) The legal source of the German laws on notary fees is the schedule of fees, henceforth: KostO. It was not conceived as a set of stipulated fees for notarial tasks, but as stipulated legal fees, as the legislation on legal costs for voluntary jurisdiction.

The notary may calculate his fees for notarial activities only on the basis provided by this legal framework.[66]

These fees are **fixed by law** with reference to their object, valuation standard and fee tariff. The notary is not only entitled, but also has a legal **duty** to charge the fees set by law for his official activities.

Any agreements on costs with an effect on their amount are **invalid**, irrespective of whether the agreement refers to the fee tariff or the value of the business on which it is based, or whether the agreement has been made in respect of higher or lower fees.[67]

The **official duty** to charge the legally fixed fees is applicable equally on all notaries.

This is one of the most important basic principles for ensuring that the official function of the notary is carried out independently and in a impartial fashion and for guaranteeing general confidence in this kind of execution; there should be no influence exerted on the free choice of notary from the point of view of a "cheap price"; there is no place here for the external manifestations of commercial competition.[68]

It is equally unacceptable for the German notary to share with any third person in any way at all the statutory fees to which he is due and which are to be charged by him.[69]

b) Any reduction or waiving of fees is allowed only infrequently, in exceptional cases, in the German legislation concerning legal costs.

In accordance with the stipulations of the legislation concerning legal costs, it is possible under certain conditions for involved parties in a weak financial posi-

---

65 Haug, in Beck'sches Notar-Handbuch, marginal no. 100

66 The system of notarial costs in Germany, Waldner, in Beck'sches Notar-Handbuch, lit. H., Law costs legislation, marginal number 1 f.

67 Vetter, in Seybold-Schippel, marginal no. 5 to § 17 BNotO

68 Vetter, loc.cit. - compare also with § 13 Section 1 RLNot: "The notary has a duty to charge the legally prescribed fees..."

69 "Promising and guaranteeing any advantages in connection with an official transaction, in particular any splitting of fees outwith a partnership is contrary to the code." - §13 Section 3 RLNot.

tion to be released from the requirement to pay fees, as per § 17 Section 2 BNotO.[70]

A waiver of fee on the grounds of general equity assumes the agreement of the chamber of notaries which has a duty to ensure that in this connection notaries are proceeding according to a standard pattern and that the stipulation enforcing the charging of the relevant legal fees and the stipulation forbidding the negotiation of fees are not circumvented.[71]

Special fee reductions are stipulated by statute for public-law corporations, in particular the Federation, the Federal States, local authorities and churches; §144 KostO (legislation concerning legal costs).[72]

c) A few further comments on the **amount** of the fees chargeable by German notaries.

The fee is not related to the work input of the notary, but is rated in accordance with the "value of the transaction". The value of the transaction is, for example, the amount of the purchase price in a purchase contract, or the subscribed capital in the setting up of a limited company. Furthermore, the fee is related to specific fee rates contained in the legislation concerning legal costs. The amount of fees is therefore taken from the table of fees as per § 32 KostO.

The level of German notarial fees is comparatively moderate. This applies particularly for common real estate transactions which represent the standard work of every notary (e.g. purchase contracts, contracts of donation, division of property, etc.). For a purchase contract with a purchase price of DM 500,000.00, for example, the notarial fee amounts to DM 1,720.00 (plus value added tax; current rate 16%, and expenses); for a purchase price of DM 10,000,000.00, the amount is DM 30,220.00. The costs of calling on the official services of a notary are comparatively modest compared with those involved in seeking other forms of legal advice. Corresponding comparative calculations between solicitors' and notaries' costs are also published in the press.[73]

In this way, the fee structure of the German notariate demonstrates a distinctly social component. The notarial fee is calculated on the criterion of the commercial value of the transaction. This means that "the concern of the state to pro-

---

70 Criteria as per Vetter, in Seybold-Schippel, loc.cit., marginal no. 37 to § 17 BNotO.

71 Vetter, in Seybold-Schippel, marginal no. 39 to § 17 BNotO - §13 Section 2 Clause 1 RLNot: "Apart from the statutory regulations permitting the waiving and reduction of fees, any such waiving or reduction is only permissible where this is demanded by a moral obligation or a consideration of propriety and the chamber of notaries is in agreement, either generally or in the individual case."

72 Overview of instances of personal preferential treatment in Waldner, Beck'sches Notar-Handbuch, H, marginal no. 40 ff.

73 Eue, loc.cit., 611 f., with reference to Capital 9/1993, 191 ff.

mote social justice is achieved, in that it is possible for notarial legal services of equal value to be provided even for those of financially weak standing".[74]

Furthermore, account is taken of the legitimate requirements of commercial transactions in that a legal limit is set to the notary's fee or to the object on which the fee is based in certain cases. Accordingly, this sees the maximum fee for authentication of the resolutions of the general meeting of a public limited company, irrespective of its size, being DM 10,000.00; §47 KostO.

For contracts and resolutions dealing with transfers and mergers under company law in accordance with the legislation on change of corporate form, the maximum value which may be used as the basis for calculation of the fee is DM 10,000,000.00, irrespective of what is in many cases a balance-sheet value of the companies involved many times higher than this figure (which produces a notarial fee of something in the region of DM 30,000.00); §39 Section 4 KostO.[75]

II. The Notarial Code of Conduct in connection with the Notary's Colleagues

"A code of professional conduct can expect no more respect than is shown by those subscribing to it among themselves."[76]

The notary must demonstrate the proper behaviour as a colleague and ensure that he shows the required respect for the justified interests of his colleagues.[77]

The duty of the notary to demonstrate proper behaviour as a colleague is an important component of the code of professional conduct.

1. Competition

It is essential for the German notariate that free competition should be curbed by means of statutory preventive measures.

a) The system of **jurisdictional districts** is applied. The provision of notarial services throughout the territory is achieved by means of a system of spatial restrictions. It retains the right of the involved parties to have access to the notary in whom they place their trust. "Migratory instincts" of the members of the profession, however, are countered by this system.[78]

The point of departure is the allocation of a **official seat of office**, §10 Section 1, Clause 1 BNotO, by which are determined both the "province", §10a Section

74 Baumann, Public office and social function, loc.cit., 79

75 New edition issued 26.06.1997, BGBl. (Federal Law Gazette) I No. 40, 1443

76 Schippel, in Seybold-Schippel, marginal no. 54 to § 14 BNotO.

77 §15 RLNot.

78 Bohrer, in Beck'sches Notar-Handbuch, K I, marginal no. 59

1 BNotO - as a rule the area of the district court in which the notary's office is located - and also the "administrative district", § 11 Section 1 BNotO, the district of the relevant Higher Regional Court.

It is the responsibility of the appointing authority to decide on the locations at which notarial offices are set up.

Accordingly, the "catchment areas" of German notaries are clearly delineated. The normal situation is that the notary's activities are restricted to the area of the district court in which his office is located; his province. The "largest circumference" for his activities is the area of the Higher Regional Court. It is not normally permissible for the notary to operate outwith his province, and outwith the district only in exceptional circumstances and with the permission of the supervisory authority.[79]

In respect of both lawyers commissioned as notary and notaries operating exclusively as such, the number and location of notarial positions are subject to state planning in response to requirements, §4 BNotO. The reference criteria for the calculation of numbers and the spatially-related requirement are the numbers of authentication procedures which can be anticipated for the notarial position, along with the workload for the appointed notaries which should be distributed as evenly as possible.[80]

The procedure for filling a notarial position is initiated by means of advertisement in the official state organs; §6b BNotO. The general personal requirements for qualification as a notary ("conditions of access to the profession") have already been discussed.[81]

b) It is self-evident that the unfair canvassing of clients by the notary represents a gross breach of the basic principles of the German notariate, both in ethical terms and with reference to the code of professional conduct.

To the extent that it is normal for public offices to distribute commissions for authentication procedures evenly, it is unprofessional for "introductions and wishes in with a view to participation" to be submitted directly at these offices.[82]

As a basic legal principle, this applies for the general behaviour adopted by the notary towards every (potential) client.

c) Right from the outset, there is no question of the amount of any fee being used as a competitive tool.

---

79 For comprehensive details of the territorial system of the German notariate, Bohrer, loc.cit., marginal no. 59 ff.

80 Overview in Bohrer, Beck'sches Notar-Handbuch, Chap. 1, marginal no. 44 f.

81 Above, Section A, No. I, 3

82 §2 Section 4 RLNot

The principal in application is that of legally specified object values, fee tariffs and individual fees. The fees may not be modified by agreement. They are not disposable, they are not "negotiable", and this is the situation in all imaginable circumstances.[83]

2. Advertising

a) "Advertising for practice is incompatible with the image and dignity of the notary." - §2 Section 1 RLNot.

It is deemed **proper professional practice** for the notary to refrain from advertising, this being a self-evident duty of the notary as the holder of a public office[84].

In general terms, it should be stated that in Germany there is currently a growing tendency for the ban on advertising as applied to the professions involved in the provision of legal and commercial advice to be relaxed.[85] It is recognised and uncontested that the ban on advertising among the German notariate should continue to apply.[86]

b) Individual instances of prohibited advertising are presented in §§ 2 - 6 RLNot.

Any advertisements dealing with an appointment to the position of notary, the occupation of business premises, etc. must "not serve the purposes of advertising in their type, size or number", §2 Section 2.

The notary must take steps to ensure that his name is not used in public in connection with the official designation of "notary" so as to create the impression of advertising, §2 Section 3 Clause 1.

The notary must not work in conjunction with persons outwith the profession for the purposes of advertising for official business; §2 Section 5.

---

83 Compare with the information provided on the German system of fees, above No. I.3.

84 BGH, DNotZ 1966, 409, 414 / 1967, 701 et al.; Vetter, DNotZ 1986, special edition, 58 f. There is also discussion of the question here as to whether the ban on advertising should not properly be regarded as a rule which primarily serves the interests of those seeking legal assistance and not the protection of the individual notary from the competition represented by his professional colleagues.

85 Kornblum, BB 1985, 65 ff., "On the ban on advertising applicable to the academic professions for the provision of legal and commercial advice." Kornblum, page 71, regards "special regulations for the notary" as being problematic; he sees the notary as "when viewed objectively, being after all not a significantly different 'independent organ of administration of the law' as the 'impeccable' solicitor in his capacity of private practitioner." - Compare also with the OECD report quoted in Limon, Anniversary publication in honour of Schippel, 742 f. - Concise summary of the review of the code of professional conduct for solicitors in the Frankfurter Allgemeine Zeitung of 14.07.1997, page 12, "From code of professional conduct to professional legislation" (relating to the commentary of Henssler/Prütting, the new edition of the federal regulations relating to solicitors, issued 11.03.1997).

86 Schippel, in Seybold-Schippel, marginal no. 45 to § 14 BNotO; marginal no. 1 to §§ 2 - 6 RLNot.

The notary must have no involvement in any process which sees his name being included in address directories, business calendars, magazines or similar directories which list only a limited number of local notaries; the same applies for directories and any works which specifically highlight individual notaries in complete printed lists, particularly in respect of the official address and telephone directories; §2 Section 6, 7.

Any work of authorship or journalism or any other public activity undertaken by the notary in the public sphere must be "professional and worthy; it must not serve the purposes of advertising"; §3 Section 1.

In publications in journals which are not directly related to the profession and in the daily press, the notary must exercise restraint as far as referring to his professional designation and seat of office; §3 Section 3.

Special restricting regulations apply to the indication of additional titles along with the professional designation of "notary"; § 4.

The Federal Constitutional Court[87] has recently adjudged a "logo" on the letterhead of a partnership of lawyers including lawyers commissioned as notary to be permissible.

3. Enticement of appointed staff

The field of the professional duty of proper behaviour towards colleagues also includes a prohibition on the enticement of the appointed staff of any other notary.

"Any attempt to entice appointed staff away from another notary is unprofessional. It also represents a breach of the professional ethic to appoint a staff member of another notary without previously having consulted the notary." This is stipulated by §18 RLNot. "Enticement" involves "exerting continuous pressure" on the relevant appointee to change his or her place of employment, while a simple inquiry does not represent this state of affairs.[88]

The standard and adequate practice is to provide notification of the intention to appoint a staff member of another notary. The consent of the notary currently employing this staff member is not required.[89]

4. Miscellaneous

a) The professional duty to behave properly towards colleagues and to take the justifiable interests of colleagues into account is general and comprehensive.

---

87 Resolution of 24.07.1997, 1 BvR 1863/96 (compare with footnote 15, above)

88 Schippel, in Seybold-Schippel, marginal no. 8 as per §19 RLNot

89 General opinion; compare with Schippel, loc.cit., marginal no. 9

"Anyone who is required to bring together the various interests of the parties involved in a impartial manner must ensure strict professionalism and adhere to the demands of courtesy with tact in his dealings with colleagues and others". [90]

b) The possibilities for infringement are numerous, both among notaries and in dealings with others. In general terms, they are difficult to specify in detail.

c) The duty to behave properly towards colleagues also includes the aspect of, where possible, having differences of opinion or conflicts resolved amicably. Public conflict between colleagues or even in public matters presented in court can have the effect of reducing the respect generally accorded to the profession.

In the event of differences of opinion or conflicts between colleagues, the parties involved must first attempt to arrive at an amicable agreement through the involvement of the professional association; § 16 RLNot. In these circumstances, the professional association assumes the role of **conciliator**.

III. The Notarial Code of Conduct in connection with the State

In its German embodiment, notarial activity represents the execution of a **public office**. This means that official duties, and in particular the professional duties on the German notary, are also, per se, duties in respect of the state.[91] The questions posed by the international co-ordinator in this section occupy a variety of levels in this respect. For one thing, with reference to the state, they address generally existing official duties, and on the other hand, concrete relationships between the notary and state authorities in terms of specific professional behaviour.

1. Independence and impartiality

These, as this report demonstrates generally and in its detail, represent **fundamental duties** on the German notary.

In his position as the executor of official functions, these duties on the notary are therefore **also** related to the state. It is evident that these official duties exist likewise in the interests of the parties involved, principally in the interest of the client as set out in part I of this7 treatise.[92]

It follows from this, just as unambiguously, that any infringement of these duties must lead directly into the system of sanctions applicable to infringements of professional duties.

2. The duty of exercising the office in person

---

90 Schippel, in Seybold-Schippel, marginal no. 3 as per § 19 RLNot

91 Compare - representatively - Schippel, in Seybold-Schippel, marginal no. 1 ff. to § 14 BNotO

92 Bernhard, Beck'sches Notar-Handbuch, F, Authentication, marginal no. 45 ff.

a) The basic principle of exercise of the office in person applies without exception for all duties of the notary of sovereign nature, and in particular the activity of authentication. The notary may not pass this activity onto another person, either generally or in any individual case.[93]

This is one of the most basic principles of the German notariate and, accordingly, a fundamental rule of the profession.

b) This rule applies for all procedures of authentication and certification.

The German notary is a "person in whom is invested public trust" (§415 of the ZPO - code of civil procedure); the authenticated deeds accepted by him are public documents and provide full evidence of the procedures authenticated in them (§§ 415, 418 ZPO).

This effect is based on the assumption that the notary will adhere to the regulations in force for the authentication procedure and fulfil his duty to represent the true state of affairs in his authenticated deeds "with the greatest of care and the utmost strictness".

Intentional false authentication, such as stating incorrectly in the written record that the document had been read out by the notary is one of the most particularly serious offences against the office. The same applies for authentication of a signature without the notary himself having performed or witnessed this function himself (so-called "authentication in absentia").[94]

c) Even for those official activities of the notary which are not classified as authentication activities, for example drafts, provision of advice, etc., the requirement to execute the office in person applies similarly.

It is not permissible to transfer these activities to the assistant staff of the notary, e.g. the chief clerk, for him to carry out on his own; the notary bears sole and complete responsibility for ensuring proper, professional execution.[95]

3. The notary and state authorities

This is a matter of whether, and to what degree, the notary is subject to special duties in his behaviour, particularly duties to provide notification, in respect of state authorities in connection with specific subject matters.

a) The primary duty of the notary is to observe confidentiality, even in respect of state authorities, and also especially in respect of the tax authorities.

---

93 Compare - representatively - Vetter, in Seybold-Schippel, marginal no. 1 to § 39 BNotO

94 Bracker, in Seybold-Schippel, marginal no. 15 to §95 BNotO

95 Vetter, in Seybold-Schippel, marginal no. 2 to §39 BNotO. - The possibilities for transferring notarial activities to notary assessors and to officially appointed representatives are not presented in any further detail here; compare with § 19 Section 2 and §§ 23, 24 BNotO; §39 BNotO.

Since the new version of the tax code came into effect on 01.01.1977[96] , this has been the directly applicable law.[97]

Exceptions are regulated by statute.

b) To a considerably degree, notaries are involved in the execution of legal transactions which give arise to tax duties. Accordingly, the fiscal authorities have a justifiable right to be provided with notification of these notarial procedures at the earliest possible time. For these purposes, in connection with certain taxes, the notary **has a duty** to provide the fiscal authority with notification of the authentication procedure. These duties to provide notification are based, without exception, in statutory regulations.

The following taxes are of particular relevance:

Real estate purchase tax; §18 of the legislation dealing with real estate purchase tax. This means that purchase contracts and their relevant contents must be revealed.

Inheritance and tax on donations; §34 of the legislation dealing with inheritance tax law, §13 of the arrangements for implementation of inheritance taxation. By the terms of these, the following should be revealed in particular: dispositions *mortis causa*; agreements on the division of an estate and contracts of donation.

Taxation of corporations; §54 of the regulations for the implementation of income taxation (EStDV), 1995, as newly integrated into the EStDV. By the terms of these, the following authenticated deeds in particular must be passed on to the fiscal authorities, as they relate to stock companies in terms of setting up, increasing capital, reducing capital, changing form or dissolution or are based on the disposal of shares in the company.

c) The German foreign trade legislation passed on 28.04 1961[98] provides the legal basis for the state control of commercial trade with foreign countries. In accordance with § 44 Section 1 of the legislation on foreign trade, it is possible for information to be requested by the authority, to the extent that this is required to monitor that the law is being observed. According to the generally accepted opinion[99], there is, however, the notary is not duty-bound to provide information; the observance of duties of notification is a matter for the parties concerned themselves.

However, duties to provide notification of deposits which have been made with the notary do arise out of the "money-laundering act" of 29.10.1993[100]. §8 of

96 BGBl. 1975 I, 613

97 Schippel, in Seybold-Schippel marginal no. 10 to § 18 BNotO; Büttel, on the legal position of notaries in respect of the fiscal authorities, DNotZ 1966, 644

98 BGBl, 1961 I, 481

99 Schippel, in Seybold-Schippel, marginal no. 37 to § 18 BNotO

100 BGBl. 1993 I, 1770; decreed in execution of the directive of the Council of European Communities issued 10.06.1991 with the aim of preventing the use of the finance system for the purposes

the money-laundering legislation requires the notary to inform the banking institute with which he is managing the sum deposited of the identity of the person for whom the account is being managed when he opens the account. According to § 3 of the money-laundering law, the notary has a duty to identify any person (and to document this) who hands over to him a cash sum of DM 20,000.00 (or more).

In accordance with § 195 Section 1 of the code of building law[101], every contract which contains the transfer of real estate property against payment must be passed on by the notary to the responsible community or district authority.

It is a matter of urgent interest than in the event of a succession procedure being initiated, the probate court should be informed of all of the declarations made by the deceased with a bearing on the succession. Accordingly, notaries are duty-bound to inform the registry office of authenticated deeds containing declarations of relevance to succession law.[102]

Finally, in respect of the supervising authority, the notary is neither duty-bound nor has he any right to refuse to provide information. The notary must supply the supervising authority with every item of information it may request.[103] The same is true in respect of the chambers of notaries.

d) Exceptions from the duty to observe confidentiality may be permitted under the general point of view of weighing up values and interests against each other.

As a basic rule, the notary is still duty-bound to observe confidentiality even when he has become aware of criminal actions in the exercise of his profession or he has learned of the intention to commit a criminal act. There are exceptions to this.

Where remaining silent would represent a criminal act, the notary has a duty to reveal his knowledge.[104]

On the basis of the position of the notary as the holder of an office in the field of non-contentious administration of the law, it follows, furthermore, that the notary has a duty to inform affected or threatened persons accordingly if it is still possible to prevent the damage.[105]

---

of money-laundering. In connection with the "money-laundering act" Federal Chambers of Notaries, DNotZ 1994, I

101 BGBl. I 1997, 2141. The law has been redrafted with effect from 01.01.1998. §195 remains unaffected.

102 The regulations in this respect differ in some details. The most recent stipulations concerning notification in matters of inheritance were published on 30.11.1979 by the Federal States of Germany. Overview by Schippel, in Seybold-Schippel, marginal no. 40 to § 18 BNotO.

103 Schippel, in Seybold-Schippel, marginal no. 36 to § 18 BNotO and 3 to § 93 BNotO.

104 For example, §§138, 139 StGB, Duty to indicate the intention to commit serious crimes.

105 Schippel, in Seybold-Schippel, marginal no. 46 to §18 BNotO. Compare also with Keller, Borderline cases between criminal law and the code of professional conduct of the notary, DNotZ 1994,

e) In cases of doubt concerning the extent of his duty to observe confidentiality, the German notary has the opportunity available to seek the decision of the supervising authority; §18 Section 2 BNotO.

What has become a concrete matter of doubt as to whether there is an duty to observe confidentiality in existence is therefore definitively settled.[106]

4. The notarial code of professional conduct and the authentication procedure

In Germany, the code of professional conduct, as the basic body of content embodying duties on the notariate as a function of the state, is also growing in importance for the form of the authentication procedure and with this also for the shaping of the law - an effect arising out of the code of professional conduct which is reaching directly into the everyday practice of the notary with a correcting and amending function.

a) The notary is an independent service provider for the involved parties; he has a duty to avoid even the appearance of partisanship. §1 Section 2 Clause 1 RLNot.

This professional duty may be compromised if authentication procedures are chosen in divergence from the standard procedure and result in one party being in some way advantaged, even if such advantages are not expressed in the material structure of the legal transaction.

Accordingly, §1 Section 2 Clauses 2 and 3 of the general guidelines for the execution of the professional activities of the notary contain the corresponding stipulations.[107] The new guideline recommendations[108] in §4 of this draft likewise contain corresponding regulations.

b) What are referred to as collective authentications represent the linking of a number of authentication procedures for which the wording of the text is to some extent overlapping (example: purchase contracts for a number of owner-occupier flats in the same property). "Collective authentications" of this kind are permissible under authentication legislation, § 13 Section 2 BeurkG. However, here the notary must exercise particular care to ensure that there is no semblance of partiality; § Section 1 Clauses 1, 2 of the general guidelines.

The Federal Chamber of Notaries and the chambers of notaries of the Federal States take the view that "collective authentications" are generally contrary to the spirit of the code of professional practice where the notary deals jointly with

99 ff.; there for the assessment of a conflict between values and duties, in particular pages 94, 99, 101 f.

106 Schippel, in Seybold-Schippel, marginal no. 59 to § 18 BNotO.

107 Enacted on the basis of the resolution of the representatives' meeting of 06.11.1970, compare with DNotZ 1971, 3.

108 In this connection, page 7 and note 28 above

more than five (sometimes the figure put forward is only three) of this kind of parallel cases in the course of a single meeting. Otherwise, the danger might arise that the notary is perceived as a part of the seller's sales organisation, thus giving rise to the appearance of partiality.[109] Therefore, in the course of a joint authentication procedure, care must be taken to ensure that each applicant understands the statements made by the notary and has made use of his right to ask questions. It should be stated to the applicant that there is no saving in costs tied in with the collective authentication procedure. If he should request an individual authentication procedure, this wish should be granted.

c) For the same reasons, there are reservations in respect of the code of professional conduct which would oppose the "systematic" use of powers of attorney in authentication procedures.

To take an example, in the given case, the seller is acting as the representative of the purchaser but with no power of attorney and the purchaser is then supposed to approve his actions at a later time. This means that when the purchase contract is authenticated, the purchaser is not actually present and is therefore not in a position to receive any advice from the notary about this purchase contract. With the authentication procedure taking this particular form, the element of notarial advice is removed from exactly the person who, in accordance with the protective purpose of the basic material legal standard, § 313 BGB, is in fact the party to whom protection is due. The most important purpose of authentication, to be guaranteed with the instruction and advice of the notary for the involved parties, is therefore not achieved - although in formal and material legal terms, the regulations have been satisfied.

The **Code of Professional Conduct** comes into play here to correct the situation and declares any authentication practice as not permissible where the purchaser is "systematically" not directly included as a participant in the authentication procedure.[110]

Adjudications have taken up and accepted these considerations contained in the code. Accordingly, the Higher Regional Court of Bavaria[111] only accepts this authentication procedure when the "atypical form of authentication is agreed or justified on the grounds of special circumstances".

d) In the final analysis, for the same reasons there can also be reservations in respect of the code of professional conduct engendered by the "systematic" separation of offer and acceptance of the contract. This can be solely in the interest of the seller who has no wish to take part in a large number of authentication procedures or wishes to absent himself in this way from the discussion of the

---

109 Schippel, in Seybold-Schippel, marginal no. 3 to § 1 RLNot et al..; Kutter in Beck'sches Notar-Handbuch, A II, General comments on the property developer's contract, marginal no. 3.

110 Compare - representatively - Brambring, in Beck'sches Notar-Handbuch, A I, Purchase of real estate, marginal no. 322; Schippel, in Seybold-Schippel, marginal no. 4 to § 1 RLNot

111 Quoted in Brambring, loc.cit.

content of the contract in the presence of the notary.[112] In these circumstances, no negotiation between the parties involved in respect of the content of the contract takes place with the participation of the notary. In such cases, a suitable solution may be that the notary passes on the draft contract to the unavailable party to the contract and seeks his agreement on the content of the contract and consent for this form of authentication.[113]

IV. Sanctions

The breach of professional duties - basic duties of the office - leads, under German law, to sanctions located at various levels of legislation.

1. In an extreme case, this may amount to the statutory definition of an offence according to criminal law.

Accordingly, in particular in the event of

- breach of his duty to maintain confidentiality, § 203 StGB (penal code);
- false authentication, § 348 StGB;
- charging inflated fees, § 352 StGB.

2. Furthermore, the breach of professional duty justifies liability claims under civil law against the notary for any damages and disadvantage arising to involved parties out of any such breach of duty.

If, intentionally or negligently, the notary breaches the official duty he bears to another party, he has a duty to make good the resultant damages; § 19 Section 1 Clause 1 BNotO. In the event of negligence, the liability of the notary is "subordinate"; i.e. the damaged party must first seek to identify some other way of receiving compensation, for example from his partner in the contract or from his personal adviser.[114] The duties which, when breached, justify the notary's being held liable for making good damages, are many and various. German jurisdiction has embodied these in individual concrete terms, with there also being a clear tendency towards intensification of the criteria applied to duties in evidence.[115]

The notary has a duty to maintain a professional liability insurance policy to cover the risks of liability for material damages arising out of his professional activity and the activity of persons for whom he is responsible; § 19 a Section 1 Clause 1 BNotO. Accordingly, the duty of the notary to be insured is not simply an aspect of the code of professional conduct but is a legal duty imposed on

112 Schippel, in Seybold-Schippel, marginal no. 6 to § 1 RLNot; Brambring, in Beck'sches Notar-Handbuch, A I, Purchase of real estate, marginal no. 383

113 Brambring, loc.cit.

114 Overview of subordinate liability in Haug, in Seybold-Schippel, marginal no. 80 ff. to § 19 BNotO

115 Compare above I, 2 a, with comment 55

every German notary. Furthermore, § 67 Section 2 Point 3 of the BNotO prescribes that the chambers of notaries shall take out insurance policies for damages which are not covered by the individual liability policies of the individual notaries, because the material damages thus arising would exceed the maximum sum insured; what are referred to as group insurance arrangements. The chamber of notaries is also required by this legislation to take out insurance as cover for damages caused intentionally and not covered by the standard professional liability insurance; what is referred to as fidelity insurance.

The minimum sums insured are DM 500,000.00 for each claim. Accordingly, there is a minimum sum of cover of DM 1,000,000.00 available as cover for damages arising out of negligence, this being the normal situation. 116 Within the context of the imminent amendment of the BNotO, the applicable minimum sum insured will be increased from DM 1,000,000.00 to DM 2,000,000.00. Naturally, it will be possible for any notary to increase the minimum cover for his own professional liability insurance from the current sum of DM 500,000.00 to any sum he wishes. In practice, there is widespread recourse to this opportunity; many notaries have insurance cover for a higher sum, this being primarily dictated by the type and extent of the authentication procedures they undertake.

Furthermore, and without any legal obligation, the chambers of notaries maintain what is referred to as a fidelity damages fund, on the basis of the authorisation contained in § 67 Section 3 Point 3 BNotO, from which statutory payments are to be made if any damages arising out of the intentional actions of a notary cannot be made good by any other kind of insurance and it appears that the obligation on the fund indicates a payment is in order.[116]

117 In this connection, Kanzleiter, in Seybold-Schippel, marginal no. 34 to § 67; Haug, in Beck'sches Notar-Handbuch, J, marginal no. 56

3. There is also the system of measures based on **right of control and supervision**.

a) Any culpable breach of any official duty imposed on him represents a neglect of duty on the part of the notary, § 95 BNotO. This clause summarises the material disciplinary law applicable to notaries.

Among the duties of the office to be included with this stipulation is, in particular, the **code of professional conduct**.[117]

Breaches of the code of professional conduct can therefore be identified as breaches and punished by the professional supervising authority as part of their supervisory activities.[118]

---

116 Overview in Schippel, in Seybold-Schippel, marginal no. 4 to § 19 a BNotO; Kanzleiter, in Seybold-Schippel, marginal no. 32 f. to § 67 BNotO

117 Bracker, in Seybold-Schippel, marginal no. 13, 19 f. to § 95 BNotO

b) The disciplinary regulations applicable for law officers are used as the criteria for notaries; § 96 BNotO.

The measures which can be applied to notaries under this system are graded.

In the case of slight breaches of duty, the supervising authority can decide not to impose any disciplinary measure, or simply state its "disapproval" (§ 94 Section 1 Clause 1 BNotO).

If a reprimand or a fine is deemed appropriate, the authority can decree the corresponding disciplinary measure (§ 98 BNotO).

If it appears that more severe measures are required - removal from the notary's own office or removal from the status of notary - the authority initiates the formal procedure before the disciplinary court.

In the first instance, disciplinary courts for notaries are the Higher Regional Court, and in the second instance, the Federal Court of Justice; § 99 BNotO.

118 Bracker, loc.cit., marginal no. 14 to § 93 BNotO, The powers of the supervising authorities, with instances of evidence from adjudications.

Topic IV

The notary as guarantor of legal certainty in the market economy

Reported by:

Notary Dr. Wolfgang Ott, Ingolstadt

I. Introduction

In the countries in which the Latin notarial system predominates, we find the prevailing economic system to a lesser or greater degree is that of a free market economy.

Increasingly, in the development of these market economy systems, particularly in connection with the current trend towards deregulation, there are conflicts with the notarial system. The supporters of these deregulations consider that this is not structured in accordance with market economy principles, and that its function prevents appropriate market economy.

In future it will be an important and fundamental task of the notary to address these comments and react to them accordingly.

II. The notarial function in detail

1. The notary's office is an institution with an old tradition and in general very high standing in the population and society.

This is not due to a special privilege of the notary's office, but to the function allocated to it in the current national legal system and the manner in which it fulfils this function.

The notary's office shares in the so-called "legal market" in all countries in this manner.

However, the meaning of the notary's office should not be reduced to pure participation in the "legal market", but substantial emphasis should be placed on its **public function**.

The notary is more than a simple participant in the legal advice market. The notary practises **sovereign, i.e. primarily state duties** which have been entrusted to him and is therefore differentiated from solicitors, auditors and tax advisors, for example.

In exercising these functions allocated to him, the notary primarily contributes quite substantially to **relieving the state of judicial administration duties**, which it would otherwise have to perform itself. In many countries notaries are directly acquainted with the performance of state duties, such as the awarding of inheritance certificates or the issuing of other certificates.

In other countries, where the notary's essential activities consist in drawing up contracts, particularly in the area of company law, land law, family law and inheritance law, the relief of state bodies is in particular achieved by the fact that the notaries prepare registration documents for various registers, particularly the property register for real estate or the Companies Registration Office, and undertake the execution of the registrations.

The authorities in charge of the registers are consequently released to a quite exceptional extent from legally unqualified direct entries by citizens and are thus able to process correctly made applications quickly and speedily. This results in, on the one hand, lower demands with regard to work and personnel required for the registers, and on the other hand an **acceleration** of the relevant registrations for the citizens making the application.

2. The notaries also fulfil quite important functions within the scope of providing assistance to state bodies in the **implementation of state claims**.

This is particularly the case in the area of fiscal law. In most countries where the Latin notarial system is used, it is prescribed that copies of particular notarial instruments, such as land sale contracts, for example, are forwarded to the state Inland Revenue Offices, so that they can establish the stipulated taxes as well as the basic purchase tax for the purchasing process, and also so that they can get an overview of the citizens' asset situation and consequently have available bases for the taxation of individual citizens.

3. In addition, the notary's office has an extremely important function in the area of legal relations between the individual citizens themselves.

Through its **contract-forming activity** on the one hand and the **strict obligation to neutrality** on the other, it is possible for the notary's office to validate for law-seeking citizens the formation of their contracts in a way that is satisfactory for both parties and to formulate and perform them in a way that protects the interests of both parties. Thus in drawing up the contract, for example in the area of land sale contracts, the notary must protect both the vendor, with regard to his expected sales price, as well as the purchaser, with regard to his acquisition of the ownership of the land once he has paid the purchase price.

In these cases the involvement of solicitors is not necessary as a rule. On a practical level, solicitors are only required in the rarest of cases.

Moreover, the correct drawing up of contracts relieves the state courts quite considerably, as **contracts recorded by the notary are only rarely disputed** and therefore do not concern the courts as often as contracts that have been drawn up privately.

4. In this area, the **consumer-protection role** of the notary should also be particularly noted.

When drawing up contracts, particularly where one party is financially stronger, it is a matter of priority for the notary also to take account of the interests of the financially weaker party, incorporating these into the contract accordingly. This is of particular importance, for example, in the area of building promotion law, such as contracts where large development companies develop and build on plots of land, and then sell the individual units on to individual buyers.

5. Constant reference is made to the fear of a "collision" between the Latin notarial system with market economy tendencies. In many western industrial coun-

tries there is currently a **trend towards deregulation** of the economy in the sense of cancelling or restricting legal regulations which are allegedly capable of impeding the free development of economic activity.

Particularly influenced by the Anglo-Saxon legal environment, the notary's fees, for example, are seen as an obstacle here, as in general is the involvement of notarial and legal registration procedures, for example in the area of commercial law and also in that of land law.

In this regard, it is necessary to oppose tendencies which generally see the law as a "brake" on economic development. The fact of the matter is actually the opposite: **economic development rolls most smoothly along the well prepared road of the law**. Only when clear legal conditions have been created can long-term economic success be achieved.

III. The Latin notary's office in the context of the market economy

Understood correctly, the notary's office is not a brake but rather a **promoter of the economy**.

Through its activity the notary's office creates **clear conditions** and thus enables the **acceleration of economic developments and contract completions**.

Some examples are given below:

1. In countries which have a Latin notary's office, where companies are registered in trade registers and these registrations are performed by the notary, it is a fact that the respective **trade register entries** can show whether a company exists, how high its share capital is and whether a particular person, who appears on behalf of the company, as Managing Director, for example, can also act for it.

This certainty is not given in Anglo-Saxon law, for example. Even if the negotiating person submits the company statutes or authorities from alleged managing directors, it cannot be gathered from this whether this person can ultimately act for the company. When completing contracts, there is thus constant uncertainty about whether the contract is valid or not.

The response given by Anglo-Saxon lawyers when discussing this problem, that such problems are **ultimately resolved by liability regulations** and the problem of inability to pay in this regard is handled by appropriate insurances, is more than unsatisfactory. The currently predominant tendency in the Anglo-Saxon legal system to transfer solutions which are undertaken in our legal systems within the framework of the preventive administration of justice to the stage when problems occur and to ultimately refer those concerned to claims for damages, is a **system which clearly gives priority to the financially stronger party in law**. It is usually only possible for this party to ensure, through appropriate precautions, such as taking out insurance or the possibility of more de-

tailed advance declaration of circumstances, that legal relations are handled correctly. The withdrawal of the state from the preventive administration of justice, which is connected with the adoption of Anglo-Saxon legal views, therefore works against consumer protection in a counter-productive manner, one-sidedly supporting not the consumer, but the financially stronger contractual partner, particularly therefore the participant in economic life who frequently forms contracts with various other parties. The transfer of state legal control from contract preparation and the creation of legal relations to the subsequent control of breeches of contract leading to damage compensation obligations, is also unsatisfactory from the legal economic point of view, as experience has shown that **subsequent disputes lead to disproportionately higher costs for the state legal system, than the costs of preventive administration of justice.**

2. In the sphere of the Latin notary's office plots of land are recorded in the land registers, which clearly show who is the owner of a plot of land and what burdens exist. The **land registers** enjoy **public faith**, i.e. the current owner registered in the land register is considered as the person who is entitled to dispose of this plot of land. This public faith can only be granted to the land register if a **certain and orderly registration procedure is ensured, with involvement of the notary**. There is no land register in this sense in countries under Anglo-Saxon law. Therefore, in all land dealings uncertainty reigns as to whether the vendor of a plot of land is actually its owner. Extensive research measures are necessary for this purpose, the so-called "Title Research". In connection with land sale contracts an insurance policy usually also has to be taken out, so-called "Title Insurance". In these countries one or several solicitors are frequently also involved in preparing the contract.

3. With regard to the correct understanding of the notary's office as it currently exists in free market economy systems, the legislator in many countries has also recognised that **further duties can be transferred to the notary's office** and that these can be performed more effectively and securely by notaries than by other organs of the administration of justice.

Examples of this can be provided by some legal changes which have already occurred and legal changes which are currently being planned in Germany:

a) It was previously possible for natural and legal persons to be able to submit in notarial documents to immediate compulsory execution from the respective document, i.e. on account of numerically determined claims or issue of defensible matters.

This provision contained in S 794 of the German Civil Procedure has now been expanded. Thus **submission to compulsory execution in notarial document** can now be declared basically **for all claims**, with the exception of eviction claims when giving notice to tenants and of claims upon issuing of a declaration of intent.

This notarial document represents an enforceable legal document, and consequently is equal to a court judgement in its enforcement effect. The creation of this notarial document thus also leads to a relief of state legal proceedings due to the fact that many actions no longer have to be brought, because enforcement submission declarations already exist. In Germany, for example, an enforcement submission declaration by the purchaser with regard to payment of the purchase price is adopted in practically every sales contract, so that the vendor can instigate compulsory execution measures against the purchaser in the event of the non-payment of the purchase price, without having to call on the state courts.

b) In 1994 the **Transformation Law** in Germany was completely reformulated.

This law now enables the merging of all types of companies, as well as the selling off of parts of a company from existing companies as independent companies, and the transfer of assets from one company to another and changes in the legal form of companies.

The possibilities of these legal forms have been considerably expanded, with new possibilities in particular for tax-favourable economic reorganisation being created through the splitting of companies.

All of these transactions always require a merging or splitting contract which must be authenticated by a notary, and the relevant company resolutions. The notary is therefore extensively involved in all the above-mentioned transactions with regard to the Transformation Law, whereby he usually draws up the contracts, thus shaping the transformation as such, documenting them and then ensuring their registration in the relevant trade registers.

The nature of the responsibilities with which the notary has been entrusted in the new Transformation Law clearly demonstrates the high regard in which notaries and their activities are held by the German legislator. Transformation Law is a very complicated legal area, in which the notary is able to participate due to his outstanding legal training and knowledge, particularly with regard to the structure of the law, which enables him to provide legal certainty.

c) Within the framework of the integration of the new federal states which formed the former German Democratic Republic, there were many difficulties involved in transferring the specific legal institutions which then existed into general German law.

So, for example, in the former DDR ownership of buildings was separate from ownership of land.

These differences are to be eliminated through the so-called law of **Property Settlement Act**, which specifies that, for example, ownership of buildings can be converted into hereditary ownership law.

For the purposes of discussion and ultimately agreement between the various interested parties, in particular, for example, the owner of the land and the owner of the building, a notarial mediation procedure is provided, in which the notary

partially practises judicial functions. For example, he can summon the parties concerned to an appointment where he then makes proposals about how matters should be regulated. In order to be effective, these proposals must naturally be accepted by the parties concerned.

d) Important innovations have also occurred in the area of **electronic legal transactions**.

The so-called "Signature Law" prescribes so-called certification offices, which confirm the authenticity of an electronic signature and give it a code key, so that it can then be used accordingly for legal transactions. Practical experience with this institution has shown that privately organised certification offices are unable to adequately check the correctness of certain certification information. This is especially true for so-called attribute certificates, i.e. certificates which go beyond a person's simple name and date of birth, especially the confirmation of a particular professional attribute, as well as the confirmation of representation authorisations for particular companies, or the confirmation of powers of attorney which have been granted, attribute as managing director, etc..

When the first certification offices recognised the difficulties of checking such attribute designations and continuing to constantly monitor their correctness, they stipulated in their contractual guidelines that these so-called attribute certificates can only be produced in electronic legal transactions with the collaboration of a notary.

This is a notarial transfer of responsibility which has occurred voluntarily on the part of these private legal companies, because they have established that in practical legal transactions they are not themselves in a position to provided the required confirmations, but that they must make use of the notaries' specialised knowledge in the area of company law in order to be able to provide certain legal certificates.

e) The so-called Administration of Justice Relief Law, which was passed recently, stipulates the setting up of **arbitration boards**, whose - unsuccessful - appeal is a prerequisite for the institution of later disputed proceedings. Notaries are to be expressly endorsed as such arbitration boards. Therefore, according to this law, notaries can in future be called upon to arbitrate and to instigate a mediation process in disputes of all types, provided that they are of a civil law nature. If this process results in an agreement between the parties concerned, the notary can register this agreement immediately and thus resolve the matter. If an agreement cannot be reached, the notary issues a corresponding certificate, which is the prerequisite for the institution of the disputed legal proceedings which then follow.

f) A legislative procedure which is currently underway anticipates the future notarial transfer of the task of issuing certificates of inheritance. In Germany, the **issue of certificates of inheritance** has previously been the responsibility of the state Courts of First Instance. These determine the heirs and then establish

the inheritance shares either on the basis of existing wills or on the basis of intestate succession, and issue a corresponding certificate.

This task is in future to be granted to the notaries, in order to relieve the state courts. This transfer is of great significance. Today the majority of wills are already produced by notaries in notarially recorded form. To also transfer the granting of inheritance certificates to them would be a matter of course.

This is also an area where substantial relief can be afforded to the state courts, if the law is passed in this manner.

g) In this regard it should be noted that there is a further plan to set up a **central register of wills** in the German Federal Notaries' Chamber. All testaments documented by notaries are to be registered in this register under the testator's name. In the event of subsequent deaths, this register of wills can be consulted to see whether a will has been set up, and this can then be opened by the probate court or by the notary.

In addition, there are plans to link this register of wills in a further developmental phase on an international level with the will registers of other countries, so that even where a will has been set up abroad, the opening of this will can be ensured.

This central system would replace the previous decentralised system of will registration in the respective birth registry offices, resulting in simpler inquiries into and searching out of wills.

h) The **Children's Rights Reform Law** of 1998 stipulates that, contrary to the previous regulation for unmarried couples who have children together, custody is not exclusively granted to the mother, but the father and mother of the child can agree to exercise custody jointly. This agreement is set down with a joint, so-called custody declaration by the child's parents. This custody declaration is made in a notarial document. The custody declaration can also be made by separated parents who, after a separation, despite an originally different custody arrangement, now agree to exercise custody jointly in future. In future divorces, if no more far-reaching application is made by one of the parents, joint custody will on principle be the rule.

4) The previously cited examples of current legislative processes and the laws already passed show that the **regulating and settling function of the notary in society** has been recognised by the legislator in Germany and, on the basis of this fact, further responsibilities are being transferred to the notary by the legislator.

This transfer of responsibilities results in a **financial relief for society as a whole**, as the state courts which it finances benefit from a reduced workload.

This means that the notarial function also serves to **reconcile the interests** of citizens, on the one hand, and the state on the other, within the free economy system, in which the notary is necessary as a guarantor of legal certainty and as

a regulator between the partially different interests of citizens involved in private legal transactions and contributes to the development of these market economies.

The German legislator has recognised this for a long time, continually transferring new responsibilities to the notary's office in order to trim down the state [?] through privatisation of these tasks and to release the economy from state regulations.

In addition to this function, the notary also exercises a considerable **consumer protection function**, where he gives just as much advice to the economically weaker party in private business contracts as to the economically superior party, thus ensuring a fair balance of interests and smoothing the way for economic development in the relevant countries.

Seen in this way the **notary's office is not a hindrance but a driving force for economic development**, and his preservation and expansion of responsibilities by the state is an instrument for the improvement and acceleration of economic development in individual countries.

It is now also evident that, contrary to the repeated claims, **legal certainty** in these areas is substantially lower in the Anglo-Saxon legal system than in legal systems of the Latin notary's office.

The notary exercises an extremely important function in the legal protection of citizens, by **ensuring the reliability of legal transactions and of register entries**.

Initially, the introduction of Anglo-Saxon legal trends may supposedly accelerate economic development by "simplifying" the contractual forms and foundations previously reserved for the notary's office. This quickly won condition, which first of all appears as an advantage, is, however, only of short duration. It then rebounds when, due to the safeguarding of legal transactions brought about by liberalisation, disputes concerning concluded contracts increase.

Then, firstly, there will be an increasing burden on the state courts, due to increasing legal disputes, and secondly, the social costs of the legal system will rise.

In the United States, for example, legal prosecution costs already constitute a proportion of approximately 2.5% of the American gross national product, whilst these costs only constitute approximately 0.5% of the German gross national product.

This is not only a matter of an "insurance problem", as the advocates of the American legal system and, in particular, the theory broadcast there of the "Economic Analysis of Law" would have us believe, but the result is a dramatic deterioration in the quality of the legal services provided to the population overall.

Only the economically strong side in legal transactions is normally able to protect himself by calling in appropriate solicitors and taking out the relevant insurance policies; the economically weaker side usually falls by the wayside in this legal system.

The Latin style notary's office today represents an essential factor in economic development and in the protection of the population within the context of this economic development.

Understood correctly, the market economy functions best and is of most benefit to citizens within market economy systems when the notarial system is utilised.

The train of economic development rolls best on the level track of the law and, in particular, that of the preventive administration of justice.