Evolution of the notarial competencies in Europe

The notariat is the result of the evolution of the society it makes part, it is not the artificially invented product, it was not traced ‘geometrically’ by the Cartesian legislator, it is the spontaneous result of the civil society which has produced the contractual security system that should avoid, if possible, the existence of the illegal, fraudulent actions, the ones violating other people rights, unjust or simply faulty.

That system is the only one that provides the real legal security, and as the institution that has its bases in the social service, the notariat has to continue to provide the additional value as the response to the request of trust and security of the modern society.

There is no order that could maintain the institutions that are not legitimate by themselves according to the social service that they provide. That obliges us to permanently analyze our function and to evolve together with the society that we serve to, whose dynamism, the globalization and the rapidity of the new technologies could provide the space for the changes in the social models and destroy essentially the economical, political and social institutions although they now seem never-changing and solid.

During the last twenty years the principal lines of the social evolution that especially concern the notaries are: the new technologies, family structures, the intensification of the real estate changes, the globalization of the commercial relations and the acts of the voluntary jurisdiction.

NEW TECHNOLOGIES

In all the countries of our study, the notary disposes of the electronic signature recognized as the notarial signature. This electronic signature assures more security and is equivalents to the manual signature.

The principal practical applications of the recognized electronic notarial signature are

- Connection with the cadaster
- Consultation of the fiscal debts on the taxes that fall down on the immovables
- Liquidation of taxes on real estate transactions and in some cases also on taxes on successions and donations
- Connection with the land registry, commercial registry
- Obtain the ID number for companies (NIF) which are formalized by a notary
- Preparation and negotiation of loans
- Communication between notaries and government bodies
- The given communication with the public administration. Indeed, the given communication by electronic means from the notary to the tax authorities, is one of the main weapons against tax evasion and money laundering.
The ease of electronic communication between the notariat and the Public Administration enables the more effective organization of the archives and testament, consultations records of life insurance

The public electronic document is admitted into the legislation for supporting documents of all types, including public documents.

The use of the existence of electronic public document is situated in the special efficacy and the probative value of the latter.

Currently electronic public document is considered as the electronic copy of the original public document in paper form. It is not yet settled and we do not consider electronic public documents as the originals, there is still the need to establish clear standards for electronic signature which should be employed for those who use it as well as the precautions and the consequence of improper use of the electronic signature.

It should be, finally, noted that we are not talking about e-commerce itself, but what was achieved with the electronic signature between the ones that are not present and with the simultaneous intervention in different areas from notaries physically distant, which allows for the issues that are expressly excluded from the e-commerce to be explicitly or implicitly attributed to the function of notaries, we can also take the advantage of the Internet in combination with the public faith, entering through this fake door in the context of hiring not the Internet, but with the Internet, with enjoying the legal and formal security which grants the notarial intervention excluded from the network by the Directive on Electronic Commerce 2000/31/EC of the European Parliament and the Council, from June 8th 2000 (Article 9).

Before the accession of the electronic signature, the European Notarial has defined a strategic position that has been successfully developed for more than a dozen years with the result that not only we has not replaced the electronic signature but has strengthened it.

NOTARIES AND THE NEW FAMILY LAW. -

Notary in the countries from our study has changed his traditional functions related to the family law and retained his powers in succession, thus:

FAMILY. -

- Agreement on the matrimonial economic regime and its amendments. Almost all countries have the jurisdiction conferred by the Law

- De facto unions. - Only a few countries have the competencies conferred by the Law regarding this matter, in other countries beside the fact that this notarial competence is not specifically determined it is common for those who live together without marriage to regulate their situation with a contract formalized by the notary.

The increase of de facto unions is perhaps one of the consequences of the increased number of divorces. Whether they relate to the people of different sex or not, they pose many legal problems:
the one that led to the establishment of registered partnerships, in many jurisdictions, which are not under the exclusive competence of the notary: but difficulties related to the patrimony of partners, on one hand, and the dissolution of the partnerships between the living and the dead on the other hand, must make the notaries to pay attention, perhaps more than they do today, to these new situations.

- Adoption. - It has ceased to be notarial competence, and is to exclusively judicial, and only France requests the notarial consent for adoption or related document for the adoption by the infertile spouses.

- Recognition of parentage. - Although the parentage is not an exclusive competence it can be acknowledged by notarial documents in almost all of the countries.

- Emancipation of minors. – only Spain acknowledges this as the notarial competence.

- Tutorship. - It is not a notarial competence but in some countries you can make a notarial declaration for parents to designate tutors that the judge must appoint for their children.

   - Auto-supervision - . Considering the ageing of the population, many legislators have introduced mandates for future protection, allowing everyone to organize its possible future disability. These mandates, more numerous, are not always necessarily notarized, but we can see that the majority of clients come to the notary for advice.

- Divorce. - This is not yet a notarial competence although it is common that the divorce and the liquidation of assets of the spouses is settled before a notary.

INHERITANCE. -

- Testaments - All countries without exception admit notarial competence for or the authorization of the testaments, but the establishment of testaments is not an exclusive notarial competence and they can be holographic, although they must be previously or subsequently deposited before the notary .

- Declarations of heir. - In order to reduce the work of the courts, it has become a notarial competence, the declaration of heirs, ab-intestate at least for the spouse, parents or descendants.

-Inheritance - Yes , it’s an exclusive and usual notarial competence to perform the division of inheritance.

CONTRIBUTIONS . - Yes , it is an exclusive and usual notarial competence make contributions of the immovable property.

REAL ESTATE TRANSFERS. - It is probably one of the most important notarial competencies. In almost all countries the law acknowledges an exclusive and usual competency to the notary in real estate transactions and the acquisition of real rights over immovable property, but the question is not
whether the notaries should be involved in the purchase of the immovable, but what is his specific function in such competence, and that is one completely different aspect.

It is generally acknowledged that the intervention of the notary protects the rights of consumers, each time more and more real estate and urban legislation impose to the notaries further obligations to ensure that the rights of the consumer are respected, especially in terms of material quality, respect of the legislative standards for land and constructions, to ensure that the purchase conditions are met, as well as the authorizations and administrative licenses, etc.

TRANSFERES OF THE MOVEBLES - There are no specific notarial competences in the transactions of personal property.

LOANS . - We must distinguish two types of loans: mortgages and personal or without mortgage guarantie.

Regarding the mortgage, its creation, modification and regulations in all countries acknowledged the Notarial competence, especially as something new, in countries like France we assumed known rechargeable mortgag, which in other countries is formed as a kind of maximal mortgage that can guarantee maximum various obligations, by losing the so called principle of specialization of each obligation with its own mortgage.

The loans without mortgage security, therefore with no access to public land registry, are not considered as the common notarial competence, except in Spain where the Law acknowledges executive powers to the bank contracts concluded before the Notary, and since then practices that almost all bank loans without immovable guarantee are passed before the notary.

COMPANY LAW. -

Business. - Most countries from our study, with the exception of France, acknowledge the notarial exclusive competence for the establishment of companies and modification of their status. There is also a competence, non exclusive for the appointment of their directors or sale and purchase of the shares or their social participation.

Civilian. - The general requirement for the notarial intervention in commercial companies is not defined in the constitution as well as the modification of the civil companies, for whom the notarial competence is not prescribed by the Law but is imposed by the practice.

Sports clubs and associations . - The law of any country does not requires the intervention of the notaries neither for their creation nor modification.

Foundations. - The intervention of the notaries in the creation of a foundation is necessary, in most of the countries.
VOLUNTARY AND AMICABLE JURISDICTION.

The notariates can have a growing involvement in the acts of voluntary jurisdiction, or non-contentious business, to help alleviate the excess of business in the courts, by allowing the judges a faster resolution of exclusively judicial issues that are to be ruled to enforce what is being judged.

As the examples of acts of voluntary jurisdiction which could be borne by the notaries, we highlight the following:

- Regarding Family Law and marital separations, including divorce by mutual consent.
- In terms of rights and obligations, allocation and deposition of trade and non-executive auctions. AND intervention in mediation or the decisions on extrajudicial conflicts.
- In terms of actual rights, the delimitations between properties;
- On the right of succession, the exclusive competence of heirs without distinction of the parents; acceptances of legacy to benefit of the inventory.
- In material issues extinguish the public notarial belief in the findings of fact or their perception by the notary.

To this we add the table of competencies made by Bram Vuylsteke Notary, Notary Riemst (Belgium) in the Study on notarial competences made for the European Affairs Committee of the UILN in 2009. Obviously this table concerns countries very different from each other, countries with old notarial systems and the ones with the younger ones. Our wish is that the notariat of Bosnia and Herzegovina gains as many competencies as possible and to achieve this objective so that it can have the full support of those who represent the oldest notariates.

thank you

Ernesto Tarragon Albella

Notary in Castellón (Spain)

April 2014