

**Dialogue between legal systems: “The added value of the notarial act”**  
**Society of Scrivener Notaries and International Union of Notaries**  
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**Title: *United in diversity: rethinking the dialogue between notarial systems in the digital age.***

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

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

### **Quebec panorama**

As we all know, Canada is a bijural country where two legal traditions coexist: the civil law in the province of Quebec and the common law in the rest of the country.

The notarial institution, which has existed in Quebec since 1621, has taken on distinctive characteristics within the civil law system, due to the particular context in which it has evolved, which is a continent dominated by the common law. As a result of being detached from its French roots and influenced by its North American environment, the Quebec system became a sort of mixed jurisdiction, which means that it is fundamentally a civil-law jurisdiction that has integrated several aspects of the common law tradition in its private law institutions and codification. With regard to the notarial profession, Quebec notaries have developed a particular character, showing both the break and the continuity of the civil law tradition in Canada.

### **Civil notary**

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

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

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

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

### **Singularities**

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

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

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

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

### **Liberal recognition of public acts**

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

Foreign public documents are characterized as semi-authentic documents, but they are, in practical terms, treated as authentic ones. When it comes to recognizing the cross-border effects of a foreign notarial act, Quebec law makes no difference between civil and

common law notaries, because the only condition is that it is issued by a competent public officer. The same applies to powers of attorney certified by notaries public from the common law.

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

### **Need for dialogue: comparative and international perspectives**

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

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

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

### **Preconceptions and misunderstandings**

#### **The common law notary misunderstood**

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

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

Another false assumption is that the notary public could never replace the civil notary, due to the lack of fundamental requirements related to their functions. Indeed, it is largely ignored that notaries public in many common law jurisdictions are public officials appointed by the State to authenticate acts within a given territory, a characteristic shared by civil law notaries. It is also unknown that they have a duty to act as impartial witnesses to the transaction. The same can be said of other duties such as that of asserting the identity, the capacity and the free will of the person, which may also be present in some common law jurisdictions.

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

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

### **Emergence of a new source of division: remote authentication**

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

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

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

### **Common law notaries divided**

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

Just to mention one example, the Society of Notaries of New South Wales (Australia) issued a formal statement with the title “*Remote notarisation – don’t do it*” warning against the practice of remote acts during the pandemic. It was the opinion of the Society that it is unacceptable to notarise the signature of a client using electronic video conference facilities (of any kind) because it is inconsistent with the duties legally imposed on notaries, which

require the physical presence of the parties and the notary in the same location. An interesting position has been adopted by Louisiana, which, like Quebec, is a mixed jurisdiction. Although remote online notarization is allowed in general, it is not permitted when performing authentic acts (as defined by article 1834 of the Civil Code), which are the most solemn form of documents in Louisiana. This scenario shows a picture of the inferiority of remote acts in the hierarchy of written evidence in that State.

### **Civil law countries divided**

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

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

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

### **The German case:**

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

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

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

## **Conclusion**

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