"*Fortune brings in some boats that are not steered*" … but generally planning ahead is better: let's discuss some notarization issues in cross borders transactions and some ethics issues in International Law

International Law Committee

Thursday, January 23, 2014, 1:30-4:45

Materials

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Apostile Convention)

Protocol on Uniformity of Powers of Attorney Which are to be Utilized Abroad

Nathan M. Crystal & Francesca Giannoni-Crystal, *Do the Right Thing (for your duty of competency): Some Ethical and Practical Thoughts on "Notarization" in International Transactions*

Nathan M. Crystal, *The Duty of Competency in International Matters, Parts I and II,* September and November, (Ethics Watch 2013)

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

12. CONVENTION ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS[1]

(Concluded 5 October 1961)

The States signatory to the present Convention,
Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.
For the purposes of the present Convention, the following are deemed to be public documents:

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("*huissier de justice*");
b) administrative documents;
c) notarial acts;
d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

a) to documents executed by diplomatic or consular agents;
b) to administrative documents dealing directly with commercial or customs operations.

Article 2

Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.
However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Apostille Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Neuvième session (1960)*, Tome II, *Légalisation* (193 pp.).

two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "*allonge*"; it shall be in the form of the model annexed to the present Convention.
It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.
When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.
The signature, seal and stamp on the certificate are exempt from all certification.

Article 6

Each Contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.
It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

a) the number and date of the certificate,

b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more Contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

Article 9

Each Contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth Session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *d)* of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, the Convention shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

a) the notifications referred to in the second paragraph of Article 6;
b) the signatures and ratifications referred to in Article 10;
c) the date on which the present Convention enters into force in accordance with the first paragraph of Article 11;
d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;
e) the extensions referred to in Article 13 and the date on which they take effect;
f) the denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth Session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

Multilateral Treaties

» PROTOCOL ON UNIFORMITY OF POWERS OF ATTORNEY WHICH ARE TO BE UTILIZED ABROAD (C-6)

The Seventh International Conference of American States approved the following resolution (No. XLVIII):

"The Seventh International Conference of American States Resolves:

1. That the Governing Board of the Pan American Union shall appoint a Commission of five experts, to draft a project for simplification and uniformity of powers of attorney, and the juridical personality of foreign companies, if such uniformity is possible. If such uniformity is not possible, the Commission shall suggest the most adequate procedure for reducing to a minimum both the number of different systems of legislation on these subjects and the reservations made to the several conventions.

2. The report should be issued in 1934, and be given to the Governing Board of the Pan American Union in order that it may submit it to the consideration of all the Governments, members of the Pan American Union, for the purposes indicated."

The committee of Experts appointed by the Governing Board of the Pan American Union pursuant to the above resolution prepared a draft of uniform legislation governing powers of attorney to be utilized abroad, which was submitted by the Governing Board to the Governments, members of the Pan American Union, and revised in accordance with the observations of the said governments.

A number of the governments of the American Republics have indicated that they are prepared to subscribe to the principles of the said draft, and to give them conventional expression, in the following terms:

ARTICLE I

Powers of attorney granted in the countries, comprising the Pan American Union, for utilization abroad, shall conform to the following rules:

1. If the power of attorney is executed by or on behalf of a natural person, the attesting official (notary, registrar, clerk of court, judge or any other official upon whom the law of the respective country confers such functions) shall certify from his own knowledge to the identity of the appearing party and to his legal capacity to execute the instrument.

2. If the power of attorney is executed in the name of a third person, or if it is delegated or if there is a substitution by the agent, the attesting official, in addition to certifying, in regard to the representative who executes the power of attorney, or delegates or makes a substitution, to the requirements mentioned in the foregoing paragraph, shall also certify that such representative has in fact the authority to represent the person in whose name he appears, and that this representation is legal according to such authentic documents as for this purpose are exhibited to said attesting official and which the latter shall mention specifically, giving their dates, and their origin or source.

3. If the power of attorney is executed in the name of a juridical person, in addition to the certification referred to in the foregoing paragraphs, the attesting official shall certify, with respect to the juridical person

in whose name the power is executed, to its due organization, its home office, its present legal existence, and that the purposes for which the instrument is granted are within the scope of the objects or activities of the juridical person; which declarations shall be based on the documents which for that purpose are presented to the official, such as the instrument of organization, bylaws, resolutions of the board of directors or other governing body, and such other legal documents as shall substantiate the authority conferred. The attesting official shall specifically mention these documents, giving their dates and their origin.

ARTICLE II

The certification made by the attesting official pursuant to the provisions of the foregoing article, shall not be impugned except by proof to the contrary produced by the person challenging its accuracy. For this purpose, it shall not be necessary to allege falsity of the document if the objection is founded only on an erroneous legal construction or interpretation made by the official in his certification.

ARTICLE III

It shall be unnecessary for the grantee of a power of attorney to signify therein his acceptance of the mandate; such acceptance being conclusively presumed by the grantee's acting under the power.

ARTICLE IV

Special powers of attorney to authorize acts of ownership granted in any of the countries of the Pan American Union, for use in another member country, must specify in concrete terms the nature of the powers conferred, to enable the grantee to exercise all the rights necessary for the proper execution of the power with respect to property as well as to the taking of all necessary steps before the tribunals or administrative authorities in defense thereof.

General powers of attorney for the administration of property shall be sufficient, if expressly granted with that general character, to empower the grantee to consummate all manner of administrative acts, including the prosecution and defense of law suits and administrative and judicial proceedings, in connection with the administration of the property.

General powers of attorney for lawsuits, collections or administrative or judicial proceedings, when so worded as to indicate that they confer all general powers and all such special powers as, according to the law, ordinarily require a special clause, shall be deemed to be granted without any limitation or restriction whatever.

The provisions of this article shall have the character of a special rule which shall prevail over such general rules to the contrary as the legislation of the respective country may establish.

ARTICLE V

Powers of attorney granted in any of the member countries of the Pan American Union, which are executed in conformity with the rules of this protocol, shall be given full faith and credit, provided, however, that they are legalized in accordance with the special rules governing legalization.

ARTICLE VI

Powers of attorney granted abroad and in a foreign language may be translated into the language of the country of their destination and the translation incorporated as part of the text of the instrument thereof. In such case, the translation, so authorized by the grantor, shall be deemed accurate in every particular. The

translation of the power of attorney may also be made in the country where the power is to be utilized, in accordance with the local usage or pertinent laws of such a country.

ARTICLE VII

Powers granted in a foreign country do not require as a prerequisite their registration or protocolization thereof in designated offices. However, this rule will not prevail when the registration or protocolization of such instruments is required by the law as a special formality in specific cases.

ARTICLE VIII

Any person who may, pursuant to the pertinent legislation, intervene or become a party in a judicial or administrative proceeding for the defense of his interests, may be represented by a volunteer, on condition, however, that such representative shall furnish the necessary legal authority in writing, or that, pending the due substantiation of his authority, such representative shall furnish bond, at the discretion of the competent tribunal or administrative authority, to respond for the costs or damages which his action may occasion.

ARTICLE IX

In the case of powers of attorney, executed in any of the countries of the Pan American Union in accordance with the foregoing provisions, to be utilized in any other member country of the Union, notaries duly commissions as such under the laws of their respective countries shall be deemed to have authority to exercise functions and powers equivalent to those accorded to native notaries by the laws and regulations of (name of country), without prejudice, however, to the necessity of protocolization of the instrument in the cases referred to in Article VII.

ARTICLE X

What has been said in the foregoing articles with respect to notaries, shall apply with equal force to the authorities or officials that exercise notarial functions under the laws of their respective countries.

ARTICLE XI

The original of the present protocol in Spanish, Portuguese, English and French, under the present date shall be deposited in the Pan American Union and opened for signature by the states, members of the Pan American Union.

ARTICLE XII

The present protocol is operative as respects each High Contracting Party on the date of signature by such party. It shall be open for signature on behalf of any of the states, members of the Pan American Union, and shall remain operative indefinitely, but any party may terminate its own obligations hereunder three months after it has given to the Pan American Union notice of such intention.

Notwithstanding the stipulations of the foregoing paragraph any state desiring to do so may sign the present protocol ad referendum, which protocol in this case, shall not take effect, with respect to such state, until after the deposit of the instrument of ratification, in conformity with its constitutional procedure.

ARTICLE XIII

Any state desiring to approve the present protocol with modifications may indicate, when signing the protocol, the form in which the instrument will be given effect within its territory.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, having deposited their full powers found to be in due and proper form, sign this protocol on behalf of their respective governments, and affix thereto their seals on the dates appearing opposite their signatures.

[Signatories and Ratifications]

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Topics

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Do the Right Thing (for your duty of competency): Some Ethical and Practical Thoughts on "Notarization" in International Transactions

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Do the Right Thing (for your duty of competency): Some Ethical and Practical Thoughts on "Notarization" in International Transactions*

Nathan M. Crystal and Francesca Giannoni-Crystal

Abstract

International trade and the role of lawyers in international transactions have increased dramatically in the last few decades, and projections indicate even greater growth. To comply with their ethical and legal duties of competency in international transactions, lawyers must have a certain level of direct knowledge; lawyers do not comply with their duty of competency by hiring and blindly relying upon foreign counsel. There are too many cultural, linguistic, and legal differences between countries to justify a lawyer in relying exclusively on the knowledge of foreign lawyers (what we would call "indirect knowledge").

This article focuses on a frequently misunderstood area in which an international lawyer should have direct knowledge – the authentication of documents by notaries either overseas when the document is to be used in the US ("inbound") or in the US when the document will be sent overseas ("outbound").

The concept of a notary in civil law countries is quite different from that in the common law system. In civil law countries notaries are public officials, like US notaries, but their role as public officials is wider than US notaries because of their ability to draft public instruments (also called "authentic instruments"). Civil law notaries are also legal professionals who do not simply authenticate signatures on private instruments, they give impartial advice. Finally, the number of civil law notaries is radically smaller than the number in the US – for example, 8000 in Germany.

Because of these differences, problems with regard to notarization can arise in either (i) "inbound" transactions, i.e. when a party is required to supply a document from a civil law country to be used in a US transaction (for example, a power of attorney from a resident in a civil law country) or (ii) in "outbound" transactions, i.e. when a party must supply a document from the US to be used in

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a civil law transaction (for example a document certifying that a US resident has been bequeathed real estate located in a civil law country).

With regard to "notarization of documents," the duty of competency in our view requires lawyers to know the important differences between civil law and common law notaries; the fact that notarization by a civil law notary may be time consuming, expensive, and even unnecessary for many US transactions; and practical ways to deal with notarization problems in inbound and outbound transactions.

KEYWORDS: 1.1, civil law, common law, competency, cultural, ethical, inbound, international, linguistic, notarization, notary, outbound, translation

INTRODUCTION

International trade and the role of lawyers in international transactions have increased dramatically in the last few decades, and projections for the future indicate even greater growth. When lawyers are involved in international transactions, the concept of their "competency" is broader than when dealing with purely domestic transactions. Indeed, their clients generally need and expect more from them than in domestic matters. Clients expect their lawyers to be generally competent on foreign law involved in their matters, at least in the sense of being able to advise on timing, costs, and avoidance of pitfalls, but they often rely on their lawyers to advise, not only on purely legal matters, but also on social and cultural issues of the relevant foreign countries. Moreover, clients expect their lawyers to be able to effectively supervise if a foreign counsel is involved in the transaction. Lawyers who fail to advise on these issues, do not meet their clients' needs and expectations. With an unsatisfied client, the lawyer risks a malpractice action or an ethical complaint.[1] And, even if a lawsuit or a complaint will not ensue, the lawyer might suffer damage to reputation or might lose the client.

THE CONTENT OF THE DUTY OF COMPETENCY IN INTERNATIONAL TRANSACTIONS

The most fundamental ethical obligation for a lawyer is the duty of competency, reflected in ABA Model Rule 1.1. In 1957, the New York Court of Appeals, remarking on the duty of an American lawyer in dealing with foreign law, had this to say:

> When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State.[2]

[1] *See* Ethan S. Burger & Frank A. Orban, III, *International Legal Malpractice in a Global Economy: A Growing Phenomenon*, 29 Intern'l Leg. Prac. No. 2 (2004).
[2] In re Roel, 144 N.E.2d 24, 37 (N.Y. 1957).

At least one author has elaborated on lawyers' duty of competency in international transactions.[3] Robert E. Lutz has pointed out that the first obligation for a lawyer involved in an international transaction is the ability to spot issues of foreign law: "Once a lawyer recognizes them, to meet the competency standard the lawyer must address the foreign issues as promptly, expertly, and inexpensively as foreign counsel would, or advise the client to retain foreign counsel."[4] The same author has explained that lawyers involved in international transactions also have the ethical obligation "to be sensitive to and respectful of the cultural differences encountered in representing a foreign client . . ." and should also advise on the different costs and timing of the operations.[5] In addition, he pointed out that if lawyers decide to retain local counsel, the duty of competency includes the supervision of their work and of their relationship with the clients. This task might be difficult because of language barriers.[6] We add that the task is also difficult because of legal system barriers: even if lawyers can understand each other, a legal concept may vary so much in the two legal systems that any translation becomes meaningless (consider, for example, the different meaning of the concepts of "ownership" and "notary" in the common law and the civil law). In addition, the same language and legal system barriers exist when US lawyers must explain – as they should -- to their American clients "the substance of a foreign lawyer's advice on foreign law."[7] We call the discrepancies between legal systems that no translation can fill, "lost in translation" issues.

The duty of competency of lawyers involved in international transactions involves at least the following skills: (a) ability to spot issues in relation to every system involved; (b) understanding of the timing of operations abroad; (c) understanding of the law making process of other countries; (d) ability to work in teams with foreign lawyers; (e) knowledge of the role of lawyers in other

[3] Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 Fordham Intern'l. L.J. 53 (1992).
[4] *Id*. at 61.
[5] *Id*. at 67.
[6] *Id*. at 83.
[7] *Id*. at 83.

countries; (f) ability to interact with foreign clients in the way these clients are accustomed to interact with local lawyers; (g) ability to explain to American clients when and why they should retain/associate foreign counsel for the transaction and ability to supervise foreign counsel; (h) flexibility to new schemes; and (i) familiarity with cultural and language differences.

We could summarize the lawyer's obligation in connection with the foreign aspects of international transactions by saying that the lawyer must be "competent" pursuant to ABA Model Rule 1.1, however, without further specifications, the concept of "being competent" is too general to be helpful to international lawyers. More specifically, with regard to foreign aspects of international transactions a lawyer must have a certain level of direct knowledge: lawyers do not comply with their duty of competency by hiring and blindly relying upon foreign counsel. There are too many cultural, linguistic, and legal differences between jurisdictions to justify a lawyer in relying exclusively on the knowledge of a foreign lawyer (what we would call "indirect knowledge"). On the other hand, it is unrealistic to expect a lawyer to have detailed knowledge of the law and practices of other jurisdictions. What is necessary, practical, and consistent with the duty of competency is a general level of personal knowledge. Lawyers must be personally aware of certain local issues independently from the "indirect knowledge" deriving from association with local counsel. Only if lawyers have a sufficient level of "personal general knowledge" are they able to spot issues, to supervise local counsel, to effectively plan ahead, to give timely advice clients, and to avoid criticalities.

In this article, we do not attempt to delineate the specific topics on which an American lawyer should have personal general knowledge. We focus on one of those topics -- a frequently occurring but often misunderstood situation that arises in international practice, i.e. the authentication of documents by notaries either overseas when the document is to be used in the US ("inbound") or in the US when the document will be sent overseas ("outbound"). A lawyer's lack of general personal knowledge of the difference between civil law and common law notaries may compromise clients' transactions and fall below the standard of competence expected of international lawyers.

KNOWING THE DIFFERENT ROLES AND FUNCTIONS OF NOTARIES IN COMMON LAW AND CIVIL LAW COUNTRIES IS PART OF THE DUTY OF COMPETENCE

When a transaction concerns more than one legal system, a problem of coping with the differences between the systems always exists. Sometimes these differences are so significant that they require a radical change in the transaction, or even break the deal. Even when such differences do not destroy a transaction, they can increase costs, generate delays, and trigger client frustration; lawyers should be aware of these problems and plan ahead. The role and nature of notaries in the US and in civil law countries is one difference between legal systems, but it is usually possible to overcome this problem with foresight and planning.

It is beyond doubt, that, when civil law countries use the word "notary" (or *notario*, *notaio*, *notaire*, *Notar*, etc.), the reference is to something different from a US "notary." The word "notary" comes from Latin "*notarius,*" which means "rapidly written"; in the Roman Republic a transcriber who used a fast method of writing ("*notae*") was called *notarius.*[8] During the Roman Empire, notaries came to be connected with high officials, and they acquired therefore a enlarged status as a prominent profession.[9] Notaries maintained a certain importance in Continental Europe in the Middle Ages,[10] and during the Renaissance they were central figures of the law.[11] This is still the case in civil

[8] Notary History, National Notary Association, available at http://www.nationalnotary.org/resources_for_notaries/what_is_a_notary/notary_history.html:

> The true ancestors of Notaries were born in the Roman Empire. Many regards history's first Notary to be a Roman slave named Tiro, who developed a shorthand system which he called notae for taking down the speeches of famed orator Cicero. Other witnessing stenographers came to be known as notarii and scribae.

[9] *Id.*

[10] "In medieval times the notary was an ecclesiastical officer who preserved evidence, but his duties were mainly secular." *Notary*, Encyclopedia Britannica Mobile, available at http://www.britannica.com/EBchecked/topic/420516/notary.

[11] See Notary History, Notary Wise available at http://notarywise.com/notary-history.htm:

> Notwithstanding the collapse of the Western [Roman] Empire in the 5th century AD, the notary remained a figure of some importance in many part of continental Europe throughout the Dark Ages. When the civil law experienced its renaissance in medieval Italy from the 12th century onwards, the notary was established as a central institution of the law . . .