law countries, but not so in common law countries, particularly the US.

In the US, notaries are not professionals. A notary public or public notary (or simply a "notary") is a public official delegated by the state some authentication powers. In common law countries, generally notaries administer oaths and affirmations, receive statutory declarations, witness and authenticate documents, take acknowledgments of deeds, and do other activities depending on the jurisdiction. In the US notaries are appointed by government authorities for a limited term (called "commission"). Unlike other common countries where the number of notaries is insignificant (e.g., 740 notaries in England), in the US the number is enormous (4.5 million). Indeed, in the US notaries are widely used for routine transactions. While in England and in other common law countries notaries are generally lawyers and must go through a special training, in the US notaries are predominantly lay people, who, depending on the jurisdiction, may or may not be required to attend a brief training seminar. In the US notaries are prohibited to practice law; lawyers, however, are allowed to be notaries.

In civil law countries notaries ("civil law" notaries or "Latin notaries" or simply "notaries")[12] are public officials like the US notaries, but they are also law-trained, highly respected legal professionals. Notaries are generally distinct from lawyers -- in some countries, like Italy, lawyers are even expressly prohibited from being notaries;[13] there are exceptions, however, notably Germany.[14] Civil law notaries have generally the same or greater prestige than

[12] "[T]he notaries of Latin type . . . [are] present in 81 countries of the world . . ." Italian Consiglio Nazionale del Notariato, available at http://www.notariato.it/it/notariato/notai-mondo/notai-mondo.html.

[13] Article 3 R.D.L. November 27, 1933 no. 1578 (Professional Law): "The practice of law (as an attorney) is inconsistent with the profession of notary."

[14] German Civil Law Notaries, Bundenotarkammer, available at http://www.bnotk.de/en/index.php:

> In roughly two thirds of the country civil law notaries practise as single-profession . . . In the other areas, civil law notaries exercise the profession as an additional office alongside with their activity as attorneys. . . . For historical reasons, there are also state-employed civil law notaries in some parts of the State of BadenWürttemberg. However, the same professional rules apply to all civil law notaries.

attorneys in the US. In addition, however, they enjoy a reputation of neutrality -- unknown to attorneys -- that can be compared to that of an ADR neutral.

The requirements to become a civil law notary are quite extensive. Generally notaries attend the same law school as future lawyers and judges, but in some countries (e.g., Argentina[15]), notaries attend a specific law school. After law school, notaries typically go through a period of training (e.g., 18 months in Italy, 2 years in France) with a notary official and take a highly selective state examination; only those ranking at the top become notaries because generally the number of notaries for a territory ("district") is established by law.[16] As a result, the number of notaries is quite low; for example, less than 5,000 notaries in Italy, 3,000 in Spain, 9,000 in France, 8,000 in Germany.

Civil law notaries participate substantively in transactions, while the role of their US counterparts is formal. By law, civil law notaries generally must be present and authenticate property transfers, formation and incorporation of companies, bank loan contracts, donations of assets, drafting of wills, and many commercial transactions. In some countries the role of notaries might be greater.[17]

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[15] Universidad Notarial. See http://www.universidadnotarial.edu.ar/.

[16] Ian Paterson et al.'s Research Report, *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States* ("Paterson's Research Report") at 51, available at http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf

> In countries where there is a Latin notary, the market entry regulations are always without exceptions relatively rigid. First, notaries have to fulfill extensive qualification requirements in those countries. A university degree in law is a mandatory precondition to enter the profession. Additionally, in most countries some professional practicing is required. Further, special professional exams exist. . . .[I]n all countries with a Latin notary (due to recent liberalization, with the exception of Netherlands) the number of notaries or of notaries' branch offices is structurally limited (via more or less objective economic needs test, etc.).

[17] *Id*. at 51:

> In all countries regulations exists a question concerning the case for which the consultation of a notary is mandatory and there appear to be a wide variety of more or less inclusive regulations in this point. Whereas, for example, in Italy [until recently – authors] even the buying of a used car has to be certified by a notary, the regulations in Austria are less restrictive. Here notarial forms are required for more sensitive areas, such as for marriage contracts, donations, all legal transactions undertaken by blind, deaf or illiterate persons, medical artificial reproduction, and for some cases in company law.

Civil law notaries are public officials.[18] Their role as public officials, however, is wider than that of US notaries because of their ability to draft public instruments (also called "authentic instruments"). US notaries cannot issue public instruments, except in Louisiana and Puerto Rico, which have a civil law tradition, and in Florida[19] and Alabama,[20] which passed special statutes to this effect.[21] By contrast, with some exceptions,[22] the public instrument is the typical product of civil law notaries. A public instrument is a document that is drafted entirely by the notary.[23] A public instrument has high probative value of the authorship of the document, of the parties' declarations, and of the other facts that the notary certifies as happening in front of him.[24] In addition, a public instrument has the "privileged enforceability . . . of a definitive judgment,"[25] meaning that in case of a breach of an obligation by a party, the other party may start an enforcement procedure without waiting for a court decision on the breach. Moreover, in a few countries, public instruments are the only documents that can be entered into public registries. Public instruments are stored by the notary and generally are available to whomever requests them (hence the name of "public"). Besides issuing public instruments, civil law notaries authenticate private documents ("authenticated instruments"). An authenticated instrument is a written

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As for Italy, as an author quite effectively wrote: "Notaries run Italy's system of registration of real property and commercial documents." Patrick Del Duca, Notice-Filing with a Civil Law Notary "Public Writing" Requirement, 44 UCC L. J. 33-66 (2011).

[18] *See, e.g.*, Article 1 of French Ordinance November 2, 1945, regulating the status of the "notaire" in France: "The notaries are public officials established to receive all the acts and contracts to which the parties must or wish give the character of authenticity of public authority's acts."

[19] Chapter 118 Florida Statutes, International Notaries.

[20] Alabama Code, Section 36-20-51 - Civil Law notaries.

[21] J. B. McClane & Michael A. Tessitore, *The Florida Civil-Law Notary: A Practical New Tool For Doing Business With Latin America*, 32 Stetson L. Rev. 727 (2003).

[22] *See, e.g.*, Scandinavian countries in Paterson's Research Report, note 16 above, at 51.

[23] You can recognize it because it is generally written in the first person: "Today, in front of me, Ms. Y, Notary in Rome, Mr. Doe and Mr. Roe appeared . . . whereas. . ., the parties, whose identity I have personally verified, agree as follows . . .."

[24] *See, e.g.*, Article 2700 Italian Civil Code. A judge "must consider. . . [it as] legally true and trustworthy . . . until impeached for falsity with a special procedure." Italian Consiglio Nazionale del Notariato, available at http://www.notariato.it/en/italian-notaries/who-we-are/responsibilities-of-the-notary.html.

[25] *Id.*

private document that is signed by its authors in front of a public official (in this case a notary) who certifies their identities after obtaining proper documentation. An authenticated instrument, like a public instrument, has a high probative value but only as to the identity of the signors. With some exceptions a private authenticated instrument can also be entered in the public registries. While a civil law authenticated instrument is essentially the same as a notarized document in the US, the participation of civil law notaries makes the document more persuasive.

Civil law notaries as public officials are considered custodians of the "public trust" (or "legal certainty" or "authenticity").[26] As a result, the verification of parties' identity and of powers of attorney is generally lengthier than in the US. In addition, because civil law notaries are also legal professionals, they have the mission to give legal advice.[27] Notaries' legal advice must be impartial.[28] Civil law notaries, therefore, do not simply authenticate the signatures on a private instrument, they read the text, explain the legal consequences, and give impartial advice.[29]

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[26] *See, e.g.*, Spanish Reglamento Notarial, June 2, 1944.

> As functionaries, [notaries] perform the notarial public trust, which. . . protects . . .: (a) in the area of facts, the exactness of what the notary sees, hears or perceives with his or her senses; (b) in the area of law, the authenticity and the evidentiary strength of the parties' declarations of intent [when] in an act drafted according to the law . . .."

[27] *See, id.*: "As a legal professional he has the mission of giving advice to those who engage his service and to recommend the most appropriate legal means to reach the lawful purposes that they intend to reach."

[28] *See e.g.*, Colégio Notarial do Brasil, at 3, available at http://www.notariado.org.br/#/: "The Latin type of notary, unlike the Anglo-Saxon type of notary, requires this professional to be a 'jurista' (law expert), to be an independent and impartial advisor . . .."

[29] To better understand the attitude of civil law notaries, consider the following abstract from the website of the Italian Consiglio Superiore del Notariato, note 24, above: "Having been delegated the 'authenticity' public function, the . . . Notary has a specific, legally binding duty to: - check out the conformity with the law provisions of the agreements the parties ask him to notarize; - explain to the parties the legal consequences and effects . . ., also from a fiscal point of view, pointing out the possible risks; - be absolutely neutral and impartial."

DO THE RIGHT THING NOW: SOME PRACTICAL THOUGHTS TO HOPEFULLY AVOID CLIENTS' DISSATISFACTION

Civil law notaries and US notaries share two characteristics that help solve most of the problems that may arise in international transactions: they can authenticate instruments and they have their signature deposited at some governmental department (hence, their documents can be apostilled or legalized through diplomatic authorities). The differences between the two types of notaries, however, *can* trigger some difficulties in international transactions.

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

In most cases, lawyers should be able to overcome these difficulties through knowledge, planning, and flexibility. In particular, lawyers should (1) know enough of the two legal systems, both from a legal and a practical standpoint, to deal with the different role of notaries; (2) plan in advance; (3) be flexible in the structure of the transaction; and (4) be available to work in team with other professionals (for example, local counsel and independent experts).

In *inbound transactions*, issues are time, cost, and content. Parties to the transaction may sometimes, either intentionally or without adequate reflection, require authenticated instruments (for example, affidavits) even when the law does not. In the US, the request is not perceived as a major aggravation because notaries are easily available, inexpensive (even gratuitous in many cases), and quite liberal -- indeed, they almost always notarize what they are asked. None of these characteristics are true for civil law notaries. Making an appointment with a notary takes from several days to several weeks, notaries can be costly (often the equivalent of several hundred dollars), and they might refuse to authenticate documents that they conclude do not comply with the law. Because of their role

as custodians of the "public trust" and their mission to give legal advice, civil law notaries might reject a certain text (for example, sometimes they deny notarization of documents in foreign languages or they refuse to notarize broad powers of attorney). In these cases, parties and their lawyers must be flexible and lawyers must be knowledgeable of the two systems to find a solution. Here are some thoughts.

First, in general, when lawyers know they need a document from abroad, they should think carefully if notarization is *really* material for their transaction (and explain to clients the extra time and cost associated with it).

Second, allow plenty of time to make the notary appointment, to translate the document and to apostille/legalize it.

Third, contact the notary and understand what (both form and content) the notary will accept and what information the notary requires. Going even further: when -- as it is often the case -- parties' intentions can be formulated in different ways, lawyers should choose the way with which the notary feels most comfortable. A practical tip to save time: contact the notary in advance and ask for the notary's own form, translate it, and change only what it is really material.

Fourth, notaries tend to "specialize" in types of transactions, so, for example, some notaries focus on business transactions and others on real estate. There are notaries who are willing to make their due diligence on foreign documents while others require formal and sworn translations; some notaries authenticate nothing other than documents in their national language while others agree to notarize bilingual documents. Local counsel can help to locate the most appropriate notary.

Outbound transactions might trigger more serious concerns because US notaries cannot issue public acts or deliver legal opinions, which might be requested from abroad. However, knowledge of the legal systems, advance planning, and flexibility, allow parties to deal with most cases.

First, while it is true that civil law notaries often issue public instruments to close transactions, a public instrument is almost never *required* by law: an authenticated instrument is generally a viable alternative; there are, however, exceptions, such as donations, which almost everywhere require a public

instrument. So, lawyers for the parties should agree in advance on the type of instrument that they will execute, bearing in mind that a US notary cannot issue authentic instruments. Imagine the following scenario: for a transfer of a real estate located in a civil law country, to which the American buyer is unable to take part, the civil law notary requires a power of attorney (or proxy). The proxy must be issued with the same formalities of the document for whose execution the proxy is given. If the parties agree to close the sale contract through a public instrument, the proxy must also be issued as a public instrument, which would be impossible for the American buyer. It would be very disappointing near the closing – or worse at the closing itself -- for the parties to realize -- after the buyer had his proxy notarized, apostilled, and officially translated, -- that the civil law notary cannot close the sale because the proxy is an authenticated instrument and not a public instrument.[30]

Second, knowledge of the private international law might help. For example, in the foreign jurisdiction a statute like the following might exit: "The document granting the authority is considered as having valid formality if it is considered valid by the jurisdiction whose substantive law governs the matter or by the jurisdiction in which the document is formed."[31] From a practical perspective, such a statute can save transactions in which lawyers have not fully planned in advance and obtained, for example, a proxy with the proper formality.

Third, while civil law notaries are generally required to verify the content of foreign documents, their control must be made "with reference to the so-called international public order," i.e., fundamental principles necessary "for the maintenance of [the country's] . . . own political, economic and social structure."[32]

Fourth, while "numerous US-executed documents . . .[have] been rejected by legal and recording authorities overseas" and "[t]his has occurred when . . .

[30] See above for the difference between the two instruments.
[31] Article 60(2) of Italian Law no. 218, of May 31, 1995.
[32] Italian Consiglio Superiore del Notariato, note 24 above.