The English Notarial Profession
- A German Perspective -

Essay by

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I am greatly indebted to Gregory Taylor, Solicitor and Notary Public, London for his invaluable contribution in translating the original German version of this Essay ”Das englische Notariat“, which was first published in “Mitteilungsblatt der Arbeitsgemeinschaft Anwaltsnotariat”, No. 1/2001, pp. 11 - 18.

The English Notarial Profession

I. Introduction

Little success will be achieved by attempting to gain an insight into the English[1] Notarial profession with the aid of the literature published in Germany. As there is no single, comprehensive account[2], the few individual references available can be arranged systematically only with difficulty, if at all. What is even more discouraging is that these references, particularly those of a general nature, often deal with the subject-matter unsatisfactorily, and unfortunately in many cases, simply incorrectly. This is to be attributed not only to the difficulties which are, no doubt, posed by a foreign language and foreign law ; the publications dealing with professional policy, in particular, also reflect international competition between the systems of law on the one hand, and between the legal professions dealing with foreign law on the other hand.

The following remarks cannot replace the missing comprehensive account of the English Notarial profession. They do, however, represent a first attempt to present from a current (German) perspective, and within the limits of the length of an essay, a first overview of the history, nature and activities of English Notaries (also called Notaries Public or Public Notaries). A brief look at the literature relating to English Notarial law (**II.**), as well as a small excursion into the history of English Notaries (**III.**), are indispensable for a better understanding, before I turn to the main section (**IV.**).

1 References to England apply equally to Wales..

2 The discussions by A. Mann "Die Urkunde ausländischer, insbesondere englischer Notare und der deutsche Rechtsverkehr" in NJW 1955, pp. 1177 ff. and I. Strauch in "Die Geltung ausländischer notarieller Urkunden in der Bundesrepublik Deutschland", 1983, pp. 127 ff. are either too limited, or in part outdated, or both.

II. Literature

Literature on the law relating to the Notarial profession in England and Wales (the Notarial professions in Scotland, Northern Ireland, the Channel Islands and the Isle of Man are subject to their own respective rules) has, since its first edition published in 1839, been dominated by "Brooke`s Notary"[3], the 11th edition of which was published in 1992, with a first supplement in 1994 dealing mainly with newly-introduced Rules for Notarial professional conduct. Given that in the 1980's and 1990's, and even since 1994, very many Rules have been created by delegated legislation affecting the Notarial profession, English Notaries impatiently await a 12th edition, especially as concerns the new Rules introduced in 1998 relating to access to the profession, and the Access to Justice Act 1999 which broke the centuries-old local monopoly of the London Scrivener Notaries for Notarial activities within the City of London and a radius of three miles around the City.[4]

A considerable part of the gap has now been filled by the book "The General Notary"[5] written in 1999 by A. G. Dunford who, both as the Secretary of the Notaries' Society (most closely comparable to the German Bundesnotarkammer[6]) and as a practising English Notary, is able to deal authoritatively in his book with the professional, legal and practical aspects of English Notarial activity.

Two monographs are indispensable for a deeper understanding of the history of the English Notarial profession : "Notaries public in England in the 13th and 14th centuries" by C. R. Cheney, 1972 ; and "Notaries Public in England since the Reformation", by C. W. Brooks, R. H. Helmholz and P. G. Stein, 1991. Important references are also contained in the essay by H. C. Gutteridge, "The Origin and historical development of the profession of notaries public in England", Cambridge Legal Essays, 1926. Finally, mention should also be made of an older work : Joshua Montefiore's "Commercial and Notarial Precedents" in 1813, which affords an interesting insight into Notarial forms and precedents in the early 19th Century.

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3 Richard Brooke was a Proctor and Notary Public.

4 The Parliamentary history of the loss of this monopoly demonstrates how painful and difficult the change of old traditions can be. One view of these events can be found in Mark Kober-Smith, Legal Lobbying: how to make your voice heard, Cavendish Publishing Limited, London 2000.

5 "The General Notary" is the successor to "The Provincial Notary" by the English notary G. E. Delafield, the 3rd and final edition of which was edited in 1991 by A. G. Dunford, and further publication of which ended with the abolition of the District Notaries.

6 Although membership in the Notaries` Society is voluntary.

III. History

1. The history described in "Brooke's Notary"[7] leaves no room for doubt that the English Notarial profession is descended from the Roman Notarial profession which had been revived in Bologna, and the English profession is thus a grandchild of the Roman profession. The first Notaries appearing in England in the 11th and 12th Centuries were Italians appointed by either the Emperor or the Pope, and were recognisably involved in areas of law which the Common Law and its Courts, at least until then, had not taken over, i.e. essentially in the areas of family law and inheritance law dominated by the Church, as well as - in the case of the Papal Notaries - of ecclesiastical law itself. The first two Notaries practising in England and of known identity were a certain Swardius (active at the time of King Edward the Confessor) and later a Master Philip (1199). One must imagine these early "imported" Notaries as being primarily recording officials (registrars) of the ecclesiastical Courts, who were involved in administrative functions relating to the conduct of trials, in minuting and officially recording the trials and decisions of the Courts, in the issuing of copies, and later also in the preparation of written appeals. The transition from Court official to the holder of the professional office of Notary took place over many centuries in a more or less meandering way. Some of the Notaries later practising as self-employed professionals were appointed as recording officials in the ecclesiastical Courts (as well), some exercised the office of Notary as a full-time profession, and yet others practised both as Notaries and lawyers.

   The purely ecclesiastical functions of Notaries essentially involve, even to this day, the supervision and minuting of events in accordance with ecclesiastical law, e.g. the election of a bishop.

7 pp. 1 - 19.

2. The development of an independent English Notarial profession began in 1279 with a decree of Pope Nicholas III, granting to John Pichem, the Archbishop of Canterbury, the right to appoint annually three Papal Notaries. This Archbishop also imported from Bologna a Notary called John (Giovanni) of Bononia (Bologna) with the aim of training those to be appointed as English Notaries in the manner taught at the law school of Bologna. The emphasis of their activity lay furthermore in ecclesiastical law in the narrower sense and in those areas of private law dominated by ecclesiastical law and the ecclesiastical Courts. However, the English Notaries also attained importance in relation to the certification of acts of a constitutional nature, such as the deposing of a king. The previously step-by-step entry into the area of private law accelerated in the 14th Century and affected Notarial activities in the areas of family law and Probate law in particular.[8] With this development, there began the step-by-step separation of the previously fused office of Notary into the offices of the secular and ecclesiastical Notaries.

3. A third part of the history of the English Notarial profession comprises the period from 1533 to 1801. As a consequence of the English Reformation under Henry VIII, the English Crown assumed the exclusive right to appoint Notaries, and it delegated this authority to the Archbishop of Canterbury, who was tied to the newly-created Church of England, and who was not inexperienced in these matters. This delegation was effected in 1533 by the Ecclesiastical Licences Act. Up until the first statutory regulation of the Notarial profession in 1801 by the Public Notaries Act, the office of Notary had been gradually extending itself into new areas, in particular into several specialised areas of commercial law (shipping, bills of exchange), into areas of law with an international dimension, and in particular into the area of conveyancing (purchase agreements, mortgage documentation), in all of which areas the English Notaries gradually achieved a dominant position, at least in London, where England's economic activities have traditionally been concentrated. The London Notaries had joined the "Company of Scriveners", a guild comprising three separate professions, namely the Scriveners themselves (originally, merely educated scribes), Attornies-at-Law (forerunners of today's Solicitors) and Notaries. The dominance of the London Notaries in this Company in conveyancing matters was, however, broken in 1760 as a result of a Court case between the Scriveners' Company and representatives of other legal professions.[9] In view of their greater numbers and closer proximity to their clients, as well as the prohibition against Notaries conducting litigation, it is no wonder

8 This can be explained by the fact that there was no contract law or tort at that time; these areas of law essentially developed in the 18th century with the further evolution of the Common Law.

9 Harrison v. Smith, 1760, see E. Freshfield (ed.), The Records of the Society of Gentlemen Practisers (1897).

that the Attornies, Solicitors and Proctors on the one hand (combined into the single profession of Solicitor on occasion of the fusion of the Courts of Common Law and Equity to the High Court in 1875), and the Barristers and Serjeants-at-Law on the other hand, succeeded in forcing the English Notaries out of conveyancing, and to this day, English law contains no requirement for Notarial involvement at all, apart from one single exception mentioned below[10].

The absence of comprehensive statutory regulations concerning the structure of the Notarial profession and the proper exercise of the office of Notary has allowed English Notaries, time and again, to move into new areas (of law) as particular activities have been lost. The loss of dominance in conveyancing was, in part, compensated for by activities as real estate agents (like the French Notaries), and in part through entry into the market as money-lenders, although these professional "excursions" were of short duration due to the strengthening of the corresponding specialised professions (real estate agent, banker). The general tendency was for English Notaries to be forced out of the domestic market for legal services ; consequently, they turned increasingly to providing legal services across frontiers, with the result that some, especially the London (mostly Scrivener) Notaries, could almost be described as "foreign Notaries in England": these Notaries are conversant both in English law, as well as the law of the leading foreign jurisdictions, and in addition to Notarial acts in accordance with English law, they also produce acts according to foreign substantive law and in conformity with the foreign formal rules for Notarial acts.

10 This applies equally to the Scandinavian countries. Is it only a coincidence that the Latin Notarial profession in Europe, revived and newly structured in particular by Napoleon, is nowadays to be found in its developed form only in those places which his troops did not reach?

IV. The Notarial profession in England and Wales today

The modern English Notarial profession was established by the Public Notaries Act 1801, followed by the Public Notaries Acts 1833 und 1843[11], the Courts and Legal Services Act 1990 and finally the Access to Justice Act 1999. The English Notarial profession, in its present form, developed in the course of those 200 years, and is distinguished by the following characteristics :

Areas of activity of English Notaries

1. Apart from the requirement that a foreign bill of exchange be formally protested by a Notary[12], English law contains no compulsory involvement of a Notary.

2. The particular attraction of the English Notarial profession lies in the fact that, in the absence of a protected domestic market for Notarial acts – the Common Law prefers the legal form of the Deed for formal agreements, i.e. a form of legal certification with witnesses to the signatures (and historically, with seals) – the vast bulk of Notarial activities are concerned with international business. To a large extent, these involve, for historical reasons, countries of the British Commonwealth, but since the United Kingdom's accession to the European Community, they increasingly relate to EU countries as well. The peculiarity which the English Notarial profession thus displays is that the English Notarial act must not only be effective under English law, but must also comply with the substantive and formal requirements for effectiveness of the recipient State [13]. A legal document which must satisfy the requirements of two jurisdictions in equal measure demands from the lawyer appointed for that purpose both a greater knowledge of languages and a knowledge of foreign legal systems, with the emphasis (both in terms of language and law) on the areas of company law, copyright law, conveyancing and powers of attorney. For this reason, primarily the London Scrivener Notaries, but increasingly General Notaries as well, are "at home" with the various languages and jurisdictions which are in demand. Publications on foreign law belong just as much to the standard equipment of an English Notary as an impressive array of general and legal dictionaries for two or more lan-

11 The end of the 18th century and the beginning of the 19th century experienced important codifications of Notarial law on the European Continent as well. With the decline of the German Holy Roman Empire, there was no more need for Notaries appointed by the Emperor. The Treaty of Lunéville on 9th February 1801 formally sealed this decline and was simultaneously the moment of birth of the European nation-state in its modern form.

12 Section 51 (7) Bills of Exchange Act 1882.

13 Dunford pp. 45 ff.

guages. Furthermore, the English Notary must also look into the respective legalisation requirements, ascertaining what they are, and organising compliance with them.

3. In the English legal services market, the Notaries are also involved, apart from the protesting of bills of exchange as mentioned above, in the area of ship protests[14]. A ship protest is a Notarial act by which the captain and other crew members, referring to the entries in the ship's log, record events which have led to damage to the ship and cargo or where such damage is feared, noting at the same time the absence of default on their own part. Both ship protests and the protesting of bills of exchange go beyond the function of purely authenticating a document: in those cases, English Notaries produce classic Notarial acts following the model of the Continental European, and thus ultimately the Roman, Notaries.

In addition, English Notaries supervise draws for the redemption of a prescribed number of bonds (organised like a lottery), as well as similarly organised ballots for the allotment of over-subscribed shares; they also supervise the orderly destruction of securities no longer intended for the market.[15] In all these cases, the Notary produces corresponding acts, in which he precisely describes and certifies the orderly conduct of the relevant events.

Furthermore, the Notaries are involved – in competition with other legal professions – in the areas of conveyancing (including producing mortgage documentation), Probate law[16], drafting charterparties for shipping[17], as well as the registration, sale and mortgaging of ships[18].

14 Brooke`s Notary pp.164 ff.
15 ibid. pp. 168 ff.
16 Brooke`s Notary pp. 24 f.
17 ibid. p. 25.
18 Dunford pp. 89 ff.

The English Notary is also a Commissioner for Oaths and therefore authorised to administer Oaths and to take Statutory Declarations.[19] Finally, the English Notary is involved in :

a) dealing with legal documents involving foreign law and/or foreign languages[20] in the form of public acts ;

b) the authentication of copies of documents[21],

c) the authentication of signatures[22] of parties and witnesses, mainly in relation to powers of attorney for international dealings, often also with certification of the existence, legal capacity and the proper representation of companies and other donors of powers of attorney, and with a confirmation of the legal effectiveness of the declarations in accordance with English law ;

d) the certification of Notarial observations beyond the mere observing of the execution of documents, including establishing legally relevant facts and relationships, such as, among other things, entitlement to estates, attainment of the age of legal majority, capacity to marry, resolutions of company directors etc.[23] ;

e) the authentication of translations[24].

19 ibid. pp. 146 - 147. See also Section 113 Courts and Legal Services Act 1990 and Section 18 Statutory Declarations Act 1835.

20 Brooke`s Notary pp. 397 ff.

21 Dunford p. 203.

22 ibid. p. 167.

23 ibid. pp. 174 ff.

24 ibid. p. 204; however, the English Notaries have not been specifically sworn for this purpose, nor do they affirm the correctness of the translation by way of an affidavit.

Structure of the Notarial profession

4. With the abolition in 1990 of the geographically restricted District Notaries[25] there are, apart from Ecclessiastical Notaries who are involved exclusively in areas concerning the Church of England, only General Notaries (presently around 950) and Scrivener Notaries (presently around 25) practising today in England and Wales. Those General Notaries are predominantly Solicitors, rarely also Barristers, and outside of London practically never Notaries only. The Scrivener Notary, being a member of the Scriveners` Company, currently practising only in London, does not enjoy any particular Notarial powers beyond those of the General Notary ; he is a Notary Public like a General Notary with, as a rule, further training in foreign law and languages, and who is subject to the additional rules of the Scriveners' Company which are, themselves, subject to the authority of the Court of Faculties.[26] As a rule, he normally practises as a Notary only, very exceptionally also as a Barrister or Solicitor, sometimes also as a foreign lawyer.

5. The English Notary authenticates and produces Notarial acts by State authority. The Notary receives his certificate of appointment (his "Faculty") from the Court of Faculties of the Archbishop of Canterbury, who, acting through powers delegated by the State, has since 1533 been responsible for the appointment of Notaries, both ecclesiastical and secular. The English Notary thus exercises a public office[27].

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25 One could only become a District Notary if seen as an "eminent lawyer" in one`s local business area, which was generally to be proved by recommendations from around 20 leading business people!

26 Dunford pp. 12 ff.

27 The Declaration of Office of an English Notary is as follows: "I do solemnly, sincerely, and truly declare and affirm that I will faithfully exercise the office of a notary public. I will faithfully make contracts or instruments for or between any party or parties requiring the same, and I will not add or diminish anything without the knowledge and consent of such party or parties that may alter the substance of the fact. I will not make or attest any act, contract, or instrument, in which I shall know there is violence or fraud; and in all things I will act uprightly and justly in the business of a notary public, according to the best of my skill and ability."

6. At the head of the Court of Faculties is the Master, usually, but not necessarily, one of Her Majesty`s Justices who, acting on authority conferred by the State, makes delegated legislation ("Rules and Regulations")[28] supplementing the very small number of statutory provisions relating to Notaries, and thereby regulates the whole of the Notarial profession, from the training, appointment and disciplining of Notaries, to their possible removal from office. The Registrar of the Court of Faculties is its administrative head, and the Registry itself is called the Faculty Office. In matters of admission to the Notarial profession, the Master is assisted by an eight-member advisory committee, the Qualifications Board, which comprises experienced Notaries. Appeals against decisions of the Master in matters of appointment of Notaries may be made to the Lord Chancellor; otherwise, judical review is available to appeal decisions of the Master before the High Court.

7. For about the last 20 years, the English Notarial profession has been increasingly attempting to move as close as possible (again) to the Latin Notarial profession. Practically all the relevant Rules and Regulations of the Master of the Court of Faculties originate from the 1980's and 1990's and are clearly based on Continental European models.[29] Essentially, they concern the requirements for admission, the disciplinary rules, the regular supervision of newly-admitted Notaries during the first two years after their appointment, matters of indemnity insurance and fidelity cover[30], the keeping of registers and copies of Notarial acts, the orderly exercise of the profession, the (limited) opportunities for Notaries to advertise, and the keeping of Notarial accounts and client/trust accounts.

28 Brooke`s Notary pp. 519 ff.; dto. first supplement pp. 15 ff.; Dunford pp. 229 ff.

29 ibid. pp. 519 ff.; dto. first supplement pp. 15 ff.; Dunford pp. 229 ff.

30 via compensation funds: either the one established under the Solicitors` Compensation Fund Rules 1995, or the one run by Notaries` Guarantee Limited, linked and supervised by The Notaries` Society.

English Notarial acts

8. The acts of English Notaries in England itself do not enjoy the same privileged evidentiary status[31] as those of Continental European Notaries. English Notarial acts – unlike those originating from Continental Europe, as much of the case law has shown – are not "public documents" under English law, even if they have in the meantime been made to approximate public documents very closely in substance[32]. By contrast, English Notarial acts are recognised practically throughout the world as public acts. For some years, the English Notaries have been calling for appropriate legislation which would accord their acts the same status under domestic law as those of Continental European Notaries.

9. Nor are English Notaries empowered to notarise as directly enforceable certain claims arising from their acts or, when required by the creditor, to issue enforceable copies. Such Notarial activities are foreign to the Common Law. Yet, in the meantime, Notarial acts enforceable in other EU countries can also be enforced in England under the 1968 EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, with the curious result that English clients cannot obtain enforceable Notarial acts from their own Notaries but must, rather, resort to Continental EU notaries for this purpose. For years, the English Notaries have been calling for corresponding changes in their domestic law. It is nevertheless true that, despite the lack of a privileged evidentiary status for English Notarial acts and despite the lack of powers to issue enforceable copies, the English Notary is the holder of a public office under State supervision.

10. Like his Continental European colleagues, the English Notary also keeps a meaningful register of all Notarial acts; in addition, the keeping of an equally meaningful protocol containing copies of all Notarial acts has become customary.[33]

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31 Dunford p. 44.

32 Brooke`s Notary pp. 60 ff.; Dunford p. 44; the Woolf Reforms of the civil justice procedures in 1999 have led in practice to the acts of English Notaries having direct evidentiary status, provided they are not challenged by the opponent: if they are, the Notary would, as ever before, be examined as a witness.

33 Dunford pp. 29 ff.

11. As already mentioned in 2. and 3. above, the English Notary is familiar with the classic Continental European Notarial act with all its requirements (the so-called "public (or authentic) act (or instrument)" in legal dealings both with foreign jurisdictions and domestically, particularly in the area of ship protests. In addition, there are also a whole range of Notarial certificates (so-called "private acts") concerning facts and legal relationships, in particular proof of the genuineness of signatures, of a person`s true identity, of agency relationships etc. In all of these, the English Notary is a true "brother in office" of his Continental European colleague, perhaps apart from the fact that the English Notary does not have to include in the actual document itself the legal advice offered by him to the parties, something increasingly seen as imperative. Instead, the English Notary often notes the appropriate warnings and advice in his register[34] and often has these countersigned by the parties ![35]

Training and access

12. Given the profession's international orientation, it is no wonder that the usual examination in English Notarial practice requires candidates to be familiar with the legalisation requirements for around 200 (!) jurisdictions worldwide, as well as for those jurisdictions' formal requirements (even down to the individual states, provinces and territories of Australia, the USA and Canada !) and also, for a range of "usual" jurisdictions, the most important legal principles in the jurisdictions mentioned above.[36] In the best English tradition, examinations take place, in principle, without any type of aid – except pen and paper – and under the supervision of an invigilator. The candidate must be in a position to draft and write down the most important Notarial acts from memory. Additional examination requirements for the Scrivener Notaries are a knowledge of two foreign languages of the candidate's choice, as well as legal knowledge of one foreign jurisdiction.

34 Dunford pp. 21 f.

35 ibid. p. 31.

36 Brooke`s Notary pp. 595 ff.

13. The English Notarial profession's international focus and openness to the world have led to the position that, with changes in 1994 and 1999[37], EU European lawyers who have been admitted as Notaries in their home countries or who satisfy the requirements for appointment there, can also be appointed as English Notaries in England without any nationality requirement and with unrestricted choice of location, provided they can demonstrate the necessary knowledge of language and law.[38] This is dealt with by way of an aptitude test, the extent of which is decided by the Qualifications Board of the Court of Faculties. So far as I am aware[39], only two Scottish Solicitors and a German Solicitor-Notary have so far made use of the possibility of applying under these provisions, without an appointment having yet been made.

14. The training of English Notaries has in the meantime achieved a high academic level. The following specific areas are dealt with[40] :

a) Public/Constitutional law ;

b) The Law of Property;

c) The Law of Contract;

d) The Law of the European Union;

e) Roman Law (or Civil Law: the legal systems, institutions and principles of modern Civil Law jurisdictions);

f) Equity and the Law of Trusts ;

g) Conflicts of Law;

h) Conveyancing ;

i) Business Law and Practice;

j) Wills, Probate and Administration;

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37 Access to Justice Act 1999.

38 Notaries (Qualifications) Rules 1998, para. 9 "European Economic Area Notaries".

39 As at July 2000.

40 Dunford pp. 14 f.

k) Notarial Practice (including Bills of Exchange).

Those English Barristers or Solicitors seeking a Notarial appointment must, as a rule, pass fresh examinations in at least three of these subjects, in any event in the law of Notarial practice, as well as usually in Conflicts of Law and EU Law. This means : The English Notary, usually a Solicitor-Notary, is, under the most recent training and admission rules, very conversant with the Notarial law required in England.

Notarial practice

15. From among the professional rules for the English Notary, the following points are to be emphasised :

a) The Notary is in principle obliged to accept and carry out instructions.[41]

b) The Notary is to ensure that the legal public has access to him ; if necessary, he should himself arrange for appropriate representation by a Notarial colleague.[42]

c) The Notary is liable for errors in the exercise of his office, in accordance with the general principles of contract law and tort.[43]

d) The Notary must decline instructions if a conflict of interest is apparent.[44]

e) So far as necessary, the Notary should use the services of translators and interpreters, and if necessary, experts in the laws of foreign jurisdictions.[45]

41 Dunford p. 21.
42 ibid. pp. 20 f.
43 ibid. pp. 24 f.
44 ibid. p. 21.
45 ibid. pp. 22, 34 ff.

f) The Notary is obliged to charge an appropriate fee. English Notaries generally charge by the hour, the Notaries' Society's recommended average hourly rate presently standing at £ 135.00[46]. The English Notary is prohibited from sharing his fees with others, except other Notaries, or Solicitors with whom he is in partnership as a Solicitor.[47]

g) Where the Notary has a duty to co-operate professionally with Solicitor colleagues, he must ensure that his independence as a Notary is not compromised.[48]

h) The Notary must keep his own Notarial accounts and client/trust accounts separate, and keep careful records of all movements of money.[49]

i) The English Notary is prohibited from advertising other than by means of factual descriptions of his Notarial activities.

j) The Notary must have professional indemnity insurance and contribute to a compensation fund of the Notaries' Society-run Notaries` Guarantee Ltd. Failure to pay or to provide evidence can lead to the Faculty Office withholding from him the Practising Certificate which must be renewed annually.[50]

k) If the Notary practises other professions – and these may even be non-legal professions, something which would hardly ever occur in practice – the rules of those other professions which must in principle be observed, must not conflict with the rules of the Notarial profession.[51]

l) As well as a register of Notarial acts and a collection of copies of Notarial acts (protocol), the Notary has his own seal. The rules concerning the use of stationery and ink, and the binding and sealing of documents, mostly correspond to those of the Latin Notarial profession.[52]

m) Register, protocol, seal and Notarial files are to be kept under lock and key ;

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46 plus Value Added Tax (VAT) presently at 17.5 %, if appropriate.
47 Dunford pp. 22 f.
48 ibid. p. 24.
49 ibid. p. 24.
50 ibid. pp. 24 f.
51 ibid. p. 25.
52 Dunford pp. 27 f.

the Notary is to have sole responsibility and control in relation to them.[53]

n) The Notary being the holder of a public office, there could be a potential conflict between his public duties on the one hand, and his duty of secrecy and confidentiality towards his client on the other hand. Even though the written law does not confer on Notaries the same protection of confidentiality as on English Solicitors und Barristers, the Notary would be well advised to apply the same principles, unless he is obliged to provide information by Court order or under statutory rules.[54]

16. As already convincingly demonstrated by Mann and Strauch[55] and acknowledged in most cases and textbooks, the act of an English Notary is of equal value to that of his German colleague, in any event with respect to certificates and authentications relating to companies registered in Germany, as well as binding purchase agreements for land in Germany, since the English Notary is equivalent to a German Notary in training and position in legal life. The absence in English Notarial acts of formal warnings and advice to the parties in accordance with the German Notarial model of the "Belehrung" does not diminish this assessment.[56]

It is also sometimes said that shareholder resolutions relating to the merging or demerging of German companies (but not contracts obliging shareholders to merge, demerge or transfer such companies or shares) can only be produced before a German Notary ; A. Reuter has countered this view with convincing arguments.[57]

There are no justifiable reasons for the view still currently held by the judiciary that the transfer of title with respect to land in Germany (as well as instruments charging such land) can only be effected before German Notaries.[58] It is now only a question of time before this interpretation will have to be reviewed in the light of the weakness of its own arguments and under pressure from Europe[59].

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53 ibid. p. 28.

54 ibid. pp. 21 f.

55 see A. Mann "Die Urkunde ausländischer, insbesondere englischer Notare und der deutsche Rechtsverkehr" in NJW 1995, pp. 1177 ff., and I. Stauch "Die Geltung ausländischer notarieller Urkunden in der Bundesrepublik Deutschland", 1983, pp. 127 ff.

56 cf. eg.: Münchener Kommentar, Art. 11, EGBGB, marginal note 47 ff.

57 BB 1998, pp. 116 ff.

58 cf. eg.: Münchener Kommentar, Art. 11, EGBGB, marginal note 47 ff., marginal note 45.

59 The European Commission is presently examining closely whether the nationality requirement imposed by many countries can be maintained.

V. Outlook

As stated above, the English Notarial profession, despite presently meagre support from the English legislator, is following the best path, as a member of the family of the Latin Notarial profession, to remember its common roots and to re-conquer, step-by-step, its internal market. This is also underlined by the fact that the Scriveners' Company, as the "flag-ship" of the English Notarial profession, was admitted to the Union Internacional de los Notariados Latinos (UINL) a few years ago. Historically, the English Notarial profession has convincingly and repeatedly proved both its will to survive, and its ability to adapt, especially at the end of the 18th Century after the loss of dominance in the market for conveyancing in London, and, more recently, in the final 20 years of the last century, influenced by an increased European market for legal services with its internal reforms and an increased orientation towards the Continental European Notarial profession with Latin characteristics. I have no serious doubt that the English Notarial profession rightly occupies its place in the family of European Notarial professions, and that our English colleagues will succeed, in the not-too-distant future, in convincing the English legislator to recognise English Notarial acts unreservedly as public acts with privileged evidentiary status, and to allow English Notaries to notarise enforceable claims and to issue enforceable copies. I am also confident that, independent of all that, the English Notarial profession will retain and further develop its international flair which has been developed over centuries of facilitating international trade.

11 July 2001