

Jens Bormann and Philip M. Bender

# Judge Without Lawsuit

## The Notary in Civil Law Countries



  
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Jens Bormann and Philip M. Bender  
Judge Without Lawsuit

Jens Bormann (Editor) and Philip M. Bender (Author)

Judge Without Lawsuit  
The Notary in Civil Law Countries  
Explainer



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# Foreword

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Civil law notaries play a central role in the preventive administration of justice and the implementation of the rule of law in the digital age. At the same time, we feel that people know very little about them. This is generally true for those outside the notarial sphere, but it particularly applies to representatives from the common law world, where notaries, as understood in the civil law context, do not exist. However, our profession depends on being understood. Otherwise, national policy makers or international experts – be it from the World Bank or the OECD – will not appreciate the added value that a functioning system of preventive justice provides.

This is why we made this explainer a priority of the German Vice-Presidency for Europe within the International Union of Notaries (UINL). It is written for the curious reader who just wants to acquire some fun facts about our profession, for the common law jurist interested in exchange, for policy makers and experts who have to draft regulation in notarial matters, and for our colleagues from all around the world who wish to reflect on their daily business.

Berlin, September 2024

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## Executive Summary

Notaries serve the **interests of contracting parties**. They provide legal certainty *ex ante* and thereby avoid litigation costs *ex post*. They also lower transaction costs by giving neutral advice to both parties, tailoring the law to their needs, managing bureaucratic communication and explaining legal language in simple terms. In addition, they de-bias individual preferences and equalize bargaining power. Part I is about these advantages to the parties of transactions.

Notaries also promote the **interests of society**. They are gatekeepers of reliable registers, which in turn make costly due diligence, title search, and title insurance obsolete. They fight money laundering and other crime, serve distributive justice, relieve the judiciary and push digitalization. Fulfilling these tasks requires public status, independence, and state supervision. Part II deals with this public dimension of the notarial profession.

Notaries intervene in central **areas of law**. Indeed, they accompany transactions in real estate law, company law, succession law and family law. These areas concern the most valuable assets of our society, trigger a special need for legal certainty and involve issues of public policy. Notarial intervention is also common for powers of attorney because individuals value the notarial authentication as a way to lower agency costs. In addition, as facilitators of international exchange, notaries are experts in conflict of laws rules. Part III outlines the different areas of law in which notaries exercise their profession and explains the reasons for notarial intervention.

## Part I

### Serving the Interests of Contracting Parties



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## Part I

# Serving the Interests of Contracting Parties

Notaries in civil law countries<sup>1</sup> provide benefits for individuals that want to conclude a contract, form a company or make a will because they lower transaction costs. The first part of this book is about these notarial benefits to the parties of a transaction.

In Chapter 1, we will see that parties spend less on litigation *ex post* due to notarial intervention *ex ante*. Chapter 2 focuses on the benefit of having one neutral advisor for both parties instead of lawyers on each side. Chapter 3 explains how notaries tailor default rules to the individual level and thereby maximize joint surplus. In Chapter 4, we conceptualize notaries as interpreters between legal and everyday language, which enable parties to take advantage of abstract, technical concepts without incurring the costs of abstraction. Chapter 5 underlines the managing function of notaries: as trusted neutral players, notaries ensure the safe execution of contracts and streamline the implementation of business objectives by taking over bureaucratic communication with public authorities. Finally, Chapter 6 is about how notaries guarantee that “true preferences” of the contracting parties are the basis of their legal acts. Indeed, the de-biasing and the equalizing function of notaries makes them an essential part of the consumer protection infrastructure in civil law countries.

# Judge Without Lawsuit

## *Did you know?*

The profession of the civil law notary has a long-standing history. It has existed for thousands of years. Predecessors of notaries can be found in Ancient Egypt, the late Roman Empire, and the Mayan culture.<sup>2</sup> Notaries are an integral part of civil law countries throughout history.

Civil law countries created an institution to prevent lawsuits from arising in the first place: the notary. The notary is a highly trained jurist entrusted with public power to give neutral advice to the parties of a transaction, to translate their preferences into legally binding documents, and to provide legal certainty. In that way, notaries avoid litigation costs.<sup>3</sup>

Notaries are best understood as judges without lawsuits.<sup>4</sup> In drafting legally sound and binding acts according to the preferences of the parties, they are bound by precise procedural rules, similar to those that structure litigation. These rules justify the high evidentiary value of notarial authentic instruments<sup>5</sup> and are the reason that they can serve as title in foreclosures.<sup>6</sup> Indeed, notarial acts function as anticipated judgments.<sup>7</sup>

Both, judges and notaries serve justice, but they do so in different ways. Whereas judges serve justice *ex post*, notaries do so *ex ante*. According to this difference, the judiciary in civil law countries is divided between judges dealing with litigation and notaries serving what is called preventive justice.<sup>8</sup>

**Key takeaway:** Notaries provide for legal certainty *ex ante* and thereby reduce litigation costs *ex post*.

## Neutral Advisor

### *Did you know?*

The notary is one of the most popular and prestigious legal professions in civil law countries.<sup>9</sup> Highly competitive entry exams and years of legal training limit the number of people that are admitted to become notaries.<sup>10</sup>

Contract law is the law for people with an interest in maximizing joint surplus.<sup>11</sup> In that sense, they only need someone who translates this joint interest into legal language. However, contracting parties also have diverging interests as to the distribution of that joint surplus.<sup>12</sup> Therefore, each party will be skeptical of the lawyer hired by the other party because that lawyer does not aim at maximizing joint surplus, but the surplus of her client. As a result, both parties are likely to end up hiring a lawyer even in standard situations with straightforward solutions.<sup>13</sup> This increases transaction costs, which in turn leads to an inefficient distribution of property rights.<sup>14</sup>

Notaries solve this problem. They are not mandated by the contracting parties but – just like judges – by the government. As holders of a public office, they are legally bound to the principle of neutrality<sup>15</sup> and focus on maximizing the joint surplus only. The parties only have to pay one legal advisor instead of two because they can trust the notary.<sup>16</sup> This reduces transaction costs and fosters an efficient distribution of property rights.<sup>17</sup>

**Key takeaway:** In civil law countries, contracting parties only need to pay one notary instead of two lawyers. This reduces transaction costs.

## Personalizing Default Rules

### Did you know?

Many famous operas feature notaries. For instance, in Wagner's *Rienzi*, *The Last of the Tribunes*, Rienzi had gained the trust of the people as papal notary and, as a consequence, was able to proclaim a new Roman Republic and become its tribune.<sup>18</sup>

Most provisions of contract law are non-binding default rules.<sup>19</sup> If parties do not like their content, they can contract around them. These default rules are intended to mimic what parties would have wanted.<sup>20</sup> Indeed, parties will either opt-out of the default provision they do not like and thereby produce transaction costs; or, they will stick to the default rule and thereby suffer the consequence of a smaller joint surplus. However, due to the limited knowledge of lawmakers as to the specificities of the individual case, parliament can only enact general statutes.<sup>21</sup> They apply to a variety of different people over a long period of time. Therefore, they are necessarily sometimes too broad (over-inclusive) or too narrow (under-inclusive).<sup>22</sup>

Notaries solve this problem. Just like the legislature, they intervene *ex ante*, but like judges, they have in-depth knowledge of the individual case.<sup>23</sup> Based on their professional experience, they can tailor default provisions parties might not have even considered. This is included in the costs for notarial service and does not lead to any additional fees so that otherwise typical costs of opting out<sup>24</sup> are avoided.

**Key takeaway:** Notaries tailor default rules to the individual preferences of the parties. Thereby, they reduce transaction costs and increase the joint surplus.

## Between Legal and Ordinary Language

### *Did you know?*

Beyond notarial proceedings, notaries also take part in the legal education of citizens. For instance, they teach courses at community colleges or they are invited to events on what individuals have to be aware of in specific situations. Most of the time, legal advice of notaries also starts with a general explanation of the content of the law.<sup>25</sup>

The legal system of civil law countries is based on codifications.<sup>26</sup> These codifications contain abstract concepts of law which are outlined in highly technical, legal language.<sup>27</sup> This abstract legal language has important benefits: it reduces complexity and ambiguity for those who understand the language.<sup>28</sup> This, in turn, increases legal certainty and lowers litigation costs.

However, people without a legal background cannot easily work with abstract concepts and access the technical language of the law.<sup>29</sup> An interpreter is needed to translate legal concepts into everyday language, and vice versa, to translate the preferences of individuals into legal language. Notaries fulfill this function.<sup>30</sup> They are the binding element between the legal and the non-legal sphere. Thereby, they foster the trust of individuals in their legal system and societal cohesion.<sup>31</sup> They make sure that democratically enacted legal provisions are understood<sup>32</sup> and that private preferences correctly enter the legal realm.<sup>33</sup>

**Key takeaway:** Notaries explain technical legal concepts to individuals and translate their preferences into legal language. This enables civil law systems to benefit from abstract legal language while at the same time avoiding the costs of abstraction.

## Managing the One-Stop-Shop

### *Did you know?*

In Germany, it is possible to create and register a limited liability company online and within twenty-four hours.<sup>34</sup> Founders only need to communicate with the notary, who manages their interests.

Transactions involve a variety of stakeholders: public registers and tax authorities need to be notified, public authorizations must be issued, holders of preemption rights are involved, banks on the side of the seller and the buyer have to consent.<sup>35</sup> In addition, time is of the essence: the bank consents to delete a mortgage and the seller to transfer the property, but only after receiving the money.<sup>36</sup>

The participation of many stakeholders is necessary to safeguard private and public interests and to provide a system of administrative checks and balances. However, the bureaucratic communication with stakeholders is also time-consuming for both, public authorities and individuals. If left to the parties, it dramatically increases transaction costs. This is even more the case as individuals often see notaries in a psychological state of exception in which they do not want to be confronted with bureaucracy: they have lost a beloved one, are getting married or divorced, have to move, or are starting a business.

Notaries are managers of the contract and reduce these costs.<sup>37</sup> They avoid unsecured advance payments,<sup>38</sup> concentrate communication with stakeholders and are the binding element between the private and the public sphere. The parties only have to deal with one interlocutor they trust and know. Notaries thus offer a one-stop-shop.<sup>39</sup>

**Key takeaways:** Notarial transactions involve many stakeholders. Notaries manage and streamline the communication among them and offer a one-stop-shop.

## De-Biasing and Equalizing Bargaining Power

### Did you know?

In some countries, procedural law for notaries contains special consumer protection safeguards such as a cooling-off-period of two weeks between the moment where the contract draft is sent to the consumer and its notarial authentication.<sup>40</sup> In that way, consumers have time to carefully think about the transaction and avoid the biases they are subject to at first contact.

Individuals do not always act rationally. They are subject to a variety of biases.<sup>41</sup> For instance, they tend to over-estimate short-term benefits and under-estimate long-term costs (*bounded will-power*),<sup>42</sup> they over-estimate themselves (*over-confidence-bias*)<sup>43</sup> as well as the likelihood of positive outcomes (*optimism-bias*),<sup>44</sup> and their decision to contract will be influenced by the sympathy with the offeror (*sympathy-bias*).<sup>45</sup> In addition, bargaining power is unequally distributed among contracting parties.<sup>46</sup>

Notaries intervene in essential areas to de-bias individuals, e.g. the testator under undue influence, and to protect the weaker contracting party, e.g. the consumer who purchases an apartment under construction or the spouse without income that enters into a prenuptial agreement.<sup>47</sup> In that sense, they can be described as consumer protection agencies.<sup>48</sup>

Notaries are successful in this task for three reasons: First, seeing a notary implies a cooling-off-period (*temporal element*).<sup>49</sup> Second, notarial intervention implies concluding the contract in a safe place, which can either be the notarial office or the place the individual has chosen to make use of safe notarial online proceedings (*spatial element*).<sup>50</sup> Third, notaries explain unfavorable clauses to the party concerned, emphasizing potential risks (*substantive element*).<sup>51</sup>

**Key takeaways:** Notaries de-bias individuals and equalize bargaining power. They are an essential element of the consumer protection infrastructure in civil law countries.

## Part II

### Serving the Interests of Society



## Part II

# Serving the Interests of Society

Part I discussed the benefits of notaries for the parties involved in a transaction. Of course, these benefits are not limited to the contracting parties, as they also have spillover-benefits for society at large. For instance, not all litigation costs are internalized by court fees, so there is also a public interest in avoiding litigation. Translating legal concepts into everyday language provides basic legal education to individuals, which in turn makes them better informed citizens. And protecting consumers and vulnerable parties is not only a matter of promoting “true preferences,” but of societal principles and values. However, the primary focus in Part I was the parties to the transaction.

Part II conceptualizes the notarial function beyond the parties of the transaction. It focuses on the benefits which directly concern public interest and society at large. Economically speaking, the following chapters are about reducing externalities of individual behavior.<sup>52</sup> In Chapter 7, we discover the notary as a gatekeeper to public registers. Chapter 8 underlines the importance of notaries in fighting money laundering and other crimes. Chapter 9 dwells on how notaries serve distributive justice. In Chapter 10, we point out how notaries perform judicial tasks even *ex post* and thereby relieve the judiciary. Chapter 11 is dedicated to notaries being frontrunners of digitalization in their countries. Finally, Chapter 12 describes the particular situation of notaries between independence, on the one hand, and dense regulation and supervision, on the other.

## Gatekeeper of Registers

### Did you know?

In civil law countries, citizens have a legal right to notarial authentication: if not illegal, notaries have to implement their preferences. This right is part of the broader right of access to justice because notaries are part of the preventive administration of justice.<sup>53</sup>

Individuals do not only contract with humans but also with partnerships and corporations. Their existence and their representatives are not obvious. Likewise, individuals do not only sell moveables but also shares and land. Here, defining what is sold and determining who owns it is crucial. Civil law systems fulfill these tasks through public registers.<sup>54</sup> Land registers define property rights in real estates, commercial registers define property rights in shares,<sup>55</sup> but they also provide information on your non-human contracting partner. Sometimes, these registers even enable *bona fide* purchases.<sup>56</sup> Thus, instead of incurring the costs of due diligence, title search, and title insurance,<sup>57</sup> individuals may fully rely on public registers.

Notaries are gatekeepers of these public registers.<sup>58</sup> They ensure that, as a matter of principle, only valid transactions are registered.<sup>59</sup> Without this notarial high-quality control, the accuracy of public registers would suffer and one of two problems would arise: in a system *without* *bona fide* purchases, buyers could not rely on registers, depriving them of their core function; in a system *with* *bona fide* purchases, individuals would regularly be expropriated and property rights invalidated.<sup>60</sup>

**Key takeaways:** Notaries are gatekeepers of public registers and guarantee their trustworthiness. Public registers, in turn, make due diligence, title search, and title insurance obsolete, thereby lowering transaction costs.

## Fighting Money Laundering & Other Crimes

### *Did you know?*

There are far more lawyers than notaries in Germany,<sup>61</sup> but in 2022, German notaries filed 78.51 times more money laundering reports to the competent authority, the Financial Intelligence Unit.<sup>62</sup>

To make use of illegal money, criminals need to transfer property rights in the most valuable assets of our economy: shares of companies and parcels of land. In civil law systems, both types of transactions are typically handled by notaries.<sup>63</sup> Therefore, among all the public officials fighting crime, they are the cheapest cost avoider<sup>64</sup> when it comes to combating money laundering.<sup>65</sup> By closely analyzing the economic structure of control, they detect suspicious transactions, either block or suspend them, and notify the competent law enforcement agencies.<sup>66</sup> Lawyers cannot replace notaries in this field because (i) the lawyers' mandate is voluntary so that individuals can easily avoid exposure, (ii) lawyers are not neutral,<sup>67</sup> and (iii) they are not as closely supervised by the government.<sup>68</sup>

Notaries do not only support law enforcement as regards money laundering. They also block or suspend transactions aimed at financing terrorism,<sup>69</sup> they fight tax evasion by notifying tax authorities of taxable transactions,<sup>70</sup> and they implement EU sanctions by refusing services to certain blacklisted individuals involved in Russia's war of aggression against Ukraine.<sup>71</sup>

**Key takeaways:** Notaries support law enforcement agencies. They fight money laundering, terrorism financing, and tax evasion. They also implement EU sanctions.

## Promoting Distributive Justice

### *Did you know?*

The notary system is part of solving the most pressing problems of today: preventive administration of justice by notaries plays a key role in the quest to end extreme poverty, address the challenges of climate change, and establish food security. This is because of its contribution to the responsible and sustainable governance of tenure of land, forests, and fisheries.<sup>72</sup> Notaries also promote gender equality, increasing the share of women holding property rights in land.<sup>73</sup>

The market is an efficient way to allocate goods and services. This is why citizens can freely choose their notary.<sup>74</sup> However, there are two essential market failures. First, people who cannot afford paying the market price are forced out of the market.<sup>75</sup> Second, high quality lawyers end up where the money is: in the cities. Rural areas are left behind.<sup>76</sup> As regards legal advice, this is unacceptable. Restraints of budget and geographic origin must not pose restraints on access to justice.

The civil law notary system generally solves both market failures by relying on three core elements in its professional rules, which at the same time serve distributive justice.<sup>77</sup> First, notary fees typically depend on the value of the transaction, mimicking the diminishing marginal utility of money.<sup>78</sup> In that way, the rich cross-subsidize the poor.<sup>79</sup> Second, the number of notaries is limited.<sup>80</sup> In that way, the average amount of notarial fees is enough to safeguard the notarial independence even though some fees are way below the production costs of legal advice. Third, notaries have to take office in specific districts. In that way, an equal geographical distribution of high-quality legal advice is ensured.<sup>81</sup>

**Key takeaways:** Notaries serve distributive justice because professional rules lead to cross-subsidies in favor of the poor and rural areas. Thereby, they promote access to justice for all and counter-balance market-failure.

# Relieving the Judiciary

## *Did you know?*

Notaries sometimes even act as judges in litigation. For instance, the Constitutional Court of Bavaria regularly counts one or two notaries among its judges<sup>82</sup> and the German Federal Court of Justice comprises notaries at the side of full-time judges in lawsuits against notaries for professional misconduct.<sup>83</sup>

Notaries relieve the judiciary. The first way of doing so is to avoid litigation *ex post* by relying on authentication *ex ante*.<sup>84</sup> At least four dimensions can be distinguished in this context. First, the authentication procedure optimizes contracts, leaving little room for ambiguity.<sup>85</sup> Second, it provides evidence, allowing to predict and thereby avoid court decisions.<sup>86</sup> This evidence dimension also concerns the occurrence of facts.<sup>87</sup> Indeed, courts sometimes outsource parts of their evidence proceedings to notaries.<sup>88</sup> Third, authentic acts serve as anticipated judgments,<sup>89</sup> making it superfluous to sue to obtain a title for foreclosure. Fourth, even if a dispute has arisen, notaries still prevent litigation since some civil law countries require parties to seek mediation at a notarial office before they are allowed to file a lawsuit.<sup>90</sup>

The second way of relieving the judiciary concerns court proceedings in non-contentious matters. Sometimes, notaries entirely replace judges. For instance, in some civil law countries, notaries can perform marriages and pronounce divorces, provided that everyone agrees.<sup>91</sup> Sometimes, they make judicial proceedings such as the nomination of a custodian superfluous because notarial general powers of attorney allow for sufficient representation.<sup>92</sup> Sometimes, they leave the judicial decision in place but prepare it in significant ways, e.g. by drafting the application for an adoption, a recognition of paternity, or a certificate of inheritance.<sup>93</sup>

**Key takeaways:** Notaries relieve the judiciary by avoiding litigation and non-contentious court proceedings.

## Frontrunners of Digitalization

Notaries are frontrunners of digitalization while at the same time safeguarding the highest standards of data protection and state sovereignty. Their role within the process of digitalization has three dimensions.

### *Did you know?*

Notaries are bound to confidentiality and data privacy rules.<sup>94</sup> They enjoy the same privileges as lawyers and doctors when it comes to their capacity as witness.<sup>95</sup> They are not allowed to hand over documents to prosecutors without the consent of their clients.<sup>96</sup>

First, more and more notarial services are provided online (*online authentication*). It is not always recommendable, though, to replace the protected physical space of the notarial office with the virtual world because de-biasing effects will be weaker. However, if technological and procedural safeguards are respected, many transactions, especially in commercial settings, can be performed online without any issues, which further reduces transaction costs.<sup>97</sup> Second, notaries enable the electronic storage of documents and the electronic communication with administrative agencies in their capacity as one-stop-shops (*electronic storage and exchange*).<sup>98</sup> The tools notaries develop have spillover-effects on the state of digitalization of courts and administrative agencies because the electronic systems in use are part of the judiciary and need to be compatible. Third, notaries see Cryptography, Block Chain, Artificial Intelligence, and other disruptive technologies as opportunities to further improve their services and actively explore their potentials in research co-operations and pilot projects (*disruption*).<sup>99</sup>

**Key takeaways:** Notaries are frontrunners of digitalization while at the same time ensuring legal certainty, state sovereignty, and data privacy in the digital world.

## Between Independence and Supervision

### Did you know?

Notaries are organized in notary chambers. These are public bodies governed by public law.<sup>100</sup> They channel the knowledge of the profession. This is why notary chambers often participate in legislative proceedings as a think tank when statutes in areas of law related to the profession are enacted.<sup>101</sup>

Notaries are neutral advisors to the parties. They implement the preferences of individuals and must be shielded against political influence. This is why notaries are – just like judges – independent: in how they draft their contracts and organize their office, they are free.<sup>102</sup>

However, notaries also exercise public power. This requires a dense regulation of the profession. A strict entry control, the highest standards of legal ethics, and supervision by both, chambers and government bodies such as ministries of justice and higher regional courts, are the corner stones of such regulation.<sup>103</sup>

If notaries violate their duties, they face different consequences. First, they personally are subject to civil liability when they breach their duties towards a client (*civil liability*).<sup>104</sup> Second, they face professional sanctions imposed by notary chambers or the ministry of justice (*professional liability*). These sanctions include fines, but can also lead up to an impeachment procedure.<sup>105</sup> Third, notaries are criminally liable (*criminal liability*). Traditional offenses such as fraud, embezzlement, or breach of trust equally apply as those offenses designed for public officials.<sup>106</sup>

**Key takeaways:** The special position of notaries requires not only their independence but also a strong professional regulation based on entry controls, the highest standards of legal ethics, and government supervision.

## Part III

### Areas of Law

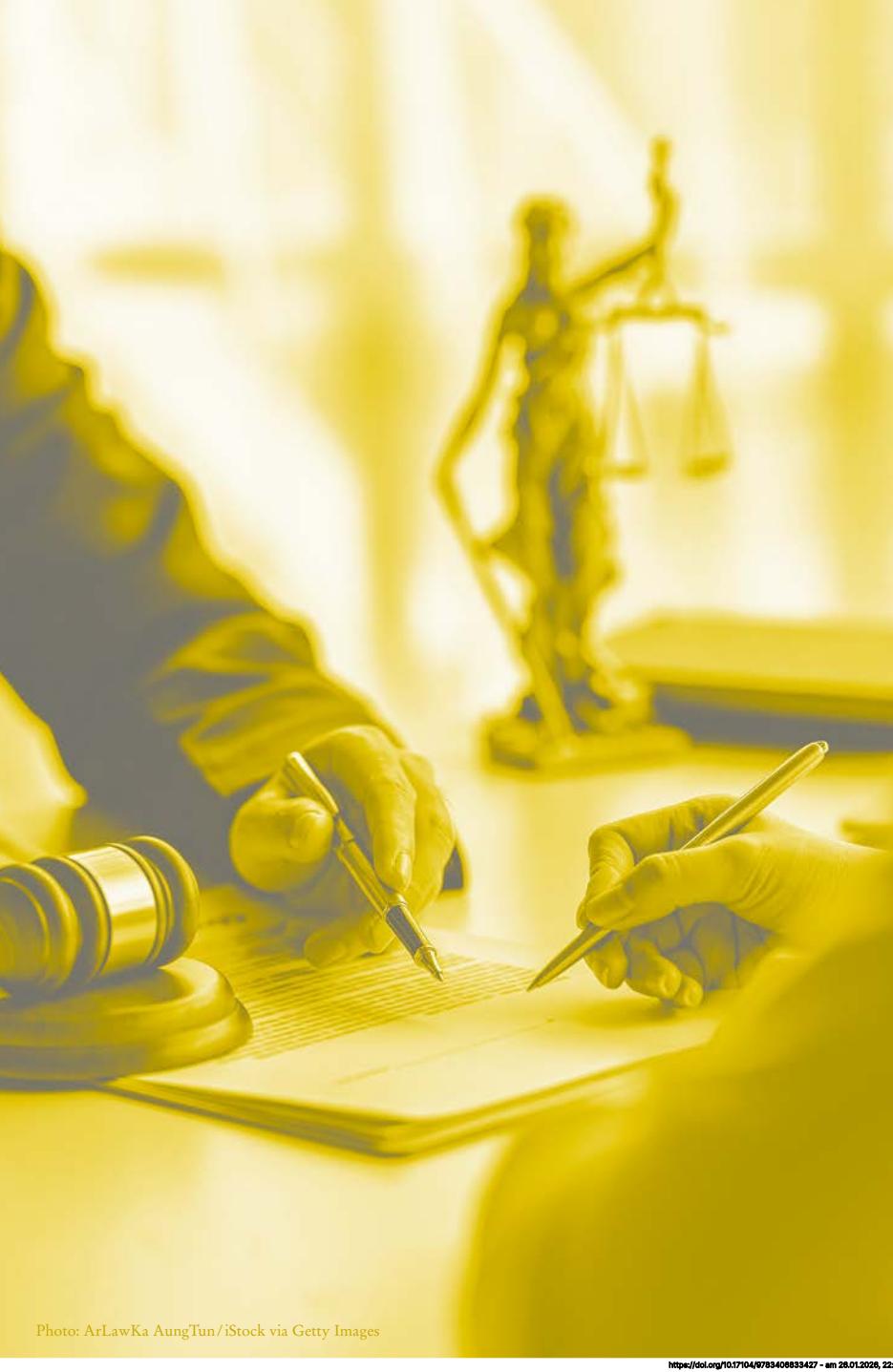


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### Part III

## Areas of Law

In Part I and Part II, we explored the institutional setting which defines the profession of notaries in civil law countries. Part III is dedicated to the areas of law in which notaries are active.

Chapter 13 and Chapter 14 focus on two areas of law in which registers play an important role: real estate law and company law. Chapter 15 explains in which ways and the reasons notaries are involved in succession law. Chapter 16 is dedicated to family law, that is the relationship between spouses and between parents and their children. Chapter 17 analyzes the role of notaries when it comes to powers of attorney. Finally, Chapter 18 points to the role of notaries as facilitators of international exchange and experts in conflict of laws. Indeed, in all areas in which notaries are active, notaries have to know the substantive and procedural law but also the rules which govern the applicable law in the first place.

The goal of Part III is to give an overview of possible notarial interventions in the areas mentioned and to explain why civil law countries have chosen precisely these areas of law.

## Real Estate Law

In most civil law countries, notarial proceedings are mandatory in real estate law. Notaries authenticate sale and purchase agreements and conveyancing deeds<sup>108</sup> but also mortgages, easements, and similar rights in rem. They are also involved in donations, dividing land, and creating condominiums.<sup>109</sup>

There are five main reasons for notarial intervention in real estate law. First, land registers record real property and notaries are the gatekeepers of these registers (*gatekeeper dimension*).<sup>110</sup> Second, immovables are expensive (*value dimension*).<sup>111</sup> Fraud in real estate transactions can lead to people being deprived of their savings and cause their bankruptcy.<sup>112</sup> Consumer protection thus plays a paramount role.<sup>113</sup> Third, land does not perish. Legal rights in real estate persist for generations, triggering an increased need for legal certainty (*time dimension*).<sup>114</sup> Fourth, land involves public interest (*sovereignty dimension*).<sup>115</sup> The intervention of notaries enables government to control the use of land through pre-emption rights and to subject the transfer of sensitive areas to prior public approval. Fifth, given all the stakeholders, real estate transactions are complex (*management dimension*). Notaries organize the contract execution for the parties and relieve individuals from bureaucratic communication by acting as transactional managers.<sup>116</sup>

**Key takeaways:** Notaries are involved in real estate transactions such as sale and purchase agreements, conveyancing deeds, mortgages and easements.

### Did you know?

The German Constitution mentions notaries: whereas article 74 grants the federal government powers to legislate in notarial matters, article 138 restricts this power and subjects any change of the current notarial structure in certain states to the consent of these states. In addition, the principle of equality between men and women, contained in article 3, was drafted by *Elisabeth Selbert*, one of the first female notaries in Germany.<sup>107</sup>

## Company Law

In many civil law countries, notaries play a key role in company law.<sup>119</sup> They are reliable advisors throughout the entire lifecycle of a business. At the founding stage, they draft the articles of incorporation. At the end, they prepare the documents needed for liquidation. In between, they accompany all relevant structural changes: transfer of share agreements for limited liability companies, mergers & acquisition contracts, shareholder meetings, changes to the articles of incorporation or the directors, and far-reaching commercial powers of attorney.<sup>120</sup>

The reasons for notarial intervention in company law are similar to those in real estate law. First, company registers provide for legal certainty and notaries are the gatekeepers of these registers (*gatekeeper dimension*).<sup>121</sup> Second, just like land, shares in companies are the most valuable goods of our economy, requiring special protection of those who deal with them (*value dimension*). Third, the articles of incorporation govern commercial affairs for decades, triggering an increased need for legal certainty (*time dimension*). Fourth, corporations involve public interest, from antitrust to anti-money-laundering issues,<sup>122</sup> which are best channeled through the notary (*sovereignty dimension*). Fifth, communication between registers and other stake-holders needs a central manager – a role best served by the notary (*management dimension*).<sup>123</sup>

**Key takeaways:** Notaries are involved in all central acts of company law throughout the entire lifecycle of a business.

### Did you know?

Notaries contribute to the development of civil law systems as law professors and academics. Indeed, many of the most influential commentaries on statutes in private law, leading law books, and decisive articles are published by notaries.<sup>117</sup> Courts regularly cite these academic contributions.<sup>118</sup> It is also common for notaries to teach at universities and to be involved in the training of legal professionals.

## Succession Law

Succession law is another area involving notaries. Notaries generally intervene at three stages. First, they help individuals opting out of inheritance default rules by drafting their wills<sup>126</sup> or the donation of assets among the living.<sup>127</sup> Second, they draft inheritance renunciations if they are legal in the country at stake.<sup>128</sup> Third, they are involved in the transfer of assets at the moment of death. Here, they draft inventories and settlements of inheritance.<sup>129</sup> They also issue or apply for inheritance certificates.<sup>130</sup> These certificates are equivalent to registers: they provide information on property rights at low costs.

Just like with real estate and company law, there are five important reasons for notarial intervention: First, notaries are required as gatekeepers because certificates of inheritance are like registers and because death changes property rights in public registers (*gatekeeper dimension*).<sup>131</sup> Second, inheritance transactions lead to the transfer of valuable assets at a moment when individuals are particularly vulnerable (*value dimension*).<sup>132</sup> Third, wills structure future economic life for generations, triggering an increased need for legal certainty (*time dimension*).<sup>133</sup> Fourth, succession law is essential for the allocation of land and social security of family members: it involves public interest (*sovereignty dimension*).<sup>134</sup> Fifth, at death, notaries manage bureaucratic communication on behalf of people grieving for their loss (*management dimension*).<sup>135</sup>

**Key takeaways:** Notaries draft wills and inheritance renunciations. They also help with the transfer of assets at the moment of death.

### Did you know?

Some countries, especially in the common law world, require witnesses when making a will or granting power of attorney.<sup>124</sup> In the traditional civil law system, notaries replace these anachronistic formalities because they guarantee the authenticity and validity of the transaction.<sup>125</sup>

## Family Law

### Did you know?

Just like judges and lawyers, notaries also sometimes act as arbitrators. In Germany, for instance, the German Notary Arbitration Court is an arbitral institution that applies the German Code of Civil Procedure in areas of law related to the notarial profession.<sup>136</sup>

Notaries are also entrusted with decisive transactions in family law. The first set of transactions includes prenuptial agreements and divorce settlements and concerns the relationship between spouses. Core questions are matrimonial property regimes, the division of assets and pension rights, alimony, and child custody.<sup>137</sup> In some countries, notaries can also directly perform marriages and pronounce divorces.<sup>138</sup> The second set of transactions includes acts of affiliation such as adoptions and recognitions of paternity and concerns the relationship between parents and children.<sup>139</sup> Finally, notaries are also involved when individuals want to change their name.<sup>140</sup>

Yet again, we find five reasons for notarial intervention. First, marital status and changes of names affect registers, triggering the need for notaries as gatekeepers (*gatekeeper dimension*).<sup>141</sup> Second, just like successions, changes in marital status may lead to great economic consequences in situations of particular vulnerability, requiring special protection (*value dimension*).<sup>142</sup> Third, marital status and affiliation have far-reaching effects in the future and bring a special need for legal certainty (*time dimension*). Fourth, public interest is involved, especially when it comes to child custody (*sovereignty dimension*). Finally, marital changes or changes of affiliation involve bureaucratic communication with different authorities where the managing capacity of notaries is required (*management dimension*).<sup>143</sup>

**Key takeaways:** Notaries draft prenuptial agreements and divorce settlements. They are also involved when it comes to adoption, recognition of paternity, and changes of names.

## Powers of Attorney

Notaries draft powers of attorney. Sometimes, the law requires the intervention of a notary. For instance, if the principal wants to grant powers to make changes related to public registers, the gatekeeping function of notaries is at stake (*gatekeeper dimension*).<sup>145</sup> However, even if the law does not require notarial form,<sup>146</sup> individuals opt in to the notarial proceedings because they value two of its core advantages.

First, they receive legal advice and certainty. Potential contracting parties can rely on the official document, which in turn decreases information costs and increases joint surplus.<sup>147</sup> Some countries further develop this aspect by instituting a public register of powers of attorney.<sup>148</sup> Legal certainty is also of great importance because powers of attorney can structure dealings for a long period of time (*time dimension*).

Second, individuals receive protection (*value dimension*). Powers of attorney are dangerous due to agency costs as the interests of the principal and the agent are not always aligned.<sup>149</sup> Especially when individuals grant plenary powers in case of their mental incapacity or even after death, which is possible in some countries,<sup>150</sup> they value the safe space of the notarial office. Indeed, these powers of attorney often have consequences as far-reaching as guardianships or wills.<sup>151</sup>

**Key takeaways:** Even though the law does not always require it, individuals often authenticate powers of attorney because they value legal certainty and protection.

### Did you know?

Notaries are not only experts in private law. Indeed, by providing services as a one-stop-shop, they also specialize in certain areas of administrative law, notably zoning law, environmental law, and tax law.<sup>144</sup>

## Conflict of Laws

### *Did you know?*

*Thibierge*, a French notary, proposed to create a new corporate form by European legislation in 1959.<sup>152</sup> In 2001, following his proposal, the European Union enacted a directive establishing the Societas Europaea (SE).<sup>153</sup>

In an ever closer connected world, notaries deal with international couples, foreign companies, cross-border transactions, and refugees of war. Often, they provide the first personalized legal advice for those who are newcomers to a country. In that context, they explain the laws of their country, but they also determine the applicable law in the first place. In fact, notaries are specialists in conflict of laws rules, also called private international law.<sup>154</sup> This body of law answers the question of which country's laws will govern a transaction. Notaries also have to be familiar with how procedural law plays out in international settings. Will one country's register accept notarial documents of another? In that sense, notaries also provide advice to the citizens of their home country who want to invest abroad.<sup>155</sup>

When foreign law is applicable, notaries can acquire basic knowledge on that foreign law based on specialized literature, an international professional network of notaries, and professional thinktanks. However, to draft a transaction governed by foreign law in due form, the notary will, most of the time, have to refer her client to the colleague of that other country. This is one of the reasons why notarial organization on different levels is crucial. The Council of the Notaries of the European Union (CNUE) fulfills this task at the European level,<sup>156</sup> the International Union of Notaries (UINL) at the international level.<sup>157</sup>

**Key takeaways:** Notaries are specialists in conflict of laws and provide advice to the international community. Thus, they facilitate international exchange in a globalized world.

# Endnotes

## Part 1

<sup>1</sup> This explainer aims at sketching out the core characteristics of notaries in the civil law world. However, to be able to provide the reader with concrete examples and references while at the same time maintaining the format of a short handbook, a focus on a specific country is necessary. Due to the origins of this explainer in the German Vice-Presidency for Europe, the country of reference is, not exclusively, but most of the time, Germany. «

<sup>2</sup> On the origin in Roman law and the development in medieval Italy, *see, e.g.*, ROLF KNIPEL, AN ECONOMIC ANALYSIS OF THE NOTARIAL LAW AND PRACTICE 69 (rec. 1), 78 (rec. 2) (Stoke-Borchert tr., 2010); PETER L. MURRAY & ROLF STÜRNER, GERMAN NOTARIES IN REAL ESTATE AND CORPORATE LAW MATTERS 15 (2020) (hereinafter MURRAY & STÜRNER, GERMAN NOTARIES); PETER L. MURRAY & ROLF STÜRNER, THE CIVIL LAW NOTARY – NEUTRAL LAWYER FOR THE SITUATION: A COMPARATIVE STUDY ON PREVENTATIVE JUSTICE IN MODERN SOCIETIES 9 (2010) (hereinafter MURRAY & STÜRNER, THE CIVIL LAW NOTARY); 1 FERDINAND ÖSTERLEY, DAS DEUTSCHE NOTARIAT: NACH DEN BESTIMMUNGEN DES GEMEINEN RECHTS UND MIT BESONDERER BERÜCKSICHTIGUNG DER IN DEN DEUTSCHEN BUNDESSTAATEN GELTENDEN PARTICULARRECHTLICHEN VORSCHRIFTEN, GESCHICHTLICH UND DOGMATISCH: GESCHICHTE DES NOTARIATS (1842). On notaries in Ancient Egypt, *see* Consejo General del Notariado, History of the notary (last visited April 11, 2024), <https://www.notariado.org/portal/en/history-of-the-notary>. On notarial documents in the Maya culture, *see* Bernardo Pérez Fernández del Castillo, *Orígenes e historia del notariado en México, in 500 AÑOS DEL NOTARIADO EN TERRITORIO NACIONAL: PASADO, PRESENTE Y FUTURO: ESTUDIOS COMMEMORATIVOS* 69, 74 (Bernardo Pérez Fernández del Castillo, Pascual A. Orozco Garibay & Gerardo Aparicio Razo eds., 2019). *See generally* MATTHEW RESTALL, THE MAYA WORLD. YUCATEC CULTURE AND SOCIETY, 1550–1850 (1997). «

<sup>3</sup> *See also* DOUGLASS NORTH, INSTITUTIONEN, INSTITUTIONELLER WANDEL UND WIRTSCHAFTSLEISTUNG 127 (Monika Streissler tr., 1992); KNIPEL, *supra* note 2, at 109–110 (rec. 8); MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 13. Litigation costs include fees for the court and attorneys, the risk of incorrect court decisions, and personal time and stress. «

<sup>4</sup> They provide “justice without litigation,” *see* BRIGITTA LURGER & KARL STÖGER (EDS.), JUSTICE WITHOUT LITIGATION. NON-CONTENTIOUS PROCEEDINGS BY NOTARIES IN THE EUROPEAN UNION (2022), summarizing the findings of the JuWiLi I project funded by the European Commission. «

<sup>5</sup> On the evidentiary value, *see* KNIPEL, *supra* note 2, at 73 (rec. 1). «

<sup>6</sup> *See also* KNIPEL, *supra* note 2, at 69 (rec. 2), 121 (rec. 2). «

<sup>7</sup> Indeed, the common law equivalent of the notarial deed is the judgment by confession, as regulated, *e.g.*, in NEW YORK CONSOLIDATED LAWS, CIVIL PRACTICE LAW & RULES, art. 32 § 3218 (2022), <https://www.nysenate.gov/legislation/laws/CVP/3218>. On the functional equivalence, *see also*

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WOLFSTEINER, DIE VOLLSTRECKBARE URKUNDE 29 (4th ed. 2019). «

<sup>8</sup> See MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 7. «

<sup>9</sup> On the very positive perception of civil law notaries in Germany, see MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 41–42. «

<sup>10</sup> On these requirements, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 35–36; MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 37–39. «

<sup>11</sup> See Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. CHI. L. REV. 255, 257 (2019); Ariel Porat & Lior J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1442 (2014); KNIEPER, *supra* note 2, at 70 (rec. 4). «

<sup>12</sup> On the difference between creating the pie (maximizing joint surplus) and dividing it (distribution) in the context of default rules, see Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 401 (2009). «

<sup>13</sup> That is what happens in the United States, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 109. If one party remains without a lawyer, the transactional imbalance will create even bigger societal costs. On that risk, see MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 154. «

<sup>14</sup> On the importance of transaction costs, see the seminal contribution of Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (hereinafter Coase, *Social Cost*). See also already Ronald H. Coase, *The Nature of the Firm*, 4 ECONICA 386 (1937). See generally GEORGE J. STIGLER, *THE THEORY OF PRICE* (3rd ed. 1966) (coining the insights as “Coase Theorem”). On the importance of clearly defined property rights, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). «

<sup>15</sup> On the neutrality of notaries, see, e.g., BUNDESNOTARORDNUNG [BNotO] [FEDERAL CODE FOR NOTARIES], §14(1) (Ger.), [https://www.gesetze-im-internet.de/englisch\\_bnoto/englisch\\_bnoto.html](https://www.gesetze-im-internet.de/englisch_bnoto/englisch_bnoto.html) (English translation). See also KNIEPER, *supra* note 2, at 69–70 (rec. 3); MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 5–6 (“Neutral Jurists in Transactional Law”), 193–205 (on neutral institutions of legal advice in the United States). «

<sup>16</sup> On trust as essential factor to decrease transaction costs, see KNIEPER, *supra* note 2, at 71 (rec. 7), 104–105 (rec. 11). On the need for two lawyers in the US, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 111, 156–158 (describing advice as a key positive attribute of the German system), 169 (lack of need for two lawyers), 173 (neutral advice). On the cost-comparison, see KNIEPER, *supra* note 2, at 110–111 (rec. 13). «

<sup>17</sup> Indeed, it makes real world settings become closer to the neoclassical assumption of perfect information, see KNIEPER, *supra* note 2, at 70–71 (rec. 5), 97–98 (rec. 2–3), 99 (rec. 8) (“[...] the civil law notary does not contradict the model assumptions of methodical and normative individualism, but actually realises them.”). «

<sup>18</sup> See WAGNER-WERK-VERZEICHNIS (WWV) 49 (1842). The historical figure that inspired Wagner was Cola di Rienzo. «

<sup>19</sup> On the notion of default rules, see Philip M. Bender, *Limits of Personalization of Default Rules*, 16 EUR. REV. CONT. L. 366, 371 (footnote 14) (2020).

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See also Martijn W. Hesselsink, *Non-Mandatory Rules in European Contract Law*, 1 EUR. REV. CONT. L. 44, 82 (2005). «

<sup>20</sup> On that neoclassical economic explanation of default rules according to the theory of complete contingent contract, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 361 (1988); Porat/Strahilevitz, *supra* note 11, at 1425–1426; Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 466–467 (1980); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34 (1991) (“corporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the costs of contracting”). Of course, this theory has to be refined, since also other types of default rules are possible, such as penalty default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989), and default rules designed as nudges, see Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 5 (2013). On that, see also Bender, *supra* note 19, at 381; PHILIP M. BENDER, *GRENZEN DER PERSONALISIERUNG DES RECHTS* 154–159 (2023) (distinguishing pushing and pulling default rules among will-deviating defaults). «

<sup>21</sup> On the limited knowledge of lawmakers and the necessity of general laws as its consequence, see OMRI BEN-SHAHAR & ARIEL PORAT, *PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE* 201–202 (2021); Christoph Busch, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, 86 U. CHI. L. REV. 309, 314 (2019). Specifically, with a focus on default rules, Alan Schwartz & Robert E. Scott, *The Common Law of Contracts and the Default Rule Project*, 102 VA. L. REV. 1523, 1556–1557 (2016). «

<sup>22</sup> On over- and under-inclusiveness, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348–351 (1949); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31–34 (1991); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 685 (1991); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257, 268–269 (1974). See also Porat & Strahilevitz, *supra* note 11, at 1454; Philipp Hacker, *Personalizing EU Private Law: From Disclosure to Nudges and Mandates*, 25 EUR. REV. PRIV. L. 651, 658 (rec. 10) (2017); Ben-Shahar & Porat, *supra* note 11, at 262; Bender, *supra* note 19, at 403, 405. «

<sup>23</sup> In that sense, the notary is the Brandeisian “lawyer for the situation”, see MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 3–5. Since the legislature gives content to the law ex ante in general ways and judges give content to the law ex post in view of a particular case, see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 608–610 (1992), notaries could also be described as “legislature for the situation.” On the possibility of lawmakers ex ante beyond parliaments, see BENDER, *supra* note 20, at 33. «

<sup>24</sup> On the costs of opting out, see Eric J. Johnson & Daniel G. Goldstein, *Decisions by Default*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY*

417, 421 (Eldar Shafir ed., 2013) (“effort tax”); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK UNCERTAIN. 7, 33–34 (1988); Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Default Rules*, 51 STAN. L. REV. 1591, 1598–1599 (1999); Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2076 (2012); BENDER, *supra* note 20, at 88–95. «

<sup>25</sup> On the requirement of the principle of democracy to first explain the content of the law before opting out, *see* Alexander Krafka & Bernhard Seeger, *Vertragsgestaltung im Immobilienrecht*, in KÖLNER FORMULARBUCH GRUNDSTÜCKSRECHT 1, 4 (Jörn Heinemann ed., 3rd ed. 2021). *See also* the advice to do so contained in the legal training literature, *e.g.*, MARKUS SIKORA & BERNADETTE KELL, KAUTELARJURISTISCHE KLAUSUREN IM ZIVILRECHT 31 (rec. 125) (6th ed. 2022). «

<sup>26</sup> On that, *see, e.g.*, Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VIC. WELLINGT. L. REV. 817, 818–819 (2001). Specifically on the German codification, *see* Reinhard Zimmermann, *The German Civil Code and the Development of Private Law in Germany*, 2006 OXFORD U. COMP. L. FORUM 1, <https://ouclf.law.ox.ac.uk/the-german-civil-code-and-the-development-of-private-law-in-germany/>. «

<sup>27</sup> Zimmermann, *supra* note 26, at text to footnote 129. «

<sup>28</sup> Complexity is used here in the sense of information to be processed. On that, *see* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995); Kaplow, *supra* note 23, at 586–590; Ehrlich & Posner, *supra* note 22, at 281; Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L. J. 1 (1993); BENDER, *supra* note 20, at 36–37; Philip M. Bender, *Comparative Norm Design: The U.S. Rules Model and the German Standards Model in Criminal Justice and Beyond*, 27 UCLA J. INT’L L. & FOREIGN AFF. 1, 9–10 (2024) (referring to this type of complexity as internal complexity). «

<sup>29</sup> On the accessibility of a legal system, *see* Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 176 (2010) (pointing to the difference between accessibility for experts and for laypeople). *See also* Cass Sunstein, Cost-Benefit Analysis and the Knowledge Problem (Oct. 12, 2014), at 9, [https://dash.harvard.edu/bitstream/handle/1/16152306/hayekdemocracy10\\_10.pdf?sequence=1&isAllowed=y](https://dash.harvard.edu/bitstream/handle/1/16152306/hayekdemocracy10_10.pdf?sequence=1&isAllowed=y); BENDER, *supra* note 20, at 38; Bender, *supra* note 28, at 10 (referring to this issue as external complexity). «

<sup>30</sup> *See, e.g.*, Claudia Balzer, *Metaphern und Geschichten als Brücke zum Mandanten*, 2023 MITTEILUNGEN DES BAYERISCHEN NOTARVEREINS, DER NOTARKASSE UND DER LANDESNOTARKAMMER BAYERN [MITTBAYNOT] 314, 315. In their capacity as interpreters, they are sometimes also obliged to read the contract to the parties (for Germany, *see, e.g.*, BEURKUNDUNGSGESETZ [BEURKG] [NOTARIAL AUTHENTICATION ACT], § 13). This practice, especially important in case of illiteracy or blindness, is also justified in other cases: it ensures (i) that the contracting parties have been confronted with the text of the contract at least once, (ii) that explanations and questions are linked to concrete contract clauses, (iii) that notaries find mistakes in the draft, and

(iv) that contracts stay short; indeed, the reading requirement functions like a tax on long contracts, which internalizes some of the externalities created by long, complex contracts. In addition, it (v) creates a certain solemnity of the authentication procedure, increasing its debiasing effect. «

<sup>31</sup> On trust as key benefit of notarial intervention, *see also supra* note 16. On notarial intervention fostering other societal values, *see, e.g.*, MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 160–162, especially 161 (“[...] the notarial system [...] fosters human values of dignity and autonomy.”). In other words, notaries implement “rules of civility” and effectuate the “expressive” or “communicative” function of law. On “rules of civility,” *see* Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL.L.REV. 957, 963–964 (1989); Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV.L.REV. 601, 623–624 (1990). On the “expressive” or “communicative” function of law, *see* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U.P.A.L.REV. 2021 (1996); Philip M. Bender, *Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May 2020*, 27 EUR. PUB. L. 285 (2021). «

<sup>32</sup> Given their function of making default rules known to citizens as the status quo, notaries can be seen as a key element in implementing the taste-shaping function of default rules. On that function of default rules in general, *see* Sunstein, *supra* note 20, at 20–21. On the democratic dimension of implementing value-enactments contained in default rules, *see also* Krafka & Seeger, *supra* note 25, at 4. «

<sup>33</sup> On the de-biasing function, *see infra* Chapter 6. «

<sup>34</sup> *See* Coalition Agreement of the current German government, SPD, Bündnis 90/Die Grünen & FDP, *Mehr Fortschritt wagen: Bündnis für Freiheit, Gleichheit und Nachhaltigkeit*, KOALITIONSVERTRAG 2021–2025, at 24, [https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag\\_2021-2025.pdf](https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf); Nadja Danninger, *Der Koalitionsvertrag aus notarieller Sicht*, BNOTK-AKTUELL, Febr. 2022, at 3, [https://www.bnok.de/fileadmin/user\\_upload\\_bnok/aufgaben\\_taetigkeiten/bnotk\\_aktuell/2022/BNotK-Aktuell\\_01\\_2022\\_Web.pdf](https://www.bnok.de/fileadmin/user_upload_bnok/aufgaben_taetigkeiten/bnotk_aktuell/2022/BNotK-Aktuell_01_2022_Web.pdf). For the statutory provisions that enable this online procedure, *see infra* note 50. «

<sup>35</sup> *See* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 54–55. «

<sup>36</sup> For a possible timeline on the basis of an example, *see* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 57–61. «

<sup>37</sup> *See also* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 54–55 (for real estate law), 65–66 (for company law), 155–156, 171 (in general on the “Platform-Function”). «

<sup>38</sup> In Germany, there are two ways to do so. The first way consists in a step-by-step execution of the contract: (i) a reservation (priority notice, *Vormerkung*) is entered in the land register in favor of the buyer, which makes sure that she will acquire property after paying the price; (ii) once the reservation is effective, the notary informs the buyer to pay; (iii) once informed by the seller that she received the payment, the notary starts passing the property

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to the buyer; *see* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 50–53, 57–61 (translating *Vormerkung* as preliminary notice). The second way consists in the notarial use of an escrow account, if justified by a special security interest of the parties, *see* BEURKG, *supra* note 30, § 57(2). «

<sup>39</sup> On that, *see* Danning, *supra* note 34, at 3. «

<sup>40</sup> For Germany, *see* BEURKG, *supra* note 30, § 17(2a) No. 2. In general on the cooling-off-period as debiasing instrument Byron D. Sher, *The “Cooling-Off” Period in Door-to-Door Sales*, 15 UCLA L. REV. 717 (1967). «

<sup>41</sup> On these biases, *see* Richard H. Thaler, *Doing Economics Without Homo Economicus*, in FOUNDATIONS OF RESEARCH IN ECONOMICS: HOW DO ECONOMISTS DO ECONOMICS 227, 230–235 (Steven G. Medema & Warren J. Samuels eds., 1996); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–1479 (1998); PHILIPP HACKER, VERHALTENSÖKONOMIK UND NORMATIVITÄT: DIE GRENZEN DES INFORMATIONSMODELLS IM PRIVATRECHT UND SEINE ALTERNATIVEN 79–80 (2017); BENDER, *supra* note 20, at 136–140. «

<sup>42</sup> Jolls, Sunstein & Thaler, *supra* note 41, at 1479. Bounded willpower is sometimes also referred to differently, *see* ROBERT MEYER & HOWARD KUNREUTHER, THE OSTRICH PARADOX: WHY WE UNTERPREPARE FOR DISASTERS 13–14 (2017) (“myopia”); Stephan Meier & Charles Sprenger, *Present-Bias Preferences and Credit Card Borrowing*, 2 AM. ECON. J. APPL. ECON. 193 (2010) (“present bias”); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997); HACKER, *supra* note 41, at 106–107 (“quasi-hyperbolic discounting”). «

<sup>43</sup> See James Scott, Margaret Stump & Peter Xu, *Overconfidence Bias in International Stock Prices*, 29 J. PORTFOLIO MGMT. 80 (2003). «

<sup>44</sup> Anat Bracha & Donald J. Brown, *Affective decision making: A theory of optimism bias*, 75 GAMES & ECON. BEHAV. 67 (2012); Tali Sharot et al., *Neutral mechanisms mediating optimism bias*, 450 NATURE 102 (2008). «

<sup>45</sup> K. Sudhir, Subroto Roy & Mathew Cherian, *Do Sympathy Biases Induce Charitable Giving? The Effects of Advertising Content*, 35 MARKETING SCI. 831 (2016) (in the context of charitable giving). «

<sup>46</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 160. This is particularly problematic in case of institutional alliances between powerful stakeholders of transactions, *see* KNIEPER, *supra* note 2, at 114 (rec. 24). «

<sup>47</sup> On the task of providing a level playing field, *see* KNIEPER, *supra* note 2, at 75 (rec. 6), 76–77 (rec. 10) (for divorce agreements). On the importance of substantive equality among the parties for the exercise of meaningful private autonomy, *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 9, 1990, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 242 (Ger.). «

<sup>48</sup> Special consumer protection agencies such as the US mortgage counselor, *see* NATIONAL HOUSING ACT (2022) § 255(d)(2)(B), (f), 12 U.S.C. § 1715z-20(d) (2)(B), (f), <https://www.law.cornell.edu/uscode/text/12/1715z-20>, are not needed in civil law countries. On the mortgage counselor, *see* Ayres, *supra* note 24, at 2077. «

<sup>49</sup> On that, *see* *supra* note 25. «

## Endnotes

<sup>50</sup> Online proceedings in Germany, *see*, e.g., BEURKG, *supra* note 30, § 16a. *See also* German Federal Chamber of Notaries, Notarial online procedures (last visited April 11, 2024), <https://online.notar.de>. «

<sup>51</sup> On the notarial duty to instruct the parties under German law, *see* BEURKG, *supra* note 30, § 17(1). On that, *see also* MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 49. «

## Part II

<sup>52</sup> On a conceptualization of externalities, *see* Coase, *Social Cost*, *supra* note 14. On externalities as a justification for mandatory rules (next to paternalism), *see* Ayres & Gertner, *supra* note 20, at 88–89; Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972). «

<sup>53</sup> See BEURKG, *supra* note 30, § 15. *See also* MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 209–210; Maximilian Wosgien, *Notarielle Amtstätigkeit und das Verbot von Rechtsberatungsdienstleistungen*, 2023 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 937, 939. «

<sup>54</sup> On these points for commercial registers, *see also* KNIEPER, *supra* note 2, at 119–120 (rec. 1–2). «

<sup>55</sup> On the importance of defining property rights, *see* the fundamental contribution of Demsetz, *supra* note 14. «

<sup>56</sup> This is the case in Germany, *see* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 892 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/) (English translation) (for the land register) and HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 15 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_hgb/englisch\\_hgb.html](https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html) (English translation) (for the commercial register). *See also* GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG [GMBHG] [ACT ON LIMITED LIABILITY COMPANIES], § 16 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_gmbhg/englisch\\_gmbhg.html](https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html) (English translation) (for the shareholder list contained in the commercial register). On the importance of bona fide purchases for the modern economy KNIEPER, *supra* note 2, at 103 (rec. 8). «

<sup>57</sup> On these costs, *see* NORTH, *supra* note 3, at 61–63; KNIEPER, *supra* note 2, at 108 (rec. 3–5). On the need for title insurance and real estate transaction costs in the United States, *see* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 108–116, 144–148. Specifically on title search and title insurance in the United States, *see* MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 129. «

<sup>58</sup> See MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 44–47 (for real estate law), 64–65 (for company law), 144, 171 (in general). «

<sup>59</sup> In general, authentication requirements involve the highest level of notarial scrutiny, including the validity. But even if notaries only certify signatures and thereby apply a lower level of scrutiny, they act as gatekeepers of registers because they at least identify the parties. In Germany, certification for the purpose of registration always also involves a control as to whether the

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transaction can be registered, *see* GESETZ ÜBER DAS VERFAHREN IN FAMILIENSACHEN UND IN DEN ANGELEGENHEITEN DER FREIWILLIGEN GERICHTSBARKEIT [FAMFG] [ACT ON PROCEEDINGS IN FAMILY MATTERS AND IN MATTERS OF NON-CONTENTIOUS JURISDICTION], § 378(3) (Ger.), [https://www.gesetze-im-internet.de/englisch\\_famfg/index.html](https://www.gesetze-im-internet.de/englisch_famfg/index.html) (English translation). This control can be described as intermediate scrutiny. <sup>65</sup>

<sup>66</sup> *See also* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 140 (risk of loss as incentive for individuals to provide for register accuracy). <sup>67</sup>

<sup>68</sup> In 2022, there were 6,711 notaries, *see* German Federal Chamber of Notaries, Notarstatistik (last visited April 11, 2024), <https://www.notar.de/der-notar/statistik>; and 17,616 lawyers, *see* German Federal Bar Association, Statistiken (last visited April 11, 2024), [https://www.brak.de/fileadmin/04\\_fuer\\_journalisten/statistiken/2022/2022\\_brak-mg\\_statistik.pdf](https://www.brak.de/fileadmin/04_fuer_journalisten/statistiken/2022/2022_brak-mg_statistik.pdf), registered in Germany. <sup>69</sup>

<sup>70</sup> German notaries filed 7,223 money laundering notifications to the Financial Intelligence Unit, whereas lawyers only filed 92, *see* Financial Intelligence Unit, Jahresbericht 2022, at 16, [https://www.zoll.de/DE/FIU/Fachliche-Informationen/Jahresberichte/jahresberichte\\_node.html](https://www.zoll.de/DE/FIU/Fachliche-Informationen/Jahresberichte/jahresberichte_node.html). <sup>71</sup>

<sup>72</sup> *See infra* Chapters 13 & 14. <sup>73</sup>

<sup>74</sup> *On the concept of cheapest cost avoider, see* GUIDO CALABRESI, THE COSTS OF ACCIDENT: A LEGAL AND ECONOMIC ANALYSIS 311 (1970). <sup>75</sup>

<sup>76</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 99, 158–159, 169. <sup>77</sup>

<sup>78</sup> For German legislation, *see* GELDWÄSCHEGESETZ [GwG] [MONEY LAUNDERING ACT], §§ 43, 46 (Ger.). For EU legislative projects in this area, the EU “single rulebook” regulation, 2021/0239 (COD), the 6th Anti-Money Laundering Directive, 2021/0250 (COD), and the regulation establishing the European Anti-Money Laundering Authority 2021/0239 (COD), are of topicality, *see* European Parliament, New EU measures against money laundering and terrorist financing (March 28, 2023), <https://www.europarl.europa.eu/news/en/press-room/20230327IPR78511/new-eu-measures-against-money-laundering-and-terrorist-financing>. <sup>79</sup>

<sup>80</sup> Instead, they are representatives of the party interests, as the German courts repeatedly underline, *see, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 3, 2003, 108 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 150 (Ger.) (under B.I.3.b.aa.); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 21, 2018, 2019 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 316, 317 (rec. 15) & May 12, 2016, 2016 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2561 (rec. 6) (Ger.). <sup>81</sup>

<sup>82</sup> On the strict supervision of notaries, *see* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 40. <sup>83</sup>

<sup>84</sup> The prevention of money laundering and terrorism financing is regulated in the same legal instruments on the European level and in Germany, so the relevant duties are contained in the statutes cited *supra* note 66. <sup>85</sup>

<sup>86</sup> *See, e.g.*, GRUNDERWERBSTEUERGESETZ [GREStG] [REAL ESTATE TRANSFER TAX ACT], § 18 (Ger.); ERBSCHAFTSTEUER- UND SCHENKUNGSTEUERGESETZ [ERBStG] [INHERITANCE TAX AND DONATION TAX ACT], § 34 (Ger.). *See also*

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MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 98–99, 158–159, 169. <sup>87</sup>

<sup>88</sup> *On EU sanctions against Russia, see* European Council & Council of the European Union, EU sanctions against Russia explained (27 March 2024), <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>. <sup>89</sup>

<sup>90</sup> FAO & UINL, Responsible governance of tenure and preventive justice. A guide for notaries and other practitioners in the preventive administration of justice. Governance of Tenure Technical Guide No. 13 (2nd ed. 2022), <https://www.fao.org/publications/card/en/c/CC0168EN>. <sup>91</sup>

<sup>92</sup> *On that, see* FAO & GIZ, Guidelines on strengthening gender equality in notarial practices South-East Europe (2019), <https://www.fao.org/documents/card/en/c/CA2953EN/>. <sup>93</sup>

<sup>94</sup> *On the free choice of notaries, see* Rainer Regler, § 10, in BECK’SCHER ONLINE-KOMMENTAR: BNOTO rec. 2 (Claudius Eschwey ed., 9th ed. 2024); MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 34. In general on the market compatibility of the notarial system, *see* KNIPEPER, *supra* note 2, at 99 (rec. 8). <sup>95</sup>

<sup>96</sup> *On the phenomenon of poorer consumers being forced out of the market, see* Ben-Shahar & Porat, *supra* note 11, at 264–265; BENDER, *supra* note 20, at 242. In general on budgetary restraints, *see* HAL R. VARIAN, GRUNDZÜGE DER MIKROÖKONOMIK 21–22 (Reiner Buchegger & Johannes Kepler trs., 9th ed. 2016); Oren Bar-Gill, *Algorithmic Price Discrimination: When Demand Is a Function of Both Preferences and (Mis)perceptions*, 86 U. CHI. L. REV. 217, 228 (footnote 39) (2019); Matthew D. Adler & Eric A. Posner, *Rethinking Cost Benefit Analysis*, 109 YALE L.J. 165, 168 (1999). <sup>97</sup>

<sup>98</sup> *On the policy consideration to assure access to notaries in rural areas, see, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 21, 2023, 2024 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 288, 293 (rec. 41) (Ger.). <sup>99</sup>

<sup>100</sup> *On distributive justice, see* ARISTOTLE, NICOMACHEAN ETHICS 94–96 (1130b30–1131a1, 1131a10–1131b24) (Robert C Barlett & Susan D Collins trs. 2011). <sup>101</sup>

<sup>102</sup> *On the degressive character of the notarial fee rates, see* Jens Bormann, § 34, in GESETZ ÜBER KOSTEN DER FREIWILLIGEN GERICHTSBARKEIT FÜR GE-RICHESTE UND NOTARE: KOMMENTAR rec. 2, 8 (Jens Bormann, Thomas Diehn & Klaus Sommerfeld eds., 4th ed. 2021). On the diminishing marginal utility according to the Expected Utility Theory, *see* JOHN VON NEUMANN & OSKAR MORGENSEN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 1–3 (4th ed., 2007); Oskar Morgenstern, *Some Reflections on Utility in EXPECTED UTILITY HYPOTHESES AND THE ALLAIS PARADOX* 175 (Maurice Allais & Ole Hagen eds., 1979). Beginnings of the theory can be found already at Daniel Bernoulli, *Exposition of a New Theory on the Measurement of Risk*, 22 ECONOMETRICA 23 (Louise Sommer tr., 1954). *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 270–271 (2011); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (9th ed. 2014); HORST EIDENMÜLLER, EFFIZIENZ ALS RECHTS-PRINZIP: MÖGLICHKEITEN UND GRENZEN DER ÖKONOMISCHEN ANALYSE DES RECHTS 43–44 (4th ed. 2015); HACKER, *supra* note 41, at 322–323. <sup>103</sup>

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<sup>79</sup> On that, *see also* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 10–11; 38, 151–152; MARKUS SIKORA, DER NOTAR IM SOZIALEN RECHTSSTAAT (2007). «

<sup>80</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 34–35. «

<sup>81</sup> On that, *see also* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 12 (“[...] the local notary is the face of law and justice for many of the citizens and serves most of their legal needs.”). «

<sup>82</sup> Currently, the Bavarian Constitutional Court counts two acting no-tary-judges and one deputy notary-judge, *see* Bayerischer Verfassungsgerichtshof, Verzeichnis der Richterinnen und Richter (last visited April 11, 2024), [https://www.bayern.verfassungsgerichtshof.de/bayverfgh/richterinnen-und-richter/verzeichnis\\_der\\_richterinnen\\_und\\_richter.php](https://www.bayern.verfassungsgerichtshof.de/bayverfgh/richterinnen-und-richter/verzeichnis_der_richterinnen_und_richter.php). «

<sup>83</sup> See Bundesgerichtshof, Senat für Notarsachen (last visited April 11, 2024), <https://www.bundesgerichtshof.de/DE/DasGericht/Geschaeftsverteilung/BesetzungSenate/WeitereSenate/senatFuerNotarsachen.html>. «

<sup>84</sup> On that, *see also supra* Chapter 1. «

<sup>85</sup> On legal certainty, *see supra* Chapter 1. «

<sup>86</sup> *See also supra* Chapter 1 (especially note 5). «

<sup>87</sup> For Germany, *see, e.g.*, BEURKG, *supra* note 30, §§ 36–43. «

<sup>88</sup> For instance, in Germany, notarial inventories are produced at the request of a person entitled to a compulsory share of the estate to prepare a potential lawsuit, *see* BGB, *supra* note 56, § 2314(1). In Brazil, each inheritance requires an inventory, *see* CÓDIGO CIVIL [Cod. Civ.] [CIVIL CODE], art. 1,991 (Brazil); CÓDIGO DE PROCESSO CIVIL [Cod. Pro. Civ.] [CODE OF CIVIL PROCEDURE], art. 611 (Brazil). The elaboration of the inventory is an independent non-contentious procedure, which is most of the time performed by notaries, *see* Lahiz Delgado, O novo CPC e o inventário extrajudicial, JUSBRASIL (last visited April 11, 2024), <https://www.jusbrasil.com.br/artigos/o-novo-cpc-e-o-inventario-extrajudicial/716019868>. *See also infra* note 91. «

<sup>89</sup> On that, *see supra* Chapter 1 (especially note 7). «

<sup>90</sup> *See, e.g.*, ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 15a (Ger.), [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (English translation), together with BAYERISCHES SCHLICHTUNGSGESETZ [BÄY SCHLIG] [BAVARIAN CONCILIATION ACT] (Ger.). «

<sup>91</sup> For instance, in Brazil, notaries can divorce couples and distribute their assets (inventory) as long as both spouses agree and there are no minors involved or a judicial decision has already been rendered as regards their custody, *see* COD. PRO. CIV., *supra* note 88, art. 982, 983; CÓDIGO DE NORMAS DA CORREGEDORIA GERAL DA JUSTIÇA DO ESTADO DO RIO DE JANEIRO – PARTE EXTRAJUDICIAL [CODE OF NORMS OF THE INTERNAL COMPTROLLER OF THE JUDICIARY OF THE STATE OF RIO DE JANEIRO – EXTRAJUDICIAL PART], art. 310(1),(2) (Brazil). *See also* Alexandre Cruz, Quais são os requisitos para se fazer o divórcio ou a separação extrajudicial?, JUSBRASIL (last visited April 11, 2024), <https://www.jusbrasil.com.br/artigos/quais-sao-os-requisitos-para-se-fazer-o-divorcio-ou-a-separacao-extrajudicial/267101518>; Eme Nucalis, TJ-PI autoriza processos extrajudiciais envolvendo menores ou incapazes, MUNDO NOTARIAL (Sept. 25, 2023), <http://mundonotarial.org/blog/?p=7047>. On no-

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ties being more efficient in performing these non-contentious tasks than courts, *see* LURGER & STÖGER (EDS.), *supra* note 4 (focusing on matters of succession law). «

<sup>92</sup> This is quite common in Germany, where general powers of attorney are possible. *See* Stefan Huber, § 167, in BECK-ONLINE. GROSSKOMMENTAR: BGB rec. 45 (Beate Gsell et al. eds., February 1, 2022). They are even explicitly recognized in BGB, *supra* note 56, § 1820. «

<sup>93</sup> For instance, German notaries prepare the application and consent documents in adoption cases, *see* BGB, *supra* note 56, §§ 1750(1), 1752(2). For the notarial authentication in case of recognition of paternity, *see, e.g.*, BGB, *supra* note 56, § 1597(1). For the certificate of inheritance, *see* FAMFG, *supra* note 59, § 352, and BEURKG, *supra* note 30, § 38. «

<sup>94</sup> On notarial obligation of secrecy, *see, e.g.*, BNOTO, *supra* note 15, § 18. Violations of this obligation are sanctioned by criminal law, *see* STRAFGESETZBUCH [StGB][CRIMINAL CODE], § 203 (Ger.). The European Parliament & Council Regulation EU 2016/679, 2016 O.J. (L 1191/1) (GENERAL DATA PROTECTION REGULATION) also applies to notaries. «

<sup>95</sup> *See, e.g.*, STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 53(1) No. 3 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) (English translation); ZPO, *supra* note 90, § 383(1) No. 8. One could call this the notary-client-privilege. «

<sup>96</sup> On this issue with a special focus on anti-money laundering law, *see* Landgericht München I [LG München I] [District Court of Munich I], June 8, 2022, 2023 DEUTSCHE NOTAR-ZEITSCHRIFT [DNorZ] 445 (Ger.). «

<sup>97</sup> For Germany, *see, e.g.*, BEURKG, *supra* note 30, §§ 16a–16e (regulating the online authentication procedure), § 40a (regulating online certification of signatures), and BNOTO, *supra* note 15, § 78p. These online procedures increasingly dominate in the area of company law. As regards the certification of signatures required for registration, *see, e.g.*, HGB, *supra* note 56, § 12; as regards the online foundation of a limited liability company, including the power of attorney for such online foundation, and unanimous modifications of statutes, *see* GMBHG, *supra* note 56, §§ 2(2)(3), 53(3). In Brazil, even further reaching possibilities exist within the framework of their eNotariado, *see* Colégio Notarial do Brasil, Bemvindo ao serviço notarial do século XXI (last visited April 11, 2024), <https://www.e-notariado.org.br/>. «

<sup>98</sup> On the possibility to communicate electronically in a safe way between notaries and municipalities (eNoVA project), *see* NotarNet, eNoVA (last visited April 11, 2024), <https://onlinehilfe.bnot.de/einrichtungen/notarnet/xnotar/modul-enova.html>. On the electronic safe communication with Bavarian land registers, *see* Bayerisches Staatsministerium der Justiz, Elektronischer Rechtsverkehr mit den Grundbuchämtern (last visited April 11, 2024), <https://www.justiz.bayern.de/ejustice/eRV/grundbuchamt/>. On the electronic archive of authentic acts, *see* German Federal Chamber of Notaries, Das Elektronische Urkundenarchiv (last visited April 11, 2024), <https://www.elektronisches-urkundenarchiv.de/>. On the aspect of one-stop-shop, *see supra* Chapter 5. «

<sup>99</sup> On the notion of Artificial Intelligence and Machine Learning, *see, e.g.*, M. I. Jordan & T. M. Mitchell, *Machine learning: Trends, perspectives, and*

prospects, 349 SCIENCE 255 (2015); John Villasenor & Virginia Foggo, *Artificial Intelligence, Due Process and Criminal Sentencing*, 2020 MICH. ST. L. REV. 295, 300–302. For a notary-run project exploring the potentials of Artificial Intelligence in the area of land registers, see Friedrich-Alexander-Universität Erlangen-Nürnberg, Forschungsprojekte (last visited April 11, 2024), [https://www.str2.rw.fau.de/honorarprofessor/forschungsprojekte/#collapse\\_3](https://www.str2.rw.fau.de/honorarprofessor/forschungsprojekte/#collapse_3). «

<sup>100</sup> On the chamber structure, see, e.g., MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 40. «

<sup>101</sup> On the involvement in of legislation, see German Federal Chamber of Notaries, Representation of all notaries (last visited April 11, 2024), <https://www.bnnotk.de/en/tasks-and-activities/representation-of-notaries>. «

<sup>102</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 37. «

<sup>103</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 40, 170. «

<sup>104</sup> On that, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 39; MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 40–41. «

<sup>105</sup> See BNotO, *supra* note 15, § 50. «

<sup>106</sup> See StGB, *supra* note 94, § 266 (on criminal liability in case of breach of trust), § 331 *et seq.* (on crimes of public officials), § 201 (on criminal liability in case of violations of the obligation to secrecy). On the obligation to secrecy, see also *supra* note 94. «

### Part III

<sup>107</sup> On Elisabeth Selbert as one of the four “mothers of the Basic Law,” see Bundesministerium für Familie, Senioren, Frauen und Jugend, Mütter des Grundgesetzes (last visited April 11, 2024), at 10–14, <https://www.bmfsfj.de/resource/blob/94392/83dc828423407787e34f21bd0dcefa0/muetter-grundgesetz-data.pdf>. On her having been a notary, see Ordentliche Gerichtsbarkeit Hessen, Ausgeschiedene Notare (May 9, 2022), at 6, [https://ordentliche-gerichtsbarkeit.hessen.de/sites/ordentliche-gerichtsbarkeit.hessen.de/files/2022-06/ausgeschiedene\\_notare\\_stand\\_21.07.2021.pdf](https://ordentliche-gerichtsbarkeit.hessen.de/sites/ordentliche-gerichtsbarkeit.hessen.de/files/2022-06/ausgeschiedene_notare_stand_21.07.2021.pdf). «

<sup>108</sup> For a description of a typical residential real estate transaction, see MURRAY & STÜRNER, THE CIVIL LAW NOTARY, *supra* note 2, at 43–53. «

<sup>109</sup> For an overview, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 41–61. For notarial practice in detail, see JÖRN HEINEMANN (ED.), KÖLNER FORMULARBUCH GRUNDSTÜCKSRECHT (3rd ed. 2021). Central provisions requiring notarial intervention in real estate law in Germany are BGB, *supra* note 56, § 311b, WOHNUNGEIGENTUMSGESETZ [WEG] [ACT ON THE OWNERSHIP OF APARTMENTS AND THE PERMANENT RESIDENTIAL RIGHT], § 10(3) (Ger.), [https://www.gesetze-im-internet.de/englisch\\_woeigg/index.html](https://www.gesetze-im-internet.de/englisch_woeigg/index.html) (English translation), and GRUNDBUCHORDNUNG [GBO] [LAND REGISTER ACT], § 29 (Ger.). «

<sup>110</sup> On the gatekeeping-function, see *supra* Chapter 7 (especially note 45). «

<sup>111</sup> KNIEPER, *supra* note 2, at 71 (rec. 7), 98–99 (rec. 6). «

<sup>112</sup> On the importance of a real estate acquisition for individuals, see, e.g., KNIEPER, *supra* note 2, at 108 (rec. 3). «

<sup>113</sup> On the consumer protection dimension, see also *supra* Chapter 6. «

<sup>114</sup> KNIEPER, *supra* note 2, at 71 (rec. 7) (“long-term effect”). «

<sup>115</sup> On the policy-dimension, see also MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 9; KNIEPER, *supra* note 2, at 114 (rec. 26); MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 136, 139. The specialty of real estate law was also noticed by the fathers of the French Code Civil. On that, see Jean-François Niort, *Droit, idéologie et politique dans le code civil français de 1804*, 29 REVUE INTERDISCIPLINAIRE D’ÉTUDES JURIDIQUES (R.I.E.J.) 85, 101 (1992). «

<sup>116</sup> On the management function of notaries, see also *supra* Chapter 5. «

<sup>117</sup> For instance, the current edition of the most influential commentary on the German Civil Code (BGB, *supra* note 56) counts three notaries among its authors, see CHRISTIAN GRÜNEBERG ET AL., GRÜNEBERG: BÜRGERLICHES GESETZBUCH MIT NEBENGESETZEN (83th ed. 2024). «

<sup>118</sup> For instance, in the decision Bundesgerichtshof [BGH] [Federal Court of Justice], June 15, 2023, 237 ENTSCHEIDUNG DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 184, the court cites 18 authors, of which 14 are notaries. «

<sup>119</sup> Under German law, this applies in particular to corporations and limited liability companies, which are largely subject to authentication requirements, see, e.g., GMBHG, *supra* note 56, §§ 2(1), 15(3)(4), 53, AKTIENGESETZ [AktG] [STOCK CORPORATION ACT], §§ 23, 130 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_aktg/index.html](https://www.gesetze-im-internet.de/englisch_aktg/index.html) (English translation). The same is true for merger law in Germany, see UMWANDLUNGSGESETZ [UmwG] [TRANSFORMATION ACT], §§ 6, 8(3), 9(3), 12(3), 13(3) (Ger.), [https://www.gesetze-im-internet.de/englisch\\_umwg/index.html](https://www.gesetze-im-internet.de/englisch_umwg/index.html) (English translation). In partnership law, notaries apply a lower degree of scrutiny, according to which the control is focused on the registrability of acts, see FAMFG, *supra* note 59, § 378(3), HGB, *supra* note 56, § 12. The important function of notaries in the administration of preventive justice is also increasingly recognized in EU legislation, e.g. in the context of the legislative procedure on upgrading digital company law (2023/0089/COD), see Council of the European Union, ST 7966 2024 INIT, March 20, 2024, rec. 9 & art. 10, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSL:ST\\_7966\\_2024\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSL:ST_7966_2024_INIT) (reflecting the interinstitutional compromise). «

<sup>120</sup> For an overview of notarial activity in company law, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 63–105. «

<sup>121</sup> See *supra* Chapter 7. «

<sup>122</sup> See *supra* Chapter 8. «

<sup>123</sup> See *supra* Chapter 5. «

<sup>124</sup> For wills in the United States, see, e.g., the widely adopted UNIFORM PROBATE CODE, § 2-502(a)(3)(A), <https://advance.lexis.com/open/document/openwebdocview/Unif-Probate-Code-2-502/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A63KR-BF91-JJ6S-638C-00000-00&pdccomponentid=337395>; Gregory Levy, *Competency of a Witness to a Will*, 5 CONN. PROB. L.J. 369 (1989). For powers of attorney, see, e.g., NEW YORK CONSOLIDATED LAWS,

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GENERAL OBLIGATIONS, art. 5 § 1501B.1(b) (2022), <https://www.nysenate.gov/legislation/laws/GOB/5-1501B>. «

<sup>125</sup> On that, *see also supra* Chapter 1. «

<sup>126</sup> For instance, under German law, core authentication requirements are contained in BGB, *supra* note 56, §§ 2231 No. 1, 2276. «

<sup>127</sup> Technically, the donation aspect is not part of succession law but of donation law, *see, e.g.*, BGB, *supra* note 56, §§ 516 *et seq.* However, it is often conceptualized as “anticipated inheritance” and plays an important role in notarial practice, especially as regards real estates. «

<sup>128</sup> For instance, in Germany, renunciations to inheritance are possible, *see* BGB, *supra* note 56, § 2315, whereas in Brazil, these clauses are considered *pacta corvina*, and, therefore, invalid in most contexts. For a discussion in the context of prenuptial agreements under Brazilian law, *see* Giselda F. N. Hiro-naka & José F. Simão, *Direito das Sucessões: um recorte pretérito, um recorte excepcional e um recorte do futuro*, 151 REVISTA DO ADVOGADO 45, 54–55 (2021). «

<sup>129</sup> On inventories, *see supra* note 88. «

<sup>130</sup> On the allocation of competences between notaries and courts on that issue and on the increase in time-efficiency when attributing these competences to courts, *see* the study LURGER & STÖGER (ED.), *supra* note 4 (focusing on matters of succession law). «

<sup>131</sup> *See supra* Chapter 7. «

<sup>132</sup> *See supra* Chapter 5. «

<sup>133</sup> On the time dimension of inheritance law, *see* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 79 (Eduardo Nolla ed., James T. Schleifer tr., 2012) (1835) (“[...] in a sense, [the laws of inheritance] lay hold of generations before their birth.”). «

<sup>134</sup> On the public dimension of succession law, *see* notably TOCQUEVILLE, *supra* note 133, at 50–51, 77–85, especially 79 (“These laws [of inheritance] belong, it is true, to the civil order; but they should be placed at the head of all political institutions, for they have an incredible influence on the social state of peoples, political laws being just the expression of the social state.”). On that, *see generally* Max Lerner, *Tocqueville’s Democracy in America: Politics, Law, and the Elites*, 25 ANTIOCH REV. 543, 557–558 (1965/1966). «

<sup>135</sup> *See supra* Chapter 5. «

<sup>136</sup> On that, *see* Deutscher Notarverein, Schiedsgerichtshof – eine kurze Einführung (last visited April 11, 2024), <https://www.dnotv.de/services/schiedsgerichtshof/863-2/#:~:text=Mit%20dem%20Schieds%2D%20und%20Schlichtungsgerichtshof,und%20notfalls%20der%20Streitentscheidung%20vertrauen>. «

<sup>137</sup> In Germany, the drafting of prenuptial and divorce agreements requires notarial intervention according to BGB, *supra* note 56, §§ 1378(3), 1410, 1585c; VERSORGUNGSÄUSGLEICHSGESETZ [VERSÄUSGLG] [PENSION EQUALIZATION ACT], § 7(3) (Ger.). «

<sup>138</sup> For instance, this is the case in Brazil with regard to certain kinds of divorces, *see supra* note 91. «

<sup>139</sup> *See supra* note 93. «

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<sup>140</sup> For the requirement of notarial certification in case of changes of names, *see, e.g.*, BGB, *supra* note 56, § 1355(3). «

<sup>141</sup> *See supra* Chapter 7. «

<sup>142</sup> The particular vulnerability in family law settings is underlined by KNIEPER, *supra* note 2, at 118 (rec. 4). On the protective dimension of the notarial office in general, *see supra* Chapter 6. «

<sup>143</sup> *See supra* Chapter 5. «

<sup>144</sup> *See also* MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 54–55 (for real estate law), 65–66 (for company law), 115–156, 171 (in general in the context of the “Platform-Function”). Therefore, the classical handbooks on notarial law in Germany include sections on administrative law, *see, e.g.*, NORBERT FRENZ, CHRISTIAN HERTEL & PETER LIMMER (EDS.), WÜRZBURGER NOTARHANDBUCH (6th ed. 2021). «

<sup>145</sup> *See supra* Chapter 7. «

<sup>146</sup> As to the details, civil law countries differ. For instance, in Germany, as a matter of principle, powers of attorney do not require notarial intervention, *see* BGB, *supra* note 56, § 167(2). However, if land or commercial registers are to be changed, notarial certification is required, *see* GBO, *supra* note 108, § 29; HGB, *supra* note 56, § 12(1) s 2. The same is true for powers of attorney for founding a limited liability company, *see* GMBHG, *supra* note 56, § 2(2). Exceptionally, even authentication is required if the power of attorney is irrevocable, *see* Bundesgerichtshof [BGH] [Federal Court of Justice], July 11, 1952, 1952 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1210 (Ger.), or otherwise binding, *see* Reichsgericht [RG] [Imperial Court], March 29, 1922, 104 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 236, 237–238 (Ger.). In Brazil, the form requirements applicable to the transaction also apply to the power of attorney, *see* COD. CIV., *supra* note 88, art. 657. «

<sup>147</sup> *See supra* Chapters 1 & 2. «

<sup>148</sup> In Brazil, such a register already exists, *see* brasilregistros, Procuração Pública (last visited April 11, 2024), <https://www.brasilregistros.ch/pt/consular/procuracao>. In Germany, such a register is currently in planning, *see* Max Ehrl, *Digitale Transformation und ihre Herausforderungen*, BNotK AKTUELL, Juni 2023, at 4, 5, [https://www.bnok.de/fileadmin/user\\_upload\\_bnok/aufgaben\\_taetigkeiten/bnotk\\_aktuell/2023/BNotK\\_Aktuell\\_02\\_2023\\_Web.pdf](https://www.bnok.de/fileadmin/user_upload_bnok/aufgaben_taetigkeiten/bnotk_aktuell/2023/BNotK_Aktuell_02_2023_Web.pdf). «

<sup>149</sup> On agency costs, *see* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 334 (Adam Black, Charles Black & William Tait eds., 1846) (1776); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). *See generally* John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies, in The Anatomy of CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 29, 29–30 (Reinier Kraakman et al. eds., 3rd ed. 2017); FRANK H. EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 9–11 (1991). «

<sup>150</sup> Indeed, in Germany, unrestricted powers of attorney are possible and even replace the need for a tutor, *see supra* Chapter 10 (note 92). «

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<sup>151</sup> On their effect of relieving the judiciary, *see supra* Chapter 10. «

<sup>152</sup> On that, *see* C. A. Thibierge, *Le statut de la société étrangère*, in 1 LE STATUT DE L'ÉTRANGER ET LE MARCHÉ COMMUN 270, 353, 360–361 (57ème Congrès des Notaires de France 1959). *See generally* Jürgen Oechsler, *Vorbermerkung Artikel 1 SE-VO*, in 7 MÜNCHENER KOMMENTAR ZUM AKTIENRECHT: EUROPÄISCHES AKTIENRECHT rec. 1 (Wulf Goette, Mathias Habersack & Susanne Kalss eds., 5th ed. 2021). «

<sup>153</sup> *See* Council Regulation EC 2157/2001, 2001 O.J.E.C. (L 294/1) (STATUTE FOR A EUROPEAN COMPANY REGULATION). «

<sup>154</sup> Not surprisingly, handbooks on the law relevant for notaries in general include a chapter dedicated to issues of private international law, *see, e.g.*, FRENZ, HERTEL & LIMMER, *supra* note 143. «

<sup>155</sup> The above-mentioned handbooks (*see supra* note 154) also include information on foreign law. In addition, there are entire commentaries on foreign law regularly consulted by notaries, *see, e.g.*, the multi-volume commentary on international marriage and child custody law of 19,600 pages, by DIETER HENRICH, ANATOL DUTTA & HANS-GEORG EBERT (EDS.), INTERNATIONALES EHE- UND KINDSCHAFTSRECHT MIT STAATSANGEHÖRIGKEITSRECHT (7th ed. 2023). Moreover, the German Notary Institute (DNotI) provides legal support on difficult issues of international law, *see* Deutsches Notarinstitut, Das Kompetenzzentrum des deutschen Notariats (last visited April 11, 2024), <https://www.dnoti.de/>. «

<sup>156</sup> *See* Notaries of Europe, Providing Legal Certainty (last visited April 11, 2024), <https://www.notariesofeurope.eu/en/>. One important emanation of the Council of the Notaries of the European Union is the European Notarial Network (ENN), which is funded by the EU Commission and provides the possibility for notaries to acquire information through national contact points, *see* Notaries of Europe, European Notarial Network: A Notarial Network for Legal Practice (last visited April 11, 2024), <https://www.enn-rne.eu/>. It is the notarial equivalent of the European Judicial Network run by the EU Commission for the exchange between judges, *see* European Commission, European Judicial Network in civil and commercial matters (May 30, 2023), [https://e-justice.europa.eu/431/EN/about\\_the\\_network](https://e-justice.europa.eu/431/EN/about_the_network). «

<sup>157</sup> *See* International Union of Notaries, News (last visited April 11, 2024), [https://www.uinl.org/en\\_GB/home](https://www.uinl.org/en_GB/home). «

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In civil law countries, notaries play an essential role in the preventive administration of justice. This book aims at presenting their profession and the benefits they provide for contracting parties and society at large. It is based on insights from neoclassical and behavioral economics.