

# Endnotes

## Part I

<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 KNIEPER, 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 OSTERLEY, 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); KNIEPER, *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* KNIEPER, *supra* note 2, at 73 (rec. 1). ◀

<sup>6</sup>*See also* KNIEPER, *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*

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 ECONOMICA 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).

See also Martijn W. Hesselink, *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 of-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 “legislator 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. UNIV. 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.PA.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.bnotk.de/fileadmin/user\\_upload\\_bnotk/aufgaben\\_taeftigkeiten/bnotk\\_aktuell/2022/BNOTK\\_Aktuell\\_01\\_2022\\_Web.pdf](https://www.bnotk.de/fileadmin/user_upload_bnotk/aufgaben_taeftigkeiten/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

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 Danninger, *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 Stumpp & 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 Cheria, *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. ◀

<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

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>60</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>61</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>62</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>63</sup> See *infra* Chapters 13 & 14. ◀

<sup>64</sup> On the concept of cheapest cost avoider, see GUIDO CALABRESI, THE COSTS OF ACCIDENT: A LEGAL AND ECONOMIC ANALYSIS 311 (1970). ◀

<sup>65</sup> MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 99, 158–159, 169. ◀

<sup>66</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>67</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 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 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>68</sup> On the strict supervision of notaries, see MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 40. ◀

<sup>69</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>70</sup> See, e.g., GRUNDERWERBSTEUERGESETZ [GRÉSTG] [REAL ESTATE TRANSFER TAX ACT], § 18 (Ger.); ERBSCHAFTSTEUER- UND SCHENKUNGSTEUERGESETZ [ERBStG] [INHERITANCE TAX AND DONATION TAX ACT], § 34 (Ger.). See also

MURRAY & STÜRNER, GERMAN NOTARIES, *supra* note 2, at 98–99, 158–159, 169. ◀

<sup>71</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>72</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>73</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>74</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 KNIEPER, *supra* note 2, at 99 (rec. 8). ◀

<sup>75</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>76</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>77</sup> On distributive justice, see ARISTOTLE, NICOMACHEAN ETHICS 94–96 (1130b30–1131a1, 1131a10–1131b24) (Robert C Barlett & Susan D Collins trs. 2011). ◀

<sup>78</sup> On the degressive character of the notarial fee rates, see Jens Bormann, § 34, in GESETZ ÜBER KOSTEN DER FREIWILLIGEN GERICHTSBARKEIT FÜR GERICHTE UND NOTARE: KOMMENTAR rec. 2, 8 (Jens Bormann, Thomas Diehn & Klaus Sommerfeldt eds., 4th ed. 2021). On the diminishing marginal utility according to the Expected Utility Theory, see JOHN VON NEUMANN & OSKAR MORGENSTERN, 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>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 notary-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/Geschäftsverteilung/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 [BAYSCHLIG] [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; CODIGO 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 Nualis, TJ-PI autoriza processos extrajudiciais envolvendo menores ou incapazes, MUNDO NOTARIAL (Sept. 25, 2023), <http://mundonotarial.org/blog/?p=7047>. On no-

taries 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 [DNOTZ] 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.bnotk.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.bnotk.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/94392/83dc828423407787e34f21bdf0de6fa0/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, *WOHNUNGSEIGENTUMSGESETZ* [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 speciality 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 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS 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* [UMWGG] [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=CONSIL:ST\\_7966\\_2024\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL: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&pdcomponentid=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*,

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; VERSORGUNGSUNGLEICHGESETZ [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. ◀

<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 KNIPEPER, *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.bnotk.de/fileadmin/user\\_upload\\_bnotk/aufgaben\\_taeatigkeiten/bnotk\\_aktuell/2023/BNotK\\_Aktuell\\_02\\_2023\\_Web.pdf](https://www.bnotk.de/fileadmin/user_upload_bnotk/aufgaben_taeatigkeiten/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). ◀

<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.enr-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). «