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# EUROPEAN CIVIL LAW NOTARIES READY TO LAUNCH INTERNATIONAL DIGITAL DEEDS

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**This article is based upon the practice of French and Italian notaries, both belonging to the Latin notarial system. This model has experienced a strong increase in adoption the past few decades: it has been implemented in about eighty jurisdictions, covering about 56 per cent of the world population. Despite the 'Latin' label, this system is now to be found in parts of the world that do not share the Latin cultural and legal heritage: traditional areas (continental Europe, Latin America, French-speaking Africa), have now been joined by countries such as Japan, Russia, China and Indonesia. In some jurisdictions, such as in Florida, Public Notaries and Latin Notaries, also known as Civil Law Notaries, coexist. Even the London Scriveners, a small professional community with extremely interesting historical origins, are Civil Law Notaries.**

## **Defining characteristics of the Latin Notary**

The Civil Law notarial deed enjoys a special legal status, with a much higher probative value than the common law equivalent: it may be considered closer in value to judicial decisions. Such a status is only recognized because of the way a 'Latin' deed is drawn up. The notary listens to both parties, asks questions in order to clarify the details, and writes the document best suited to the parties' needs and requirements. However, the notary undertakes this task under his or her sole responsibility; in many ways the civil law notary acts at the same time as a lawyer, a conciliator and a judge. This can be considered quite an odd mix, almost blasphemous, at least from the common law point of view. It is technically possible to challenge a 'Latin' deed

in court, but this is almost unheard of.

Civil law notaries are usually recruited through a very selective process: in several countries, almost all candidates are already lawyers admitted to the bar or professional judges,<sup>1</sup> and many civil law notaries teach in law schools. Latin notaries seldom are unwise enough to put at risk their coveted status by breaching their duty of impartiality; this helps to explain how their role of counsel above the parties is well accepted and acknowledged in the culture (including the popular culture) of the countries in which they operate. Indeed, some states of the USA, such as Florida, California and Illinois, have passed legislation that prevents local public notaries from translating their qualification as Notario Público, as it would possibly confuse confident Spanish-speaking immigrants.<sup>2</sup>

Generally considered as a less dynamic organizational model than the Anglo-Saxon one, Latin notaries owe their expansion in the last decades to several factors. One of the most important is the reconstitution of civil law systems in Eastern Europe, where Latin notaries were swept away by Soviet rule. But the challenge is also brought with regard to efficiency and reliability. For example: the expression mortgage fraud is almost unknown in the countries of the Latin notarial world, where civil law notaries are in charge of the whole mortgage process. Fraud is virtually unknown because civil law notaries are personally liable for everything they do.

## **Responding to new technology**

By the 1990s, digital signatures seemed to be bound to play a major role in the on-line world. On the contrary, the technology has not been adopted by e-commerce and e-business to any significant degree. It may therefore seem quite odd, at first sight, that almost

<sup>1</sup> In some countries (France, for instance) the training of a notary, after Law School, is specialized, with no relationship with a career at the bar.

<sup>2</sup> New York State Attorney General Eliot Spitzer has

taken action on two occasions in relation to people falsely claiming to have qualifications they do not have, see [http://www.oag.state.ny.us/press/2004/jul/jul1a\\_04.html](http://www.oag.state.ny.us/press/2004/jul/jul1a_04.html) and [http://www.oag.state.ny.us/press/2006/apr/apro4c\\_06.html](http://www.oag.state.ny.us/press/2006/apr/apro4c_06.html). See also the

Federal Trade Commission web site press release dated October 6, 2004 'FTC Continues Crackdown on Scams Aimed at Hispanic Consumers' at <http://www.ftc.gov/opa/2004/10/heritagemonthsweep.htm>.

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everywhere in the world, Civil Law Notaries are now investing in the implementation of digital signature infrastructures. An evolution which can certainly be surprising: just a few years ago notaries felt almost threatened (also from a cultural point of view) by the progress of these technologies; today, in more than one country, they seem to be its keenest supporters.

This phenomenon has deep roots. The digital signature is a technique that offers much. It allows the production of documents that can be easily transmitted via the internet without significant risk of forgery. Anyone in the world who has a computer connected with the internet can verify, in just a few moments, the integrity of the document and the identity of the signer (more technically, the name stated in the digital certificate). The most common method of securing a digital signature is by retaining the digital signature on a smart card. If this method is chosen, then a reader is needed. The user must also contact a certification authority in order to be identified and certified; the secret codes must then be taken care of. Proper software must be bought and installed, both for the management of the smart cards and for the issuing and verification of signatures. As redundancy is an obvious need, the installation must be repeated in at least one other computer. Additional problems that will continue to increase the costs of having a digital signature include the need to renew the certification periodically, and the software will also need upgrading.

These are negligible impediments for those who make a professional use of the digital signature, and in fact French and Italian notaries have *all* implemented digital signatures in their office without any major shortcomings; the certification authority is, in both cases, the ruling organ of the association, the *Conseil Supérieur du Notariat* and the *Consiglio Nazionale del*

*Notariato* respectively.<sup>3</sup> But those who simply wish to shop on-line from time to time are highly unlikely to go through such a process to obtain a digital signature. This all the more so because easier instruments are available, first is the secure socket layer (SSL). This is based on technologies quite similar to those that activate the digital signature, but, unlike the latter, it does not require any effort from the user: the system is automatically implemented by the browser, and the user is simply informed, by messages appearing on the screen, of the activation of a protected connection.

SSL offers much less assurance than the digital signature used by civil law notaries: it does not identify the signer with any reasonable level of certainty, nor does it document the exchange of information in an objective manner. It just guarantees two things: the identity of the server with which the user is exchanging data (typically: the computer of the on-line shop) and a reasonable level of privacy. Very little indeed, but it seems to be enough to entice the average user into entering a credit card number, which seems to be the only thing the e-commerce world needs. The digital signature, after all, appears to be a burden that is not required.

Business across multi-national jurisdictions by large corporations, on the other hand, is carried out inside closed communities of professional operators, and their documents are not expected to be readable and verifiable from anyone (quite the opposite). Even home internet banking services can work without a fully-fledged digital signature, because they are bilateral relationships between the bank and the customer, on the basis of contractually agreed protocols. Nor does the digital signature seem to be better apt for important events in the life of a family. There are various reasons for this. First, it is very unusual for such events (the

<sup>3</sup> In Italy the deployment of the system was quite fast: it started in late October 2002 and was completed before the end of 2003. In fact, Companies' House adopted, almost overnight, a fully digital system, where not a single paper

application is allowed. Notaries had to quickly implement all the required technologies in their offices, and many thought that Latin Notaries' organisation was not advanced enough to cope with this evolution. They have been definitely

belied: Latin notaries were the first professionals in Italy to attain the 100 per cent paperless goal; even professional accountants lagged behind notaries.

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purchase of a car, for instance) to be carried out entirely on-line: a traditional exchange of documents will be a more obvious solution. Moreover, the digital signature lacks a significant characteristic of the traditional signature: the hand written signature is an immediate act, and the digital signature is more cumbersome. The user must create and save the file, start the software, find the smart card and load it into the computer, start the signature software, identify the proper file, and then execute it. Just one oversight, a slip, due perhaps to inexperience, and the wrong file might be signed. As the saying goes: *Grandma picks the bad password and loses her house.*<sup>4</sup> Last but not least, digital signature technology identifies, in an incredibly reliable way, the smart card employed for the signature. The central question is, how to tell that the smart card is indeed under the control of its apparent owner.

Any attempt to suggest a digital signature and the signature certified by a notary are the same, must therefore be rejected. There is no evidence of the fact that the content of the document matches the will of the party.<sup>5</sup> Any signed document is linked to an individual person on the basis of the identification performed by the certification authority. Even if such identification could be considered as reliable as the identification made by the notary (and this does not seem to be the case)<sup>6</sup> any fraud would have more serious consequences, as it would allow the production of an unlimited number of fictional documents.<sup>7</sup>

The reasons, outlined above, that keep the public at large from using the digital signature are exactly the same that make it a very useful instrument for the

notary's activity. This is no paradox.

In the first place, risks are reduced to a minimum. Smart cards are delivered by the Presidents of the local Notarial Chamber personally into the hands of each notary. The two people always personally know each other: the probability of a delivery into wrong hands is entirely theoretical. The notary is a professional (or rather: the professional *par excellence*) in the management of documents, and is perfectly able to master the signature system. Second, the specific advantages of the digital signature correspond to typical features of the activity of the civil law notary. The core of the 'Latin' deed is its probative value everywhere and in relation to everyone, and it is therefore impossible to rely on identification protocols operating within closed systems. The digital signature can be verified by anyone, and any internet user can verify the integrity of the document and of its true origin. It can be communicated over any kind of network, including an intrinsically unsafe one like the internet, as any attempt at counterfeiting would surface in the verification process, which is available to everybody over the internet, and will refuse verification if the notary's certificate has been revoked for any reason.

The digital signature thus appears to be an excellent tool for the transmission of notarial deeds. It is therefore far from surprising that notaries in France and Italy have currently completed the migration towards the digital technology, as far as the transmission of deeds to public offices is concerned. In Italy, where the process began in 2002, the elimination of paper is virtually total in the realm of real estate conveyances,

<sup>4</sup> This saying is reported, among others, by Brad Biddle, 'A short history of "digital signature" and "electronic signature" legislation', in Simson Garfinkel and Gene Spafford, *Web Security, Privacy And Commerce*, (O' Reilly Media; 2nd edition, 2002, Cambridge Massachusetts, USA).

<sup>5</sup> 'No form of electronic signature is capable of linking the use of a signature to a particular person. Unless the sending party confirms they sent the message or document with the signature attached, the recipient cannot determine whether the sending party authorized the use of the signature' Stephen Mason, *Electronic Signatures*

in Law, (LexisNexis Butterworths London 2003), 348. The opinion of the American Jane K. Winn, 'The Emperor's New Clothes: The Shocking Truth About Digital Signatures and Internet Commerce,' in *Idaho Law Review*, Volume 37, Issue 2 (2001), is not different: she deems impracticable any attempt to tie an identity described in a digital signature certificate with the intention of the identified party to be bound to the contents of an electronic record.

<sup>6</sup> VeriSign, the Californian company worldwide leader in this field, issued to the benefit of two impostors two certificates registered in the name of Microsoft, on 29th and 30th January 2001:

<http://www.microsoft.com/technet/security/bulletin/MS01-017.asp>

<sup>7</sup> According to Brad Biddle, 'Misplaced Priorities: The Utah Digital Signature Act and Liability Allocation in a Public Key Infrastructure', *San Diego Law Review*, 33, 1143, 1996, even the less ambitious attempt to compare the digital signature to the authentication of the American Notary Public would be inappropriate, although as it is known, this latter has no legal training and does not take any liability, except in very special cases, for the content of the document.

mortgages, incorporations and modification of companies. French notaries, in turn, have not lagged behind indeed, and thanks to the TELE@CTES procedure,<sup>8</sup> French real-estate documents are also digitally transmitted to public offices. A notarial deed is not required for incorporations in France, so French notaries have not implemented on-line procedures in that field. It should also be mentioned in this regard that, as the European Commission itself has recently remarked,<sup>9</sup> the system implemented by Spanish notaries permits the incorporation of a company in less than seventy-two hours;<sup>10</sup> the Italian system can be even faster.<sup>11</sup>

The use of the internet has changed people's behaviour. Now, every day Latin notaries send documents over the internet to an office that is just a few hundred meters from their building, yet it remains necessary to make use of paper to send a certified copy of a power of attorney across the oceans. However, the technical instruments that will permit trans-national use of digital signatures are now quite simple to use, and already widely available.

### Verifying the notarial digital signature

The notarial digital signature of a notary must be verifiable by the user of the document (normally another notary) in a simple and fast manner. The verification can be made through the internet by visiting the certifier's site, which is run by the professional notarial organization, and is equipped with state-of-the-art security techniques. This method meets specific needs. First, there is greater security as a result of the personal and direct relationship between the certifier and the certified notary. In order to allow the notarial deed to preserve its unique legal status, the verification process certifies the physical identity of the author, and their status as a civil law notary currently in office. For this purpose, most Latin notaries are adopting a radical but quite effective technique: the notarial professional organizations only certify notaries in office. If the signature of *Madame X* or of *Signor Y* is certified by the

*Conseil Supérieur* or, respectively, by the *Consiglio Nazionale*, it is accepted that Mrs X or Mr Y are civil law notaries fully in office. If their license is suspended or revoked, the signature will be respectively suspended or revoked, and the verification will be denied. The Council of the Notaries of the European Union is in the process of implementing an internet platform that will allow anyone to verify documents digitally signed by any European notary; in the meantime, on the site of the certifying authority of Italian notaries, digital notarial signatures from France and Spain can already be verified, albeit for test purposes only.<sup>12</sup>

### Some problems remain unsolved

In many countries, including France and Italy, notaries are prevented from using foreign documents (such as powers of attorney) unless they are duly legalized or provided with an Apostille.<sup>13</sup> In such cases, the international use of digitally signed documents shall have to wait for the deployment of an e-Apostille system.<sup>14</sup> However, in some cases the legalization of documents and Apostille has been abolished: between France and Italy, for example.<sup>15</sup> France and Italy are thus among the few countries in which notaries can rely on working digital signature infrastructures, and at the same time do not need electronic legalization or Apostilles.

Further, while the computer document (typically a power of attorney) can travel across the internet in safety, it will then be normally used for the execution of a traditional public deed on paper, and will be annexed to the paper version. This issue is more complex than it appears at first sight. The digital signature is, after all, a mathematical relation between the signature itself and the signed document.<sup>16</sup> If the document has been transferred to paper, such mathematical relation is lost. It is therefore no longer possible to verify the signature; this means that forgeries are not detectable any more, nor is it possible to identify the signer. In short: the printed document is no longer considered to be signed.<sup>17</sup> The solution to this problem must obviously be found in

<sup>8</sup> There is no information available on the internet in relation to this procedure.

<sup>9</sup> Report of the Commission dated 11.02.2004 to the European Council and Parliament on the implementation of the European Charter for Small Enterprises available on-line at [http://ec.europa.eu/enterprise/enterprise\\_policy/charter/2004\\_charter\\_docs/com\\_2004\\_64/com\\_64\\_en.pdf](http://ec.europa.eu/enterprise/enterprise_policy/charter/2004_charter_docs/com_2004_64/com_64_en.pdf), 50.

<sup>10</sup> <http://www.circe.es>.

<sup>11</sup> [http://www.notaassociati.it/demo\\_mexico/intro.htm](http://www.notaassociati.it/demo_mexico/intro.htm).

<sup>12</sup> <http://ca.notariato.it/internazionale/>. The system is expected to enter into full service in Spring 2007, although it was officially launched at the Franco-Italian annual civil law notaries' meeting in Sainte-Maxime, France, September 30, 2006

(<http://www.cfinot.eu>).

<sup>13</sup> The web site of The Hague Conference on Private International Law has an excellent Apostille section, currently available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=37](http://www.hcch.net/index_en.php?act=text.display&tid=37).

<sup>14</sup> Issuing of e-Apostilles does not need, for general consent, any amendment of the Hague convention: the topic has been discussed in two international fora, hosted by Hague Conference on Private International Law and National Notary Association in Las Vegas (May 30-31, 2005) and Washington (May 28, 2006).

<sup>15</sup> Convention of Brussels dated 25th May 1987, in force between Belgium, Denmark, France, Italy and Ireland. Several other treaties abolish the Apostille

on a bilateral basis: both France and Italy have such an agreement with Germany, for instance.

<sup>16</sup> Technically, the ratio is to be found between the signature and the document's hash, but this detail is irrelevant to our purposes.

<sup>17</sup> Nor the paper document can be possibly re-acquired (for example by way of a scanner): leaving aside any other consideration, just a tenth of millimetre misalignment is enough to produce a different file, which will fail the verification. Some quite interesting solutions have been proposed, such as Paper e-Sign, but none of them has acquired, to this date, the status of a widespread standard.

the rules of the notarial profession of each country, but one point should be beyond dispute. It is up to the notary, as a document specialist, to certify that the digital document, at the time of its use, had been digitally verified. Even though the printed version has lost its technical features, its legal value will be undiminished if a notary certifies that the printed text is a genuine copy of the digitally signed document.

On a personal note, the authors plan to write down our certifications with an old, trusted fountain pen. We so badly need a little revenge on our computers, from time to time ...

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