

ARTICLE:

# E-COMMERCE FOR NOTARIES IN ENGLAND & WALES

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**There are approximately 850 Notaries practising in England and Wales. This figure is relatively stable as new entrants to the profession tend to be similar in number to those retiring. They are qualified lawyers appointed by the Archbishop of Canterbury and are regulated by the Court of Faculties. They are required to be fully insured and comply with stringent rules relating to the conduct of their practice. Practising certificates are renewable annually.<sup>1</sup>**

Notaries in England and Wales operate under a system of common law, unlike most of their European colleagues who have civil law practices. Generally speaking, the role of the continental Notaries is more clearly defined and established than that of English Notaries. Not only have the acts of civil law Notaries enjoyed greater recognition within the legal systems in which they are made, but also, the status of the Notaries themselves as public officials working with state organizations has brought to their profession significant roles in the fields of property transactions, registration authorities for companies and in the area of fiscal administration.<sup>2</sup>

The following are a summary of the principal activities carried out by English Notaries.<sup>3</sup> However, it should be stressed that this is by no means an exhaustive list and the work of the English notary has been increasing steadily in recent years not least because of the appetite of the English to buy homes and conduct an increasing amount of their business abroad.

- a. Preparing and witnessing powers of attorney for use overseas.
- b. Dealing with purchase or sale of land and property abroad.
- c. Providing documents to deal with the administration

- d. Authenticating personal documents and information for immigration or emigration purposes, or to applications to marry or to work abroad.
- e. Authenticating company and business documents and transactions.

As has already been inferred above, whilst much of the work of the civil law Notary is for use in the home market, the same cannot be said for the English Notary. All Notaries are required to consider and advise on the requirements of the jurisdiction for which the documents are prepared or authenticated; not least of these is the requirement to consider what legalisation requirements might be appropriate. It is often necessary to obtain from the relevant Foreign Ministry (in the case of England and Wales, the Foreign and Commonwealth Office) and quite often from the nearest consulate of the receiving jurisdiction, a validation of the seal and signature of the Notary. If this step is overlooked, the documents may not be acceptable in the receiving country. Accordingly, as much of the work carried out by English Notaries is destined for overseas and not the domestic market, legalisation is a process commonly required. It is thought that a modernisation of the system of legalisation is long overdue, and much work is currently being done to streamline the process.<sup>4</sup>

## First steps towards e-commerce

The main purpose of this article is to describe what steps English Notaries have taken towards electronic sealing and signature of their acts or, as it is often termed, e-notarisation. This move from the paper based world into the electronic arena of the so called Cyber-Notary, requires the development of sophisticated and trustworthy electronic systems which will enable the

<sup>1</sup> See more about Notaries at <http://www.thenotariessociety.org.uk>.

<sup>2</sup> For a more detailed comparison of English and Civil law Notaries see N. P. Ready, *Brooke's Notary* (12th edn. Sweet & Maxwell) 6-08. Here and in sections 2-01 are examples of how a "Notary" has

been defined.

<sup>3</sup> <http://www.thenotariessociety.org.uk>.

<sup>4</sup> For a more detailed discussion on this topic see: <http://www.hcch.net/upload/forum2006/talpis.pps> #275,6,eNotarization and eApostilles. The British Institute of International and Comparative Law is

carrying out a project on behalf of the European Commission in relation to a review of the process of legalising documents. For further details see <http://www.biicl.org/legalisation>.

Notary to provide services in an electronic environment. A first step in defining a new role for Notaries was taken in August 1994 when the Information Security Committee of the American Bar Association, Section of Science and Technology, called for the development of a specialization to be known as the Cyber Notary.<sup>5</sup> Since then a number of events have occurred to move the profession tentatively onwards:

- a. The United Kingdom government enacted the Electronic Communications Act 2000 and issued the Electronic Signatures Regulations 2002 (Statutory Instrument 2002 No. 318) and the Electronic Commerce (EC Directive) Regulations 2002 (Statutory Instrument 2002 No. 2013). This law has provided the necessary legal framework for the recognition of electronic signatures and is similar to other legislation recently passed in many other countries to pave the way for electronic commerce.
- b. A company called the Cyber Notary Association (UK) Limited was formed in 1996, the main purpose of which is to create a body capable of licensing and administering the profession of the Cyber Notary.
- c. A pilot project was begun at the end of 2002 to develop and test software to enable Notaries to prepare and notarise electronic Notarial acts; assess the likely demand for such services, and the likely cost to implement the technology to all Notaries who wish to use it ("2002 Project").
- d. In the Summer of 2006 further development work was undertaken on behalf of the Notaries Society using different software and adopting a different approach to that used in 2002/3. This system, based around digitally signed PDFs was demonstrated to the profession at the Seminar of the Notaries Society held in Chester in September of 2006 ("2006 Project").
- e. As mentioned above, work also continues with the Hague Convention and the National Notary Association of America ("NNA") on the adoption of a system of electronic legalization, which is essential to ensure the smooth running of the office of the Cyber Notary. The NNA also continues to make good progress in evolving its own systems of electronic notarisation and electronic record keeping.<sup>6</sup>
- f. The United Kingdom Government has issued its implementation report on "Transformational Government - Enabled by Technology" and further

progress reports following that; one of its purposes being to make access to information easier for subjects and businesses.<sup>7</sup>

### The 2002 Project

In November 2002, an E-Commerce Pilot Project for Notaries in England and Wales was started in order to accelerate the development of Cyber-Notary services. The project was independently run through a company incorporated under the name Notaries For E Commerce ("NEC") for the sole purpose of completing the pilot, and was supported by members of the Notaries Society, the Society of Scrivener Notaries of London and Notaries in the Channel Islands. A contract was signed with Software Box Limited to provide certification authority (CA) services. Software Box installed and managed a Baltimore uni-cert CA within a secure environment using PKI (Public Key Infrastructure) technology. The managed CA service was designed to register Notaries, issue X.509 certificates, revoke certificates and cross certify one with the other. NEC retained all procedural controls of the CA operation. Software Box provided dial-in access to the CA service for a number of individual Notaries, selected from across the country. Software Box provided training and user support.

### Findings from the 2002 Project<sup>8</sup>

The pilot project demonstrated that e-document technologies are well-suited for Notary services. The Notaries who participated in the project had no difficulty conducting Notarial business electronically, and there was widespread consensus that e-Notary services should be developed for future use. NEC also discovered that the basic technology for e-Notary services already exists today. Little customization or development is needed to modify existing e-document services for Notarial use. Starting with the base systems developed by NEC, Notaries in England and Wales should be able to engage in e-services at a reasonable cost and with minimal training. Secure software and secure servers give Notaries the almost immediate ability to prepare, authenticate and dispatch private and commercial documents electronically, with the infrastructure installed with relative ease.

The main obstacle to e-Notary services is not technological; rather, it is the fact that outside of the

<sup>5</sup> For the text of the resolution and a discussion of public key cryptography and some developments in the field of the Cyber Notary up to 2001, see N. P. Ready, *Brooke's Notary*, Appendix 5.

<sup>6</sup> <http://www.hcch.net/upload/forum2006/>

[hansberger1.pps#358,8](http://www.hcch.net/upload/forum/richard_hansberger1.pps#358,8), [www.ensadmin.org](http://www.ensadmin.org); [http://www.hcch.net/upload/forum/richard\\_hansberger\\_e-registers](http://www.hcch.net/upload/forum/richard_hansberger_e-registers).

<sup>7</sup> See the response of the Notaries Society to the Government's review at <http://www.cio.gov.uk/>

[documents/consult\\_responses/TheNotariesSociety.pdf](http://www.notaries.org.uk/page73/page1/page1.html).

<sup>8</sup> A copy of the report of the 2002 Project can be viewed at <http://www.notaries.org.uk/page73/page1/page1.html>

profession there is a lack of understanding about what Notaries do. As a result, e-document services have not been developed specifically for Notaries. There is also an erroneous belief that e-Notary services would be less secure than their paper-based counterparts. Additionally, any departure from the well-established processes and procedures used by Notaries will always need some level of persuasion. The advantage with e-document and e-signing solutions lies not only in their simplicity, but also in their ability to integrate very closely with the current physical, day-to-day practices and procedures that Notaries already follow.

E-Notary services also face a legal obstacle. Where legalization requires paper documents and manuscript signatures, either the system of legalisation will need to change, or the offices that deal with legalisation will themselves need to embrace e-commerce. Another problem is that the typical Notary lacks the technological expertise and has limited technical support at his or her disposal to make the utilization of e-certification technologies feasible. Too many of the available solutions are better suited to large organizations with dedicated information technology (IT) staffs than to smaller offices with few IT resources. Fortunately, new technologies intended for small- and medium-sized businesses work well in a typical Notary's office.

A further hindrance is that few governments have adopted e-communications for official documents. Governments tend to believe that communications on the open internet cannot be regarded as secure, and where these systems are adopted, they should only be relied on internally. However, Notary services are often used as a means of transferring official documents from one government (or government agency) to another. If one party does not accept the e-documents, neither party can rely on them for a transaction. Intra-governmental documentation may be similarly hindered, with different agencies having varying degrees of criteria for accepting e-documents.

### **The 2006 Project**

With major advancements in applicable technology and the availability of mainstream software at reduced cost (compared with five years earlier), a new project was undertaken in 2006 culminating in a practical demonstration to members of the profession. The programme was evolved through meetings between The Notaries Society and one of Adobe's CDS (Certified Document Services) partners utilizing Adobe Acrobat pdf to create a Certified Document Service for Notaries.

The new project differed from the previous one in a number of respects:

- a. Although from a technical point of view, it is possible to record the electronic signatures of all those appearing before the Notary (and of course to take web cam images, fingerprints, iris scans and other forms of bio-metric identification), the need always for personal appearance and identification means that it is not necessary to dispense with manual signatures for the parties and their witnesses. These leave a permanent trace of the appearers' signature and allow the Notary, should he or she wish, to retain an original paper copy of the document(s) in his or her records. Also, the physical act of signing is far more indicative of an intention to be bound than a key stroke.
- b. It is the ability of the Notary to endorse their electronic seal and signature onto an electronic copy (pdf) of the document that is the solution to the success of this service. The use of Adobe Acrobat pdf means that the technology is simple to use and widely available.
- c. The ability to scan the signed documents executed by the appearers produces a digital copy in a standard document format using a high security and low cost solution. A record of the documents is automatically stored in the Notary's files and may be backed up in the usual way.
- d. Through the use of this system, the recipient is confident that he or she can receive the notarised documents speedily, securely and without alteration. Any alteration to the documents after the Notary has endorsed his or her seal and signature will result in the document becoming unusable.
- e. It appears that this type of certified document service is likely to provide the important essentials for successful transmission of notarised documents including: author validation by trusted third party; integrity of the documents; revocation facilities; revision control with time stamping and automatic archiving and record keeping with audit trail.

Whilst this system has yet to be tested by Notaries in the office, there is every indication that it will prove a very useful tool for Notaries, and the intention is to undertake practical demonstrations and training in the office environment as soon as possible. The adoption of a similar system by SAFE (Signatures and Authentication for Everyone) for the Pharmaceutical

industry in the United States is an encouraging sign of its integrity and reliability.<sup>9</sup>

### Possible Notarial applications

Many Notaries already rely upon the internet and electronic means of communication to go about their daily business – as does much of society. As e-commerce becomes the norm rather than the exception (and this is likely to happen through the need to find more economical ways of moving high value, high security documents around the globe and because governments increasingly legislate in this direction), digital signatures and electronic encryption and transmission of documents will be expected. Eventually, the current practice of transmitting by post and courier physical documents with manuscript signatures and sealed with wafers and ribbon will perhaps begin to appear a rather antiquated practice.

During the course of the last few years, Notaries have considered a number of areas where they could provide additional services electronically. These are principally, although not exclusively, in areas where Notarial skills of identification and authentication may be seen as a way of reducing fraud. The Land Registry, the Financial Services Authority, and the Probate Registry have all expressed an interest in the development of official e-commerce technologies, and all could all benefit from e-Notary services.

The Land Registry wishes to develop a process under which all applications for dealings in registered land may be submitted electronically by solicitors, notaries, licensed conveyancers and other authorised persons who have Service Agreements in place to obtain access to the Land Registry's electronic network. However, the Land Registry is obliged to provide access to subjects who wish to do their own conveyancing. Private conveyancers obtaining access to the network who have not been subjected to the identification and money laundering requirements could expose the conveyancing system to possible fraud. This seems an ideal situation for a Notary to provide a service between the Land Registry and the private applicant to ensure checks on identity and proper authentication are carried out.

The Financial Services Authority is extending its supervisory involvement to an increasingly wide area of commerce including banks, financial services

intermediaries, and now insurance companies and brokers. Applications for licenses to conduct business are becoming increasingly complex and the production of photocopied passports, driving licenses and utility accounts are becoming common-place. A single endorsement by a Notary on a relevant application form where the necessary identity checks have been made could speed up the process and make the identification process more reliable.

Some Notaries have identified problems which may exist in relation to fraudulent applications for grants of probate and letters of administration. There are many such applications made by private individuals, but it is considered that the scope for fraudulent activity is considerable, because insufficient checks are made into the identity and capacity of those making the applications and into the genuineness of wills and other documents offered as evidence of the applicant's right to be appointed. Checks of the kind customarily made by Notaries in the course of their work could help reduce the incidence of such fraud by ensuring that all such applications are endorsed by a Notary before being submitted to the Probate Registry.

These are just a few examples of services that could be offered by Notaries, providing them with a wider offering which could be further enhanced by a certified document service. Notaries look forward to adopting a safe and secure method of signature verification and document transmission and pursuing its latest project to fruition by enabling Notaries around the country to offer an electronic service to all who can benefit from it.

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<sup>9</sup> SAFE-BioPharma Association is a non-profit association that manages the SAFE digital identity and signature standard for the pharmaceutical industries. The SAFE standard provides a secure, legally enforceable, and regulatory compliant way

to provide identity verification, non repudiation, and content integrity for electronically signed documents. To become certified by SAFE, products and solutions must successfully pass product certification testing by an independent laboratory

accredited by SAFE-BioPharma Association. For more information, visit <http://www.safe-biopharma.org>.