

# XXVI INTERNATIONAL CONGRESS OF NOTARIES

## Marrakech, October 2010

### THEME II

**"The use of the notarial act in the security of investments. In particular, its reliability for public registers and its executory force"**

### CONCLUSIONS

The Theme II Commission at the Congress in Marrakech 2010, the title of which is:

"The use of the notarial act in the security of investments. In particular, its reliability for public registers and its executory force"

Presents the following conclusions:

1. The theme in question may be considered the ideal continuation of theme I of the International Congress in Madrid held in 2007, the title of which was "The notarial act as an instrument for the development of society", with the peculiarity that this time the analysis is focused on the importance of the notarial act for the security of investments, taking into account its reliability for public registers and enforceability.

2. "**Investing**" means using capital to make a profit. However, only after having reached a balance between profit and risk will an investor decide to invest, as risks are a cause for potential losses. The **goal of our analysis**, therefore, is to prove that through its enforceability and reliability for public registers, the notarial act helps control and curb legal risks, thus facilitating the protection of rights and guaranteeing security in the circulation of rights and property and in the creation of mortgages.

3. In civil law countries, the notary:

. **as a delegatee of public powers**, on the one hand, guarantees observance of legality, by taking on the role of *gatekeeper*, while on the other hand, carries out the preventive trial-like transactions outsourced to him, that can offer the contracting parties the same guarantees as a trial, attribute authenticity to his acts, assure their storage and give them probative force and enforceability;

. **as an independent self-employed professional and expert jurist**, has the confidence of the contracting parties and the State and plays the role of the upholder of the interests of privates, through a "notarial procedure" which involves listening to clients, offering impartial advise, making adjustments, providing information, discussion and impartialness, and actively dealing with all the fulfilments prior to and after acts.

4. The Latin-type Notariat is a system that affords confidence, recognised and reiterated on a daily basis, and through the generations this confidence has gained and become the faithful reflection of a social, cultural and philosophical vision and a response to a social need.

5. In Common Law systems, if the debtor fails to pay, the creditor has to go to court to obtain an enforceable order.

In *Civil Law* countries, the guarantees of reliability and legality of a notarial act fully fulfil the function of preventing disputes typical of the Latin-type notary. Moreover, these guarantees, which are the product of a "notarial procedure" capable of affording the same guarantees as a trial, legitimate the notarial act not only as evidence, but also as a title empowering to levy execution. In other words, it is tantamount to a ruling ordering a party to fulfil his or her duties, thus avoiding that the creditor go to court to ascertain his or her right and the ensuing judicial creation of an enforcement order.

6. It may be held that the utility of a public register is proportional to the reliability of the data published. Especially on depersonalised markets, the identification and traceability of the data of persons and things is crucial as are the effects of title documents vis-à-vis third parties and/or corporate matters and/or other acts, facts or states concerning persons that may be legally relevant vis-à-vis third parties. **This applies especially to the property market** where, in order to achieve the aforementioned goals, it is necessary to publish title documents in public

registers, where legal matters are entered in a sequence which, only through the consistency of the previous title or entry with the subsequent title or entry, can produce effects vis-à-vis third parties and only through the legality of titles can it legitimize rights-holders.

## 7. “Public registers” exist in all legal systems.

For example, in the field of property:

In common law countries, these lack prior public specialised verification of entries.

The data contained in them do not offer adequate guarantees of thoroughness and reliability and cases of fraud are frequent.

This is why the use of title insurance is widespread.

In civil law countries, there is prior verification of legality, performed by the notary when drawing up the act as well as verification carried out by the agency to which the State has assigned the task of keeping the register, at the time of registration.

Only a disclosure system based on acts that guarantee the utmost reliability of the data entered – especially the certainty of dates, the identities of the parties, the existence of their will, their legitimacy to act and the legality of the contents - offers guarantees concerning the existence and ownership of rights, prevents property-related disputes and makes title insurance useless.

**8.** The characteristics of the notarial act as a privileged form of evidence and an enforcement order, on the one hand, and as an instrument of reliability for public registers, on the other, have been examined from the standpoint of the economic analysis of law and the following has emerged:

. the enforceability of the notarial act, on the one hand, eases credit collection, helps save time, costs and energy, reduces losses and/or delays in the collection of financial flows; while on the other hand, it favours the use of bank loans, thus reducing the possibility that debtors fail to fulfil their duties. All this at a very low cost for creditors/investors and with the production of positive externalities for the community, thanks to the reduced number of trials, which in turn will relieve law-

court congestion and help save costs; it therefore protects credit and thus economic transactions;

. the reliability of a public register is an essential economic value that leads to positive externalities for individuals and the community alike. In the field of property, for example, this reliability favours the secure circulation of property and the use of bank loans through security on mortgage, thus reducing the risk of frauds to zero, including internet frauds, and making title insurance useless. Moreover, title insurance does not allow you to obtain what you would really like to achieve through negotiations, but in the best of cases only the equivalent value, without even taking into account the non-rational and strictly personal element, present in any legal activity, such as affective and use-related value.

9. All in all, the notarial institution has confirmed that it upholds the values of the protection of citizens and the public interest, thus allowing both the State and individuals to save costs; it contributes directly to the assessment of investment-related risks and has a positive effect on the expectations of investors, encouraging them to invest, even long-term, and contributing to the growth of the economy.

### **Having acknowledged the above, the Commission hopes that:**

#### **. regarding public registers:**

. disclosure systems are computer-based, since this on the one hand guarantees greater security and speed in data transmission and, on the other, reduces the risk of bureaucratic snags and administrative disorganisation significantly;

. in order to assure the reliability of the data entered, each civil law system should limit access to public registers only to authentic acts and judicial measures;

. in order to guarantee the prompter update of public registers, and avoid useless and costly verification by the agency in charge of keeping registers, each legal system - to the extent to which does not influence the principles regulating the conveyance of property - grant notaries direct access to public registers in order to enter data concerning acts drawn up or at any rate establish that the verification of acts by the agency in charge of keeping registers be limited to merely formal aspects, leaving it to notaries – as is the case in the countries of the International Union of Notaries – to check legality when drawing up acts.

**. regarding enforcement orders:**

- . the enforceability of the notarial act be recognised even in those countries where it is not recognised today;
- . the enforceability of the notarial act not be limited to money-related duties, but may be extended to other types of duties;
- . the system established by the Community Regulation introducing the “European enforcement order for uncontested claims” (EC Regulation no. 805/2004), may soon be extended through appropriate international conventions with other States, and this in order to favour transnational investments.

**lastly:**

- . that the International Union of Notaries collect statistics to develop an index of judicial security.

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**Given all the above and following the recent financial crisis, the Commission hopes the notarial act may be confirmed as an instrument upholding the values of the protection of citizens and the public interest, favouring the reliability of the economic and legal system of a country and offering guarantees and security to professional investors.**