

The Role of Notaries in Real Estate Transactions - Current Challenges and Perspective on the Future

Peter L. Murray

For Delivery at the 20th Conference of European Civil-Law Notaries

Salzburg, Austria

April 25, 2008

Mr. President, distinguished guests of honor, participants in the 20th Conference of European Civil Law Notaries, ladies and gentlemen:

It is a pleasure and an honor to be invited to address your distinguished gathering on the topic of the public notary as real estate conveyancer, current challenges and a glimpse into the future. I hope you will also forgive me, as a comparative lawyer of common law background, for any unintentional errors or omissions in my discussion and analysis of the finer points and intricacies of one of the most ancient and honorable institutions of the civil law world,

For many centuries the public notary has been a prominent element of the legal systems of most of the countries of the civil law world. Tracing its origins to Roman Law, the civil law notariat has developed its own national forms over the last two Millenia. In almost every notarial jurisdiction, however, the effectuation of transfers of real estate has remained a core notarial competence, and in most cases an exclusive one. In most jurisdictions instruments of transfer of real estate have been defined as “public documents” that can only be generated and authenticated by public officials. The notary has been protected in the role as exclusive conveyancer by status as a

public official capable of generating and authenticating public documents as well as by a network of other laws, regulations and practices which define professional status and regulate professional performance.

For many generations the role of notaries as the primary or exclusive conveyancers of real estate was deemed secure. In most civil law countries, where notaries had handled real estate transactions for hundreds of years, it was hard to imagine that real estate conveyancing could be performed in any other way.

All of this changed with the recent interest of the European Union in the free professions (*freie Berufe*) and in reducing local regulations that are seen to impede opportunities for Europeans to participate in a Europe-wide market for professional services. All forms of local and national licensing and regulation of professional activities have come under suspicion. Notaries, as highly regulated professional practitioners clothed in state power and exercising exclusive competencies have been a big target. The financial success and security long enjoyed by many European notaries have made their activities even more interesting to a European Commission bent on reforming and modernizing the European economy.

Rather than directly address the institutional status of notaries in the various European jurisdictions, the European Commission has chosen to look at the functions of the notaries that affect European commerce, notably the function of real estate conveyancing. Is the function of real estate conveyancing most economically performed by highly regulated notaries with exclusive competency? Or can the free market offer conveyancing services at a lower cost to all concerned? Will a comparative study of the

conveyancing function in both notarial and non notarial Member States show that the professional regulations under which notaries perform these services are more designed to protect a cosy and well paid profession than to insure that the public is served efficiently and at the lowest possible cost?

Over the past three years a group of academics headquartered at the Centre of European Law and Politics, University of Bremen (ZERP) undertook a comparative economically-oriented study of real estate conveyancing services in virtually all of the European Member States. This ambitious undertaking sought to compare economic efficiency of Member States' systems of real estate conveyancing, with particular focus on the role and cost of real estate conveyancing professionals, in most cases notaries. Civil law notaries are involved to a greater or less extent in real estate conveyancing services in 21 of the 27 European Member States. The investigators in the ZERP study attempted to collect a vast amount of data deemed relevant to the economic performance of real estate conveyancers and to make analyses on a number of axes. After long delay, the final report of the ZERP study was released early this year. Not surprisingly its conclusions were that real estate conveyancing can be performed at lower cost by non-jurist real estate brokers as in Sweden and even by private lawyers as in England, and that the notarial model is a relatively expensive real estate conveyancing system. .

Concerned that the EU Commission comparative study might be somewhat predisposed against the notarial model for real estate conveyancing, last year the Conseil Notaires Union Europeene (CNUE) commissioned an independent

comparative law analysis of the differing real estate conveyancing systems of a small number of European Member States in an effort to develop some objective data on the relative costs and other relevant attributes of these systems that could be considered by the Commission and other interested parties as a complement to the ZERP study. Your speaker, as a comparative law academic with a perspective from wholly outside the legal institutions of the European Union, was asked to conduct this study.

Although various variations of notarial land transfer are the dominant forms of conveyancing in the EU, there are also alternatives, some of which attracted the attention of friends of deregulation and privatization. In England and Ireland land transfers are handled by private solicitors acting in behalf of parties to the transaction. The Nordic countries exhibit a variety of land conveyancing institutions. In Sweden real estate brokers do almost all of the conveyancing. In Denmark private lawyers are involved.

The ZERP study gave significant positive comment to the English and the Swedish systems. In the relatively deregulated English system, parties to real estate transactions can choose from a large number of solicitors or even non-lawyer registered land conveyancers to represent their interests in real estate transactions. The theory is that competition among these professionals depresses fees to a level where the cost of two lawyers each representing one party would be no more than the cost for a single neutral conveyancer in some notarial jurisdictions.

To some fans of deregulation the Swedish system looked even better. There land conveyancing is done without jurists at all. Real estate brokers handle the matter

for all parties, and the cost is included in the brokerage commission. What could be better?

The CNUE study concentrated in depth on 5 European Member States, France and Germany, as the largest notarial jurisdictions, Estonia as a new small Member State, England, as the leading EU common law jurisdiction, and Sweden, as the leading Nordic-law Member State with its broker-operated land conveyancing system. Two jurisdictions of the United States were included to provide an outside perspective from the land of deregulation.

It should be noted that the CNUE study is a more or less traditional comparative law study, and not a “law and economics” study. The investigator is not an economist. Comparative costs are analyzed as the basis for policy determinations, but no particular market or macro-economic analysis has been attempted.

The investigator, who has some pre-academic background and experience with real estate law and land conveyancing in the United States, made visits to all of the major jurisdictions under study in an effort to get as immediate an impression of the land conveyancing process as feasible, and studied literature, statistical data, and national reports provided by research assistants and professional organizations in the various countries under study. Central to the project was the estimation of conveyancing costs for several hypothetical transactions in each jurisdiction. The total cost to both parties to effectuate a sale of a lot or small house for 100,000 Euro, sale of a house for 250,000 Euro, sale of a larger house for 500,000 Euro, and sale of a large residential property for 1,000,000 Euro, with and without purchase money mortgage,

were estimated for each jurisdiction. The features of the transaction and the role of the transaction professionals were also analyzed from the standpoint of traditional policy criteria such as resource efficiency, protection of party expectations, and insuring informed and untrammelled decision-making by transaction participants.

The results of the study were not surprising to notaries, but may have been somewhat startling to the champions of deregulation. In most smaller and average value residential transactions purchasers and sellers seem to be best and most economically served by public notaries. If we look at Table C-1 **[Project Slide]** we see that the costs expended by transaction participants for conveyancing services in the 100,000 Euro, 250,000 Euro transaction and the 500,000 Euro transaction were lowest in Estonia, but very significantly, also very low in Germany, and not really higher in France in comparison with the costs for such services in the “less regulated” England and the United States jurisdictions.

On the other hand, the notarial fee structure based on transaction value tended to result in higher costs to participants in high-value transactions. The actual work in performing a real estate transfer is not much different if the amount at stake is 100,000 Euro or 1,000,000 Euro, and cost estimates for transactions in England and the US reflect this reality. In the notarial jurisdictions there is an apparent up-charge on large transactions in order to balance out the more modest fees charged to parties buying and selling properties of lower and average value.

Sweden turned out to be a special case. The fact that conveyancing is part of the broker function there might lead to the misapprehension that these services are

rendered in Sweden “for free”. This is clearly not the case. “There is no free lunch.” The question is how to determine how the brokers are compensated for their conveyancing function and how that cost is borne by the buyers and sellers.

In studying the Swedish situation, one fact jumped out. In most of the other countries under consideration, only 50-70% of transactions involve the use of real estate brokers. Many sales are negotiated directly by the parties, who then go to conveyancing professionals for the actual transfers. In Sweden, on the other hand, virtually all sales of residential real estate involve the services of brokers, in some cases at the recommendation of financing banks. In the absence of any other likely cause, it seems probable that Swedish brokers use their function as conveyancers to garner brokerage commissions in many transactions where traditional brokerage is not needed. Thus, while Swedish buyers and sellers who negotiate their deals through brokers get their conveyancing done for the brokerage commissions, those who negotiate their own deals with each other have to pay full brokerage commissions just to get the properties transferred.

A crude approximation of the cost of the conveyancing function can be made by taking an estimate of the proportion of brokered transactions in excess of the average in the other EU Member States in which brokerage is separated from conveyancing, multiplying it by the average brokerage commission, and spreading the resulting estimate of the total amount of brokerage commissions paid for conveyancing services over the entire class of real estate transactions. It is not surprising that the resulting figure is more or less in line with conveyancing costs in other EU Member States.

Careful study of the conveyancing function and institutions in the various jurisdictions under consideration yielded some important observations about comparative quality of services rendered and comparative integrity of the various systems.

Quality of advice to participants and problem-free execution of conveyances appear to be high and relatively uniform in the three notarial jurisdictions under study. The combination of independence, impartiality, and skill and training seems to result in smooth effectuation of real estate transactions while assuring that participants are informed and advised of the legal ramifications of what is going on.

On the other hand, in the non-notarial jurisdictions, the role of the conveyancer as entrepreneur may have some adverse impact on the quality and efficiency of service to the participants. In Sweden brokers who act as conveyancers have serious conflicts of interest that very likely affects their ability to give fair and accurate advice to all transaction participants. They are hired by the seller and their compensation is only paid if the transaction closes. These factors surely affect their conduct in all respects, including the advice they give incident to the transaction. By the same token, the modest educational requirements for licensure as a real estate broker may not adequately equip the brokers to give comprehensive advice of high quality

In England buyers and sellers of small and averaged size parcels must pay a high price for individual representation. Frequently the buyer and the financing bank are represented by the same solicitor, who may be more solicitous of the interests of the bank, as a “repeat player”, than of the individual buyer. Many purchases and sales of

residential real estate in England take place in “chain transactions”, where several transactions are mutually dependent on each other. The English land register system, which is just now becoming universal in England and Wales does not provide the same degree of positive protection during a conveyance as, for example, the German system. These factors may be responsible for the high proportion (approximately 30%) transactions that fail and the relatively high level of consumer dissatisfaction with real estate conveyancing services in England.

In the United States, it turns out that buyers and sellers of lower and average value properties frequently do not generally receive any independent legal advice. In many, if not most, cases conveyancing is done by title companies or lawyers who primarily represents the lenders. The costs for professional services are borne by the parties, but the benefit of the professional’s activity flows mainly to the mortgage providers. One wonders whether the current sub-prime mortgage crisis in the United States might have been prevented or minimized had buyers been given better advice about the likely future magnitude and consequences of the obligations they were assuming.

Another important factor in the comparison of real estate conveyancing services is the quality and integrity of the public system for maintenance and perfection of title to real estate. Again, it appeared that Estonia, France and Germany maintain land register systems which give a high level of protection to transaction participants and provide a high level of certainty about interests in and encumbrances on real estate. In particular, the practice of entering cautionary notations (Vormerkungen) in the German

land register system provides positive protection against intervening interests or other out-conveyances during transaction completion. Similar protection is available in France and Estonia, although it is not as frequently used.

The systems and practices in Sweden, England and the United States range from somewhat less rigorous in Sweden to seriously deficient and backward in the United States. In Sweden the infrequency of preliminary register notations combined with sometimes poor quality of registration submissions causes problems, excess costs and delay in the completion of registered land transactions. The English land register system has reached full implementation only in the last few years. It is relatively porous in that registered titles may be subject to unregistered intervening interests and uncertainty as to exact land boundaries. While a buyer may obtain some protection through a priority notation during transaction completion, completion can be delayed beyond the priority period leaving the buyer vulnerable to intervening interests or even seller fraud.

In the United States land registration never took hold, so that land titles are based on instruments of conveyance recorded seriatim in local public registries. Title insurance now takes the place of individual title certifications based on title searches of these registries. While title insurance ultimately may provide financial indemnity, it cannot guarantee actual certainty of ownership of the land in the same way as does a comprehensive registry system. The need of each buyer to obtain title insurance, at least for his mortgagee, results in massive amounts of unnecessary cost to transaction participants. Finally, title insurance is not sold on an open or free market, but is typically

provided by the conveyancer (lawyer or title company) nominated by the mortgagee. Undisclosed commissions of up to 80% of buyer-paid premiums are typically paid to the lender's conveyancer, adding to the conflict of entrepreneurial interest.

One of the most salient facts to emerge in this study is the potential of electronic conveyancing to bring additional cost savings and transaction certainty to future real estate transactions. Many costs and problems in real estate transfer are related to the delay between the point in time when the parties have decided to buy and sell and the point of actual transfer of title and payment of the purchase price. Reduction in this time interval, particularly in delay attributed to communication, processing of filings and registrations, and the like, can bring economies and greater certainty to real estate sales and purchases.

Electronic filing and communications have tremendous potential in this area. In all of the European Member States land registers are becoming electronically accessible for search purposes. What used to require a visit to a public office and physical review of filed paper records now can be done in many Member States instantly from any computer terminal. This is obviously a great step forward.

From electronic access to land registers for search purposes, the next step toward reduction of cost and delay in the operation of a land registry system is electronic communication of filings. Most of the registry systems in the Member States included in the study are at various stages in the implementation of systems by which some or all land registry submissions are made electronically. Problems of providing

suitable safeguards against forgery and fraud are manageable, and before long it seems likely that all, or most submissions to land registries will be made electronically.

These first two steps toward e-conveyancing, electronic register search access and electronic document submission, appear to be taking place more or less simultaneously among the various notarial and non-notarial jurisdictions under study, with the possible exception of the United States, which lags. The big challenge for e-conveyancing, however, is the third step. At least some of the delay in real estate conveyancing under a real estate registry system comes from the time it takes for public registry officials to examine instruments conveying property or creating property interests, make sure that they are unambiguous and in conformity with the requirements of law and then enter them in the register. This kind of human function delay is inherent in registry systems regardless of whether the instruments of conveyance arrive at the registry by mail or electronically. As long as each transaction requires the deliberate attention of a human being at the time of submission for registration there is a built-in limitation on speed and efficiency. Of course delays in registration of transactions arising from inadequate human resources at the registry can be mitigated by adding personnel. However any significant human intervention causes appreciable delays that become noticeable in a world that operates otherwise at electronic speed.

On the other hand, the integrity of any public land registry system and the titles registered by that system depends on safeguards designed to make sure of the authenticity and legal correctness of all instruments and conveyances registered. The role of public land registry officials is not trivial. At present their examination of

instruments submitted for registration and their exclusive access to the system to effect title re-registration or notations of liens is an important safeguard of the integrity of the system. It is scarcely conceivable that access to the title registration system could be given to the public or any significant segment of the public without jeopardizing the integrity of the system and public and lender confidence in real estate titles.

The ultimate in real estate land registry transactions would be a system under which land re-registrations could be instantly and electronically effected by the transaction participants at the time the transaction is closed and the money is paid. All delays associated with registry processing of submissions, and the associated risks and costs would be eliminated. A new level of certainty would be possible, and various patches and interim safeguards presently employed could be dispensed with. The problem is, how could the safeguards presently provided by the examination by public officials of registry submissions and limitation of access to change the registry to such officials be otherwise provided?

A system permitting title re-registrations to be remotely effected by conveyancers would require that the control function presently performed by registry officials be performed at the time the instrument is submitted, presumably by the submitting conveyancer. Here is where the future of the notarial systems of real estate transfer appear particularly bright. In most notarial jurisdictions notaries are already clothed with important public functions and enjoy status as quasi-public officials. They have specialized expertise in real estate. They are of manageable numbers. They are subject to strict regulation and discipline. It is quite conceivable that notaries

could exercise the additional responsibility to insure the authenticity, regularity and accuracy of real estate conveyances and could be given access to the public registry to effect re-registrations without fatally compromising the integrity of the system. They are fully professionally, legally and financially accountable for their actions.

Thus, in notarial jurisdictions it is but a small step from a system under which notaries electronically submit their conveyances and mortgages to the registry to be there examined and entered in the register itself by a public official, to a system under which the notaries are responsible themselves for the examination and authentication of the instruments and are allowed to enter them in the registry themselves. And in fact, that very development is currently taking place.

During my visit to Paris in December 2006, a French notary showed me how he can electronically enter and discharge real estate mortgages directly in the public register without intervention of any public official. The process, which includes electronic payment of a tax, and electronic confirmation that the tax has been paid, is accompanied by safeguards such as special cards and PINS that insure that the transaction has been personally accomplished by a French notary who is fully responsible for the regularity and accuracy of the entry as well as any consequences of error.

In Estonia, the E-notary program is being developed to perform the same function. Upon its complete rollout in the next months Estonian notaries will be able to effect re-registration of real estate parcels by direct access to the electronic registry from their offices.. In Germany the Bundesnotarkammer and the various notarial

organizations in the Laender are cooperating on developing systems of electronic access and submission of documents that can well be expected at some point to permit notaries access to the registries to effect re-registrations electronically.

It seems clear that the notary system is showing itself to be well adapted to move the control function in the real estate registry system from the point of public filing to the point of document creation and authentication in the real world, i.e. the notary's office. Such a development would not only save crucial time in the completion of conveyances but would also save a lot of the expense in the operation of the land registries.

Some of the traditional attributes of civil law notaries such as their quasi-official status, their ability to create public documents, their limited numbers may be regarded by common law jurists as relics of a bygone era. Yet it is these very attributes that may be most useful to permit a partial "privatization" of the real estate register system under which notaries will have access to the public register to effect land transfers without the intervention or oversight of a public official.

Based on the study just described it appears that the future of notaries as real estate conveyancers is brighter than many EU policy makers may have assumed. Under current working conditions, notarial land transfer represents the low-cost solution for most residential real estate transfers. The notary's impartial and independent legal advice also looks good in comparison with advice available from title companies, real estate brokers, or even jurists whose main allegiance is to a financing entity rather than the party purchasing or selling. Looking to the future, the notarial systems have the best prospect of further streamlining real estate transactions by performing the registry

control function themselves thus enabling real-time direct implementation of land registration and lien entry. The cohesiveness and discipline of notaries and their organizations as well as the structure of regulation of notaries tend to facilitate this development and accelerate the pace of implementation.

Does this mean that the future holds no grounds for concern on the part of European notaries? Of course not. As long as public policy decisions are made in a political process there is risk of uninformed or misguided governmental action, whether on the local, national or European Union level. The best way to prevent miscarriage of public decision-making is education. It seems clear that notaries will have to continue and increase programs of education for governmental decision-makers and the general public to make sure that misconceptions or lack of understanding does not drive some political action that may adversely affect the profession.

Putting the vagaries of the political process aside, are there features of the notarial institution or the function of notaries in real estate transactions that may be subject to legitimate discussion or reform? Far be it from me as an outsider to suggest that there is anything conceivably wrong with your remarkable legal institution and profession. On the other hand there are some areas where one might anticipate questions from even well informed regulators and political authorities.

First of all, it is clear that the key and unique attributes of notaries which legitimize their advice and support their exclusive role as real estate conveyancers are their independence and impartiality. It is vital that notaries and their organizations do everything possible to maintain these attributes, both in theory and in practical reality.

The “law is a business” movement has seriously undermined the traditional role of private attorneys as custodians of the law both in their own eyes and in the eyes of the public. The market place for notarial, as well as legal, services has many players such as real estate developers and banks, who can be expected to generate repeat business for notaries. From a business standpoint, there can be strong pressure on a notary to pay special attention to the needs and to the interests of these repeat players. To the extent that a notary allows these considerations to be of any influence in the advice rendered and the performance of his notarial functions, the institution itself is threatened.

By the same token, maintenance of the appearance as well as the fact of strict neutrality and independence favors forms of practice in which the notary limits his work to notarial services over variations in which the notary wears multiple hats. The same is true of the present limitations on the ability of notaries to form or be members of larger legal or notarial partnerships. Although elaborate conflict of interest regulations seek to preserve the independence and impartiality of attorney-notaries or notaries in large-firm practice, it cannot be doubted that notaries who seek to function under these conditions are under subtle pressures that they may not be even aware of. The independence and impartiality of the notaries are your crown jewels. Anything that might bring any risk of tarnish to these attributes should be avoided.

There are also practices in other EU members states that may affect at least the image of a notary’s impartiality and independence. In certain EU member states some notaries also function as real estate brokers. Local regulations attempt to mitigate the

effect of the brokerage activity on the independence and impartiality of the notary. Sometimes a party can save costs by using a notary to broker a parcel of real estate since the amount a notary can collect for brokerage is regulated and is generally less than a brokerage commission. On the other hand, the effect of this brokerage function on the independence and impartiality of the notary with respect to all transaction participants is obvious even to a layperson. How can a notary give truly impartial and independent advice if she has been hired by the seller to broker the property and if she stands to gain a substantial commission if the transaction closes?

Another practice in some EU Member States that may more subtly undermine the appearance of impartiality and independence of public notaries is the participation of more than one notary in the documentation of a transaction. It is said that a party may be more “comfortable” in a strange or important transaction if he is accompanied by his “own” notary. It is also said that in this circumstance the participating notaries divide the work to be done and also divide the fee, so that there is no prejudice to the interest of any party. However the sense that a notary may owe some special allegiance to a particular party is hard to escape entirely. Why would a party feel a need to commission his own notary if the notary initially entrusted with the transaction were seen as fully impartial and independent? The notion that the notaries can share the fee does not dispel this concern, but leads to another, namely that the fee may be too large. Ultimately a transaction in which two or more notaries participate at the request of individual parties may look more like a lawyer transaction than the traditional function of an independent and impartial quasi-public official.

A second area of potential concern is the mandatory fee structure for notarial services. To be sure, our study showed pretty clearly that notarial fee schedules tend to favor parties with lower and average cost transactions at the expense of the more expensive transfers. This appears to be good public policy. It can also be argued that mandatory fees remove the haggling and negotiation of fees from the notary-client relationship and thus tend to support notaries' impartiality and independence.

On the other hand, modern economic and political thought is skeptical of the value of concealed subsidies in professional fees and charges and suggests that the efficient function of professions as well as other businesses is fostered by free and transparent markets in professional services. The wide variance in the level of mandatory notarial fees among even the three notarial jurisdictions covered by the CNUE study for what appears to be similar conveyancing functions may give rise to the conclusion that in some EU jurisdictions mandatory fees are set at too high a level.

The recent deregulation of notarial fees in Holland should be of great interest to notaries in other EU Member States. How has this affected the costs for documentation and implementation of smaller transactions, of larger ones? How has it affected the notaries' practices and their images for impartiality and independence? The Dutch experiment is a good example of the "laboratory of democracy" in which the various EU Member States can try new solutions and develop new institutions which can be adopted or rejected by the others or the Union as a whole on the basis of observation and experience.

Other traditional notarial restrictions of number, locality and nationality may also foster the same policies or other related policies of professional cohesiveness, discipline, quality of services or access to notarial services. To the extent that these restrictions are perceived as protecting local fiefdoms in a globalized economy they will come under pressure for relaxation or reform. Notaries must be ready to demonstrate why these restrictions favor the public interest, and to make adjustments to conform notarial function to a globalizing economy.

As independent and impartial legal specialists notaries offer their clients and the public services of very high quality on a very economical basis in certain legal contexts. The positive aspect of the notary's offering should always be stressed. Defensiveness around traditional prerequisites and special economic franchises will tend to encourage the free marketeers and friends of competition at all costs.

European notaries are faced with a challenge to demonstrate to modern political decision makers that their traditional function of impartial and independent professional and official implementers of real estate transactions remains valid under present day conditions. Objective data from our study supports this hypothesis. The future for notaries in a world of e-conveyancing appears to be bright. Both now and in the future, however, notaries must be vigilant to maintain and enhance their skill, impartiality and independence in image and in fact.

Thank you very much.