

A NOTE ABOUT NOTARIES

Have you, or any of your clients, ever bought a property abroad? Or have you (or they) ever had business dealings overseas that required documents, such as contracts, to be prepared? If so, you may well have had to consult a notary public. But who exactly is a notary public and why might you need his services?

There are three branches of the legal profession in England and Wales:

- Solicitors,
- Barristers and
- Notaries Public.

Of the three, notaries are the oldest. Their history stretches back to Roman times, when early Roman officials (generally known as *scribae*) were public officers who copied and transcribed legal transactions. Their primary function was to record public proceedings and register decrees, but they also prepared wills and conveyances as a record of private transactions. As the Roman Empire declined, the appointment of notaries passed from the Emperors to the Popes. At the time of the Reformation, Henry VIII took upon himself the authority to appoint notaries and it then devolved from the King to the Archbishop of Canterbury. The Archbishop still appoints notaries practising in England and Wales today.

TYPES OF NOTARY

There are two main types of notary:

- Scrivener notaries and
- General notaries.

(There is a third type, namely Ecclesiastical notaries, but their role is limited to Church matters). Both types of notary are legally qualified (most general notaries are also solicitors) but have undertaken additional study. Scrivener notaries have to meet special requirements (for example, knowledge of foreign laws and languages) and are governed by the Scriveners' Company, one of the City livery companies, but the roles of both types of notary are substantially the same.

WHAT DOES A MODERN NOTARY DO?

He is, as he has always been, mainly concerned with the making of contracts or instruments for both individuals and corporate entities. In the execution of his duties the notary undertakes not to "add or diminish anything without the knowledge and consent of [the parties] that may alter the substance of the fact" nor to "make or attest any act, contract or instrument in which he knows there is violence or fraud". The notary's role, therefore, is to put into legal effect the wishes of those who appear before him. He is a public officer and it is his duty to prepare, attest or certify under his official seal, deeds and other documents for use anywhere in the world. In practice, his role within England and Wales is limited and he is generally concerned with preparing and certifying documents for use abroad (although notaries can, and some do, undertake non-contentious legal work such as conveyancing and probate in their capacity as notaries, where the focus of that work is wholly within England and Wales).

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From Chambers UK - A Client's Guide to the Legal Profession

BUYING PROPERTY OVERSEAS

A common situation for which a notary will be required is when someone is buying property overseas. Very often that person will give his lawyer in the country in question a power of attorney to sign documents on his behalf. The power of attorney will usually need to be executed before a notary public. It is the notary's job to ensure that the person who signs the power of attorney has:

- identified himself properly (e.g. by producing his passport and evidence of address),
- the capacity to sign the document (e.g. he not under age or suffering from any mental impairment),
- the authority to sign (e.g. if he is signing on behalf of a third party such as a company, he is a properly authorised officer of that company) and,
- the requisite intent to execute and be bound by the document.

If a notary believes that any of these requirements are not fulfilled, he must refuse to act.

It is the notary's record of the execution of a document or his verification of some transaction or event (known as his "notarial act") which gives it legal effect in the foreign jurisdiction.

The notary will prepare his document recording the event (often by way of "notarial certificate") sign it and add his seal. Usually an additional certificate, or "apostille", confirming the notary's authority, will be required. This is issued by the Foreign & Commonwealth Office and the notary will arrange this. Sometimes a document will also need to be presented at the embassy of the country for which it is destined for further "legalisation". The notary will be fully aware of all countries' requirements and so be able to ensure that the formalities are completed correctly and that the document will be accepted by the receiving jurisdiction.

A notary is under an obligation to keep a record of every document he prepares and he will normally keep a complete photocopy as well as a written register. If a notarial document ever goes missing, therefore, he will be able to prepare a duplicate, no matter how long ago the original was prepared. He must make arrangements for his notarial documents to be stored safely and also ensure that they pass to another notary on his death, who is then obliged to retain them until he dies and passes them on to another notary and so on.

As you can see, although the role of notaries in England and Wales may be limited, it remains an essential part of the legal process. So next time you are thinking of buying that dream château in the south of France, remember a notary can help make it happen!

Forsters LLP's partner, Fiona Smith, is a notary public and offers a full range of notarial services. She is always happy to discuss individual cases and give advice on what will be needed in any given jurisdiction. To contact her direct call 020 7863 8570 or email fasmith@forsters.co.uk

This article offers general guidance only. It reflects the law as at November 2008. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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