# THE NOTARIAL SERVICES IN THE NAFTA

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## ABSTRACT

Since 1994, when the North American Free Trade Agreement (NAFTA) began functioning as a mechanism that aims to reduce trade barriers between Canada, the United States, and Mexico, it has become apparent that the differences and formalities inherent in the Member Countries' legal and notarial systems constitute significant obstacles to trading, particularly in terms of the rendering of services. This paper seeks to elucidate the difficulties that Member Countries commonly face when they attempt to apply foreign notarial documents to their own legal system, to discuss the requirements for the notaries to render services in the NAFTA territory, and to propose modifications that the notarial function must adopt in order to adapt to the technological and cybernetic tendencies that the modern world demands.



## RÉSUMÉ

En 1994, lorsque l'accord de libre-échange américain du nord (NAFTA) a commencé à fonctionner comme un mécanisme visant à réduire les entraves aux échanges commerciaux entre le Canada, les États-Unis, et le Mexique, il est devenu évident que les différences entre les formalités des pays membres inhérentes à leurs systèmes légaux et notariaux constituaient des obstacles significatifs au commerce, en particulier en termes de rendu des services. Cet article cherche à élucider les difficultés que les pays membres rencontrent communément lorsqu'ils essayent d'appliquer les documents notariaux étrangers à leur propre système légal, pour discuter les conditions pour les notaires de fournir des services au sein du territoire du NAFTA, et pour proposer les modifications que la fonction notariale doit adopter afin de s'adapter aux tendances technologiques et cybernétiques que le monde moderne exige.

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## IMPORTANT TERMINOLOGY

**NOTARY PUBLIC** Anglo-Saxon Notary Public

***NOTARIO PÚBLICO* / NOTARIOS (Pl.)** Civil Law Notary Public

**(Relevant Country) + NOTARY** Notaries in the Civil Law tradition, for example **Mexican Notary**, **Quebec Notary,** or **French Notary**, etc.

**NOTARY** An Anglo Saxon or a Civil Law Notary Public, without distinction.

**PROTOCOL** The collection of books made up of numbered and sealed *folios* in which the *notario público*, in accordance with the formalities provided for by the corresponding law, records, and authenticates deeds, and certifies that they, and their corresponding attachments, are issued before him/her. This Protocol is only used in countries that follow the Civil Law Tradition.

**DEEDS / AUTHENTIC DEEDS / PROTOCOL DEEDS** Deeds are sometimes referred to as Protocol Deeds in order to differentiate them from the Anglo-Saxon concept, which is in opposition to the Protocol Deeds that are common to the notarial public instrument in the Civil Law Tradition. Deeds or Protocol Deeds will always be referred to in the Latin concept of the word.

**HOMOLOGATE (Process of)** (of homologous) *Adj*. Being similar to or corresponding to others as to structure, value, or relationship. The act of giving similar value, structure, or relationship to a body of laws, an authority, or a function.

## ABBREVIATIONS

| | |
|---|---|
| **NAFTA** | North American Free Trade Agreement |
| **GATT** | General Agreement on Tariffs and Trade |
| **USA** | United States of America |
| **EC** | European Communities |
| **UINL** | International Union of Latin Notaries |

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# INTRODUCTION

The *praxis* of notarial services under NAFTA needs urgent reevaluation in order to guarantee the trading efficiency, security, and certainty of the legal acts and instruments that are involved in activities under the Agreement.

An international agreement involves different legal systems; therefore, the significant dissimilarities in the role of the notary in each of the countries involved create obstacles to the achievement of practical matters implicated in important transactions that require the fulfillment of numerous diverse formalities. Such is the case for the member countries of the 1994 North American Free Trade Agreement: Canada, the United States of America, and Mexico.

This thesis explores the difficulties that countries with different legal systems, specifically NAFTA member countries, face when dealing with commercial transactions in which notarial presence is required. The notarial practice encounters certain barriers that hinder each country's ability to maintain its cultural identity while guaranteeing the security and the certainty of the legal instruments and activities that are involved.

The realities of notarial practice in countries operating under an international agreement prompt several questions: Do the different legal systems involved in NAFTA have a person or an institution with an authority and capacity that is similar to that of the *notario público*? Does NAFTA require any professional certification or standard for notarial practice in its member countries? Do the dissimilarities between legal systems, cultures and customs make it necessary to homologate the different notarial systems? Or should they rather be harmonized? What difficulties arise when one attempts to homologate the different notarial systems? Is focusing solely on a free-circulating notarial document at the treaty level a sufficient measure to obtain an efficient solution to the aforementioned problem? Should there exist an organization to watch over the interests of the notaries in the NAFTA member countries? How can *e-commerce* and current technology include or exclude the *notario público* or the notary public in the NAFTA member countries, or in NAFTA itself? Should the Notary's profile be reevaluated? Are notarial services in the NAFTA member countries increasing or

decreasing? Will the notary become a thing of the past? Is the *notario público* useful for the facilitation and secure completion of modern cross-border commercial transactions?

With these questions in mind, this paper has three objectives: to describe the advantages and disadvantages of homologating notarial services at a national level (specifically in terms of the international circulation of notarial documents), and of harmonizing such services between the member countries under NAFTA; to identify the role of the notarial services as a dynamic participant in cross border commercial transactions; and to reevaluate the Notary's profile and propose new standards for the notaries in NAFTA's member countries.

In this thesis, "Homologation" will be understood as the process that provides a law, a document, or an institution the same value or status, making it recognizable in two or more jurisdictions, states, or countries, thereby eliminating the need for further recognition processes, for example, the Hague Convention's recognition of powers of attorney or mandates. Homologation will be understood as synonymous with "Exemplification" in Quebec, "*Homologar*" in Mexico, and "Homologue" in the United States.

The **first chapter** offers a general overview of the history and evolution of the notarial institution, including a brief comparative analysis of the different notarial systems in the world and the functions and roles of notaries. It also describes the essence of notarial acts as a platform for an evaluation of notarial services in each of the legal traditions, states, and countries.

The **second chapter** concentrates on International Treaties and Agreements that are relevant to the notarial function. Among them, the Conclusions drawn in the International Union of Latin Notaries, Mercosur, the European Union and Mexico Free Trade Agreement, and NAFTA; considering the last mentioned as the main focus for this investigation. The analysis also contains a brief explanation regarding the Notarial Organisms that interact within the NAFTA territory

The **third chapter** undertakes an examination of the differences in notarial nature that are present in the notariats within NAFTA territory. It examines the different roles and functions that the notaries have according to the culture where they are gestated, those of a public officer, an independent professional, or a fusion of the two. The analysis

also considers cross-border recognition of notarial documents and their status, as this chapter emphasizes the specific experiences that member countries have had in resolving issues concerning the circulation of their notarial documents in the arena of international agreements. In addition, a succinct description of the legislation relevant to the notarial practice is provided, as is a remark on the Private International Rules that apply when considering the cross-border traffic of notarial documents

This chapter addresses the evolution of document forms, from the notarial document's civil law role as the best documentary proof available, to the document's relative position in the hierarchy of documentary evidence. It also discusses the role and functions the notaries will have in an era where electronic documents, *e-commerce*, and modern technology, together with the possibility of an electronic public instrument, are increasingly common.

The **fourth chapter** provides a brief explanation of the lack of notarial legislation or discussion of notaries or rules applicable to them in NAFTA; this Agreement is indeed void of any treatment of the notarial institution. Nevertheless, each chapter of this investigation includes a NAFTA subsection in which the author proposes ideas concerning four scenarios that aim to show a virtual perspective of notarial services in the NAFTA territory and agreement.

Finally, the work will posit a specific proposal regarding the notarial profile as a future perspective.

# 1. HISTORY AND GENERAL ASPECTS OF THE NOTARIAL INSTITUTION

This chapter concentrates on the genesis and the historical evolution of the notarial profession. It addresses the different kinds of notarial systems and their notarial acts, taking into account countries and cultures, as well as the historic and hermeneutic circumstances that surround each of them. This chapter will conclude with a brief analysis of the notarial services provided by several countries and states, focusing on those that relate directly or indirectly to the North American Free Trade Agreement.

## 1.1. Origins and Evolution of the Notarial Institution

Little is known regarding the existence of or, indeed, the need for notaries or authentication instruments in primitive societies. This is perhaps due to the fact that legal acts had an innately public existence that was, in and of itself, a guarantee that those legal acts would be respected.

The major issues of primitive societies pertained to the satisfaction of the most elemental necessities: food, clothing, and security. The formalization of certain acts was therefore limited to verbal declarations in which the people (*populis*), as quality witnesses, gave formality to the legal act.[1]

As these societies developed, the need to create public confidence in acts and contracts became increasingly important. Furthermore, considering the fact that authentication is a concomitant and inherent quality of public acts, it is natural for courts, magistrates, and other similar authorities to search for a source of authentication endorsed by the sovereign, in order to bestow upon a private act the legal authority and value of a public one.[2]

The notarial profession flourished in many parts of the world under different names and functions. The Hebrew and the Egyptian cultures are the earliest ones in which notarial history can be found. Among the Hebrews, the need to record the legal

[1] See Froylán Bañuelos Sánchez, *Derecho Notarial: Teoría, Jurisprudencia y Otras Disposiciones Legales*, 1st ed. (Mexico: Editorial Sista S.A. de C.V., 1992) at 6 [translated by author] [*Froylan*].
[2] See *Ibid.* at 7.

foundation of each contracting party justified the drafting and formalizing of a contract or agreement. However, if the contracting parties ignored this formality, as they often did, it was compulsory for them to request the intervention of the public officer commissioned to handle these matters, the Scribe or *Scriban.*[3]

The Scribes in Egypt had a sophisticated culture. Miguel Fernández Casado wrote, "In the Isis processions, a Sacred Mayor Scribe appeared with feathers in his head, a book and a ruler in his hand, ink and *calamus*[4] for writing; he needed to have knowledge in many sciences and disciplines, such as: hieroglyphic art, cosmography, geography, chorography, and the ritual for the ceremonies, and was appointed to register and give public *fide*[5] to any event that could take place."[6] This makes evident that the ancient Egyptian Scribe embodied two functions: that of a public officer commissioned to write documents and records, and that of an expert in diverse arts and sciences. However, what the Scribe wrote or recorded had to be signed and stamped by a religious or governmental authority.

In Babylon, as in most ancient cultures, the civil and religious authorities cooperated. Judges and scribes belonged to the judicial organization.[7] The laws of the Hammurabi Code contain one of the most important notarial antecedents in Babylonian culture; it prescribes that witnesses must be present for a contract to be valid.

In Greece, logographers recorded the allegations of the petitioners that included any kind of document, inscription, and information that people requested to be registered. This action gave the logographers their public nature.[8]

Based on the French post-revolutionary publication, "*Commentaire de la loi du 25 Ventose*," (year XI, book I, origins and evolution), author Bañuelos Sánchez, citing Cagneraux, points out how the public officers' importance is recognized:

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[3] See Julio Antonio Cuauhtémoc García Amor, *Historia del Derecho Notarial*, 1st ed. (Mexico: Editorial Trillas S.A. de C.V., 2000) at 18 [translated by author] [*Amor*].

[4] Cal"a*mus\, n.; 1. (Bot.) The indian cane, a plant of the Palm family. It furnishes the common rattan, online: <http://dictionary.reference.com/search?q=calamus>

[5] Jean Lambert, "Notaries in Québec" (1998), online: The National Association of Civil Law Notaries <http://www.nacln.org/FILES-HTML/Quebec%20Notary%20information.htm > [*Lambert*].

[6] Eduardo Bautista Pondé, *Origen e Historia del Notariado*, 1st ed. (Buenos Aires: Ediciones de Palma, 1967)at 7 [translated by author] [*Bautista*].

[7] See *Ibid.* at 19.

[8] See Enciclopedia Jurídica Omeba, vol. 10 (Buenos Aires: Editorial Diskrill, 1991) at 579.

"The establishment of public officers in charge of writing the citizens' contracts in Greece was extremely ancient, and their work considered so essential that even Aristotle, in the year 360 before the Christian era, spoke about these officers, assuring that they existed in every civilized community..."[9]

The Roman Empire had *tabellios* (named after the *tabella,* a special table where some documents, such as letters, were written), officers who carried out tasks in connection with the transcription and custody of the documents and acts of some government authorities. Laws enacted during emperor Justinian's reign, such as the *Corpus Juris Civilis*, regulated their function. These officers "were commissioned to give documented form to the businesses of individuals and thus, they act as professionals in the Roman Forum[10]."[11]

The notarial profession was first organized into associations in the third Roman era, the Byzantine Empire, in which a document called *Law Manual*[12], compiled by emperor Leon VI '*The Philosopher'*, referred to mercantile corporations, art craft, and the "Corporation of the Notaries or *Tabularii.*"[13]

According to written records, it was not until the XIII$^{th}$ century that notaries were considered holders of the public *fide*[14] when they acted. This change occurred at Bologna University, founded by the roman emperor Theodosius II, where Rolandino Passagiero was among the most important exponents who expressed the typical characteristics of the *notario* and discussed the systematization of its regularization and notarial knowledge in his significant compositions "*Apparatus super summa notaire: La Aurora,*" "*Flos Ultimarum Voluntatum,*" and "*Tractatus Notularum.*" Other important authors who contributed to this noteworthy era included Salatiel, with his "*Ars Notariae,*" and

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[9] *Froylan, supra* note 1 at 9-10.
[10] The Roman Forum was the marketplace of Rome and also the business district and civic center. It was expanded to include temples, a senate house, and law courts.
[11] Francisco de P. Morales Díaz, *El Notariado: su Evolución y Principios Rectores*, 1st ed. (Mexico, Asociación Nacional del Notariado Mexicano A.C., 1998) at 25 [translated by author] [*Morales*].
[12] Year 887 a. C.
[13] See *Bautista, supra* note 6 at 82.
[14] Accord *Lambert, supra* note 5. ("the certainty or trust ratified publicly, that everyone has when regarding a legal act or fact, granted by a legally empowered person").

Reinieri, with his "*Summa Artis Notarie.*"[15] These significant writings addressed the standards for the regulation of the Notary's conduct and the formalities of the profession.

Other works that symbolize a starting point for the notarial institution's development include "*Las Siete Partidas*," "*El Fuero Real*," and "*El Espéculo*," by King Alfonso *`El Sabio'* of Spain; "*Novísima Recopilación*" by King Charles IV of Luxembourg; the "*Ordenance d'Amiens*," written in 1304 by Philippe *`Le Bel,'* King of France; "*Las Leyes del Toro*" and *"La Nueva Recopilación*," written in 1567 by Philippe II, King of Spain; and the Maximilian Constitution, written in Austria in the XVI$^{th}$ century. Each work is considered an invaluable contribution to the enrichment and evolution of the notarial culture.

Many authors[16] have a similar opinion of "*Loi du 25 Ventose*" as being one of the most important precursory documents to modern notarial legislation; this factor, as well as the time during which it was published, contributed to the *Loi*'s prompt distribution and great impact on the legal systems of that era.

Finally, the "*Ley Orgánica del Notariado Español de 1862*," which is considered to be the basis for most Latin-American notarial legislations, highlights the protocol's importance and its copies as public instruments, the role of the Executive branch of government, and the rights and discipline related to the *notarios*.[17]

### 1.2. The Notary Public, *Notaire,* and *Notario Publico*

The notarial institution has been present in the world for centuries. Evolution and the specific demands of different cultures and countries have given form to this profession. The "trusted third party" and the "keeper of history," roles that are in essence the notaries' justifications, have resulted in specialized and sometimes very different kinds of professionals, public officers, and empowered individuals called notaries. According to the legal tradition adopted by a given country or to its specific commercial demands, notaries evolve in the services they provide, the roles and privileges they have,

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[15] Juan Antonio Ruibal Corella, *Nuevos Temas de Derecho Notarial,* (Mexico: Editorial Porrúa, 2002) at 69 [translated by author] [*Corella*].
[16] Accord *Ibid* at *15*; *supra* note 16; *Bautista, supra* note 6, and *Amor, supra* note 3 .
[17] See *Morales, supra* note 11 at 47.

their commitments and obligations, the number of homologous professionals, their jurisdiction, and so on. The two most important notarial systems are the Latin notary public or civil law notary (*notario público*) and the Anglo Saxon notary public. The first, from the formalist school of the civil law tradition and the second, derived from the common law tradition.

### 1.2.1. Latin Notary Public

As described in Section 1.1, the *notario público* finds its origins in the civil law tradition, a tradition that proceeds from the given law of antiquity through Roman law, the codes of Theodosius and Justinian, Salic law, and the Napoleonic Code. In it, all law flows from a coherent set of legal principles contained in a written code provided or enacted by the sovereign.[18] Civil law is, indeed, a formalist tradition.

In order to understand the concept of the *notario público* and to perform an analysis thereof, it is essential to describe its foundations. The concept of Public Faith, or *Publica Fides*, can be defined as follows:

> *"Publica fides* is, in essence, the power of the state to authenticate or certify. Literally translated, it means "public trust" or "public faith"--"faith" in the sense of the trust that people have (or must have) in official papers or acts of the state such as texts of law and court judgments."[19]

Thus, Public Faith, or *Publica Fides*, is a concept used to describe the special trust and empowerment that the state gives to an individual so that he/she can represent the government in such legal acts that, due to their nature, necessitate special formalities that only the *notario* can provide.[20] The implication is that the government trusts the individual to whom these responsibilities are granted to perform these tasks on its behalf.

Considered *lato sensu*, Public Faith vested in the individual is a characteristic of many countries that base their legal systems on civil law, as well as in 73 countries, such

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[18] Nicholas G. Karambelas, "Civil Law Notary, An office whose time has come?" (2005) Washington Lawyer Magazine, 28.[*Karambelas*].

[19] *Lambert, supra* note 5.

[20] The connotation used for the *notario* is with respect to Mexico, being that in other countries, including some of them with the civil law tradition, have dissimilarities.

as Mexico, France, Greece, Argentina, Brazil, that have mixed systems and have adopted the legal figure of the *notario público* (Latin civil law notary public).

#### 1.2.1.1.*Notario Público*: Expert and Professional

The Latin Notary is primarily a professional legal expert with a certified degree of study and expertise in a variety of legal fields.

The drafting of the document that the *notario* authenticates is the essence of the notarial expertise.[21] The *notario* is neither a simple dispenser of "*Publica Fides*," nor is he/she simply an authenticator of documents created by third parties; rather, he creates his/her own documents on behalf of the parties, documents which he infuses with quality and legal value.[22]

The technical making of these documents can only be performed by someone with legal knowledge. The *notario* assesses the particular case and advises the contracting parties in terms of what actions must be taken. "He/she also establishes the legality of the acts placed before his/her public *faith*. This gives life to the *Juris tantum* presumption of the document."[23] This presumption is probably the most important advantage of the notarial authentic deed, which includes the force of publicity to third persons.[24]

The *notario público* is also a practical legal expert, as he operates in direct contact with social reality; he is an extra-judicial expert that applies the law without litigation, through the drafting of agreements, and is a specialized authority in civil law, corporate law, and the registration of immovable property.[25]

As a professional, the *notario* practices a liberal profession, recognized both in a legal context and in an applicable practice status. In addition to his/her official title within the legal practice, he/she possesses a legal professional certificate or *fiat* that legitimizes his/her practice. In many countries and states, a *notario* is an independent practitioner

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[21] See Silvio Lagos Martínez, *La Función Notarial ante el Tratado Trilateral de Libre Comercio*, 1st ed. (Mexico: Cárdenas Editor Distribuidor,1993) at 7 [translated by author] [*Lagos*].

[22] Theoretically this is the essential role of the notario in the commercial transactions in which he is involved. Nonetheless, the role of the notario is often reduced by the increasing involvement of solicitors and lawyers in the creation of such documents.

[23] See *Lagos*, *supra* note at 8.

[24] This will be noted with more detail in subsection 3.2 of the present investigation.

[25] Especially the disciplines noted without excluding the rest.

with full autonomy, who is entitled to practice in a particular province, district, and country, or within a specific jurisdiction or competence, as determined by his/her place of residence.[26]

#### 1.2.1.2. Notarial Praxis

Generally, the law of the place of residence determines the number of *notarios* that is authorized to practice in a particular area, according to the number of inhabitants[27] and the level of commercial activity. The notarial practice is limited to a competence in certain specific areas of law; however, the *notario* is entitled to authenticate the acts executed or perfected in any other location. In order to become a *notario*, an individual must go through a selection process that includes a demanding examination, which guarantees high quality legal practitioners.

As a public officer,[28] the *notario* is responsible for drafting the notarial document. To this effect, he explains to his/her clients the scope and legal effects of the document, certifies the legality of the act, certifies the identity of the parties and their legal capacity, and authenticates the document with his/her signature and official stamp, the instrument formalized in his/her protocol.

In some countries and states, the *notario* has a special role when dealing with the purchase of immovable property, which includes collecting the due taxes required by federal, state, and municipal laws. After performing this duty, the *notario* issues his/her testimony[29] and registers it at the Public Property Registry,[30] where it then acquires the position of *erga omnes*, giving official and universal recognition to the new property owner.

Besides, the *notario* has a noble role as a special third trusted party, whose main objectives are avoiding future litigation for his/her clients, acting as arbitrator and non-

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[26] See *Lagos, supra* note 21 at 9.
[27] This is the *numerus clausus* principle; nevertheless, there are exemptions, such as the Province of Quebec.
[28] This connotation is used for *notarios* and notaries in some countries and states; in others, they cannot be called public officers because of their dual nature as both public officers and independent professionals.
[29] Testimony meaning the exact copy of the contract that appears in the Protocol made for its free circulation and registration purposes.
[30] Or any institution that functions as a registry for the notarial acts.

biased advisor for each of the contracting parties, and providing counsel to all of the parties.

"The *notario público* is an impartial individual who contributes to strengthen the fundamental values such as: justice, liberty, equality, and the creation of law in its teleological function."[31]

### 1.2.2. Anglo Saxon Notary Public

The historical origins of the Anglo Saxon Notary Public are similar to those of the Roman-Germanic *notario público*, although the two took different paths. In England, in the year 1534, Henry VIII requested the permission of the Vatican for his divorce through a notary public (at that time the notaries were only appointed by the Church of Rome). Upon the notary's negative response, Henry VIII did away with all relationships with the Church of Rome and ordered that the nomination of notaries should no longer come from the Vatican.

The Anglican Church was born as a result of this severance in relations with Rome. From that point forward, the Archbishop of Canterbury designated the notaries; men who were not priests but who acted under the authority of Henry VIII. Due to professional competition with lawyers, who had the same professional privileges as the notaries and monopolized the real estate transactions that were the notaries' major source of income, the English Notary soon began to lose prestige. Even so, the notaries did not disappear completely; in fact, in England today there are more than 900 notaries, although most of them are lawyers as well.[32]

It appears that in England the notaries decided to end their conflicts with lawyers and united with them. As a result, English notaries have an international perspective and expertise. They used to be educated in Latin, the Franco-medieval *lingua*; moreover, as of 1969, they are compelled to speak a second language and be able to read a third one.[33]

In England, "A Notary is a qualified lawyer – a member of the third and oldest branch of the legal profession in the United Kingdom. He is appointed by the Archbishop

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[31] *Lagos, supra* note 21.
[32] See *Amor, supra* note 3 at 27.
[33] *Lagos, supra* note 21 at 26.

of Canterbury and is subject to regulation by the Court of Faculties. The rules that govern Notaries are very similar to those that rule Solicitors. They must be fully insured and maintain fidelity coverage for the protection of their clients and the public... Notaries have to renew their practicing certificates every year..."[34] With respect to notarial acts, the Notaries Society from the United Kingdom states the following:

"Significant weight is attached to documents certified by notaries. Documents certified by notaries are sealed with the notary's seal and are recorded by the notary in a register maintained by him/her. These are known as "notarial acts." Notarial acts and certificates are recognized in British Commonwealth countries and some other countries without the need for any further certification from the respective Foreign Ministry or foreign diplomatic missions."[35]

#### 1.2.2.1. Notary Public in North America

In common law jurisdictions, "the functions of notaries include the attestation of documents and certification of their due execution, administering of oaths, witnessing, affidavits, and statutory declarations, certification of copy documents, noting and protesting of bills of exchange and the preparation of ships' protests."[36]

In the United States, generally speaking,[37] a notary public is a public officer appointed by the Court of Records to serve the community as an impartial witness. Individuals usually need no special training to obtain a notary public license. They must only pass a simple test, have a personal history check, or obtain a bond or insurance to guarantee their integrity. A non-attorney notary may not offer legal advice, may not prepare documents, and cannot recommend to anyone how something should be signed or even what type of notarization is necessary.[38]

Each state authorizes a notary public to perform a limited range of activities, called notarizations. Notarization does not attest to the truthfulness of statements in a document; a notary public does not legalize or validate a document.

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[34] The Notaries Society, online: <www.thenotariessociety.org.uk>.
[35] *Ibid.*
[36] Wikipedia: The Free Encyclopedia, online: <http://en.wikipedia.org/wiki/Notary_public>.
[37] Except for the Latin based jurisdictions such as Louisiana, Alabama or Florida.
[38] The Notaries Society, online: <www.thenotariessociety.org.uk>.

Notarization requires the notary to identify the signer. This involves reviewing "official" documents, such as drivers' licenses or testimony from one or more credible witnesses, for the purposes of identification. [39]

The status given to the North American Notary Public is that of Commissioner of Oaths. Further exploration of the role and function of a North American Notary Public necessitates its comparison to the Latin Notary Public, which will be addressed in subsection 1.3.4.1.

### 1.2.3. Mixed Notarial Systems

Generally, the states[40] in a country have autonomy in their jurisdictions. In other words, they produce, enact, and apply their own laws at the state level. Cases in which jurisdictions diverge can be found in North America. Quebec, Canada, and Louisiana, USA, each maintain the civil law legal tradition, despite the fact that the majority of both countries belong to the common law legal tradition. Regardless of the extent to which obvious territorial influence may cause their legal institutions to differ from those traditional institutions of the Roman-Germanic tradition, the basic principles of the civil law tradition are present in each of Quebec and Louisiana. The differences in the notarial services of some of these states will be examined in the next section.

## 1.3. Notarial Services

In order to define notarial services, one must approach the concept of the notarial act. In essence, a notarial act is any act that a notary is authorized to perform by the authority that empowered him/her, usually in his/her own competence or jurisdiction.

In the US, for example, there is no distinction between "notarial act" and "notarization." These include taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a

[39] *Ibid.*
[40] Provinces, territory or jurisdictions.

signature, certifying or attesting a copy, and noting the protest of a negotiable instrument.[41]

In Quebec's legislation,[42] the "notarial act" concept has been changed to "notarial deed,"[43] stating that these shall be executed *en minute* or *en brevet*. The notarial deed is the instrumental form for the notarial practice. Similarly, in Mexico, notarial acts are a core area of notarial activity that must be contained in the protocol.

Notarial services are, in essence, the functions and acts that notaries perform in order to provide official and professional services to the public. Simply put, notarial services are the functions or services expected from a notary. These services vary according to the type of notary that is providing them, but the notary must be empowered for the provision of each service by its correspondent state, law or country.

### 1.3.1. Canada

Canada represents one of the mixed notarial systems in North America; its "hybrid nature" is due to the French and British influences in Quebec and to British Columbia's historic antecedents. The notarial services that Canadian notaries outside Quebec and British Columbia[44] provide are largely the same as in United States; they limit their services to the attestation and authentication of signatures on legal documents and to the provision of notarial copies of documents. They have no particular organization and their appointments are made by either the Ministry of the Attorney General or Ministry of Justice in the various provinces. There are even private companies that provide some of the following notarial services.[45]

1. Notarization of any document by a certified notary public
2. Affidavits
3. Oath commissioned by a notary public

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[41] Uniform Law on Notarial Acts, National Conference of Commissioners on Uniform State Laws, online: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ulna82.htm>.
[42] Notaries Act, Ch. N-3.
[43] Division IV, Subsection 1, Article 23.
[44] That can be considered Common Law Notary Publics.
[45] Such as the "Red Seal Notary" that provide notarial services across Canada offering among other services the "mobile notaries" that include notary public appointment scheduling, and document delivery services.

4. Certification of passports and permanent resident card applicants
5. Declaration in lieu of guarantor
6. Drafting and notarization of Consent to Travel document
7. Statutory declarations confirming identity
8. Statutory declaration of marital status
9. Certification of a copy of a document

Differing from these private companies, Quebec notaries and the notary publics of British Columbia provide the notarial services that will be described in the following subsections.

#### 1.3.1.1.Province of Quebec

**Origins and Evolution**

As mentioned, the Notarial Institution or profession finds its origins in the second half of the Roman Empire; however, its principal attributes appeared in Italy during the Middle Ages. Italy was a model for commercial and legal institutions, and their system was adopted by France. As France established its colonial empire in the basin of the *Saint-Laurent* river, notaries appeared in the area that later became the Province of Quebec.[46]

In 1647, the first *notaire* from the colony, New France, was designated; his name was Guillaume Audouart (Royal Notary of New France). He was not a notary in the strictest sense, since he was the secretary of the Council of Quebec and had administrative tasks in the government. The first true *notaire* was chosen in 1663; his name was Jean Gloria. At this time, a polemic started concerning the competence of those who had the power to designate the *notaires*, a power that was finally exercised by the Council of the King beginning in 1675.[47]

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[46] See Dale Beck Furnish, "Garantías Sobre Bienes Inmuebles en el Sistema Estadounidense" (1994) 106 Revista de Derecho Notarial 59 *[Beck]*.

[47] See Louise Lortie, "El Notario en la Provincia de Quebec" (1994) 106 Revista de Derecho Notarial 59 [translated by author] *[Lortie]*.

With the defeat of the French in 1759,[48] uncertainty resulted from the fact that the British threatened to set aside the French system. Nevertheless, the adoption of the Quebec Act in 1774 maintained French civil law in this territory. For two centuries, *notaires* monopolized legal practice in the private sector.[49]

After 1820, the notarial profession began to be better organized. In 1847, the adoption of a law birthed the three chambers of Montreal, Trois-Rivières, and Quebec *notaires*, and the 1870 Act created the *Chambre des Notaires*, Quebec's unique regulating organism of the notarial institution.[50]

Notarial Services

Like the other Latin notaries, Quebec notaries:

1. Are legal professionals acting in a liberal environment
2. Are vested with *publica fides*
3. Deal with non-litigious matters
4. Act impartially on the behalf of all of the involved parties
5. Are expected to give legal advice to all parties, draft legal documents on their behalf, authenticate said documents, and keep records of all transactions[51]

In Quebec, the *notaire* is an unbiased legal advisor; therefore, "The notary must be impartially active in the sense that he must ensure the equilibrium of the parties to a transaction."[52] As will be further discussed, this is the main difference between lawyers and *notaires*.

Quebec *notaires* produce two different kinds of notarial documents: the *minute* and the *brevet*. As in every civil law legal system, the drafting of the notarial instruments marks the essential participation of the *notaire* and *notario público* in a legal act. The official web site of the *Chambre des Notaires du Québec*[53] reads, "Drafting legal

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[48] The free dictionary, online: < http://encyclopedia.thefreedictionary.com/1759%20in%20Canada>.
[49] See *Lortie supra* note 47 at 62.
[50] See *Lortie supra* note 47 at 63.
[51] *Chambre des Notaries du Québec*, online: <www.cdnq.org> [*Chambre*].
[52] *Lambert, supra* note 5.
[53] *Chambre de Notaries du Québec,* online: <www.cdnq.org/index_qc_notaries.htm>.

instruments for consenting parties is at the core of notarial services and is still the hallmark of notaries."

The notarial services provided by the *notaires* in Quebec include:

1. Activities where substantive law requires notarial deeds and instruments, including all sectors of legal activity except litigation and advocacy.
2. Drafting of notarial conveyances of immovables, deeds of hypothec, declarations of divided co-ownership (condominiums), deeds of gift, marriage contracts.[54]
3. Drafting of notarial wills, settlements, and renunciation of successions.
4. Taxation and estate planning.[55]
5. Business and commercial transactions, such as the establishment, sale, or purchase of a business; the constitution, merger, or reorganization of a company or corporation, including its commercial financing and any trademarks related with it.
6. Notarial service for non-litigious matters as an alternative to the Judiciary[56]; in matters related to guardianship, curatorship, and probate of wills and mandates, and, recently,[57]the celebration and officialization of marriages and civil unions as well as the official acknowledgement of civil union break-ups in non-challenged proceedings.[58]

#### 1.3.1.1.1. Differences between Latin and Quebec Notaries

Despite its Latin origin, Quebec's *notaire* is evolving in the North American business environment, which elucidates the difference between the *notaire* and this

[54] This activities constitute, on average, 55% of notarial activities in Quebec, according to the web site of the *Chambre des notaires du Québec.*
[55] Regularly in trust wills and testaments.
[56] Since 1998.
[57] In June of 2002.
[58] This includes a common notarized declaration by mutual consent by the two members of a couple to put and end to their union without the need of a court judgment, only when no under aged children's rights are at stake.

profession's international standard. The main divergences of Latin and Quebec notaries are the following:

> "***Numerus clausus***. Contrary to the practice of most Latin-notary countries, the number of notaries in Quebec is neither limited nor linked to a specific population number. Puerto Rico is another country without restriction as to the membership numbers of the notarial profession.
>
> **No territorial exclusiveness** A Quebec notary may exercise his/her profession anywhere in the province, and may even do so abroad if his/her services involve Quebec residents, or if the object of the transaction is located in the province. Most Latin notaries operate on the basis of territorial exclusiveness, although many are now moving away from this restriction.
>
> **Bilingualism**. A Quebec notary may draft documents in either French or English, at the parties' request. If he also speaks another language, he may record, in an instrument drafted in either French or English, the consent of a person who understands neither official language..."[59]

Another important difference is that the Quebec *notaire* does not have a tax collection role, as do some of the *notarios públicos* in countries such as Mexico, Argentina, and Uruguay

It is important to mention that in Quebec, there is a significant overlap between the activities of the "notaire" and those of the solicitors (no pleading lawyers) who are very active in negotiating and closing a large number of significant commercial transactions, including real estate and corporate. In those areas notaries and solicitors are in direct competition with solicitors.

#### 1.3.1.2.British Columbia

Despite the fact that British Columbia notaries are considered to be common law notaries rather than Latin or civil law ones, notaries in this province have adopted the different roles and functions of the civil law tradition. Some of these include training in the general knowledge of law and the specific detailed training administered by the

[59] See *Chambre*, *supra* note 51.

Faculty of Commerce and Business Administration at the University of British Columbia, which constitutes a requirement for the provision of the notarial services. This two-year program includes a strict background check and a Continuing Education program designed to bring notaries up-to-date. British Columbia Notaries provide non-contentious legal services to the public.

It is important to highlight that the notarial services provided by the notaries in British Columbia[60] have significant similarities, to both the Latin and Anglo-Saxon notarial practice.

The Society of Notaries Public of British Columbia organizes notaries as in a civil law tradition state; the society receives application inquiries and controls the quality of notarial services as well as the economic and educational aspects of its members.

### 1.3.2. United States

Most states in the United States have adopted the common law legal tradition and, consequently, the notary public; however, the notary public's practice and services are limited to the authentication and attestation of signatures on legal documents and the provision of certified copies of documents. Although a few states, such as Louisiana, Florida, and Alabama, have begun to adopt some civil law practices, Louisiana remains the state that ascribes most closely to the pure civil law tradition.

#### 1.3.2.1. Louisiana

A peculiar example of a civil law Notary Public can be found in the state of Louisiana in the United States, which, surrounded by common law states as it is, has a perplexing history that has safeguarded the Civil Law Notarial Institution.[61]

The French colonized Louisiana in 1682, at which point Father Hannepin and de la Salle took possession of the territory in the name of the King of France. After half a century of French rule, the agreement between Louis XV and Charles III of Spain caused

[60] See Annex A.
[61] Louisiana, Florida, and Alabama are the exponents of the civil law in United States.

France to hand Louisiana over to Spain in 1762. The cession lasted until 1800, when Napoleon recovered what France had lost years ago.[62]

In 1803, Louisiana began to promulgate its first Civil Code. Written in French and translated to English, it was inspired by French and Spanish sources; later versions written in 1808, 1825, and 1870 had the same origins.[63]

With the exception of the jurisdiction of the Civil Code, Louisiana's branches of law do not come from the Civil Law Tradition; conversely, they have their foundation in the common law: constitutional, administrative, criminal, and corporate law (even though the adoption of the *Uniform Commercial Code* was partially completed). The same is true of the judicial interpretation of the Code, despite Louisiana's hybrid system that produces lawyers who, due to their legal education based on the Case Method, have a common law-oriented mentality.[64] Professor Rodolfo Batiza explains the mixed heritage of Louisiana's legal system as follows:

> "Most of the legal dispositions that apply to the notaries and to their duties are not found in the Civil Code; rather, they are found in the Louisiana Revised Statutes of 1950 and in their reforms. The norms that address who can be a notary public, and that define their principal privileges and obligations reveal the essence of the Louisiana Notary Public."[65]

Due to Louisiana's unique blend of French and Spanish legal heritage, its notaries can prepare wills, trusts, contracts, and many other documents, and have handled all "instruments in writing" for centuries, while lawyers have primarily concerned themselves with litigation. Louisiana law is thus rooted in Roman, i.e. "Civil Law," a tradition still revered and adhered to in European and Latin countries worldwide, under which Louisiana notaries are uniquely proud to serve. Therefore notaries in Louisiana are entrusted with significantly more responsibility than are the common law notaries in the

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[62] See Rodolfo Batiza, "El Notariado en Luisiana" (1989) 100 Revista de Derecho Notarial 17 [translated by author] [*Batiza*].
[63] See *Ibid.* at 18.
[64] See *Ibid.* at 20.
[65] *Ibid.*

other 49 federations of the United States who primarily witness signatures and take affidavits.[66]

According to the Louisiana Notary Public Law,[67] notaries public have the power to provide the following notarial services:

- Make inventories, appraisements, and partitions.
- Receive wills, make protests, matrimonial contracts, conveyances, and, generally, all contracts and instruments of writing.
- Hold family meetings and meetings of creditors.
- Receive acknowledgements of instruments under private signature.
- Make affidavits of correction.
- Affix seals upon the effects of deceased persons, and to raise the same.
- Create and formalize the notarial instruments which are indeed authentic acts.

It is also important to note that Louisiana is one of the founding members of the International Union of Latin Notaries (UINL)[68], and that, despite the difficulties in subsisting in a country where more than 90% of the jurisdictions have a different legal system, this state has defended its culture and has promoted the advantages of having the Latin notary public in its legal system.

#### 1.3.2.2.Puerto Rico

Puerto Rico is a US territory that has been given self-governing "Commonwealth" status, thus awarding it approximately the same degree of authority over its internal affairs as an American state. The United States federal government controls, amongst others, interstate trade, foreign commerce, and customs from every state and territory.

[66] The P.M. Notaries, online: <www.pmnotary.com/index.htm>.
[67] Louisiana Notary Public Law, Title 35, Ch. 1, 2,A(1).
[68] This organization that assembles all the Latin Notaries will be addressed in Section 2.1.

Puerto Rico may not conclude treaties with other sovereign states, although it does belong to some international bodies, such as NAFTA.[69, 70]

The Puerto Rican Notarial Institution is considered one of this Commonwealth State's most important cultural-legal patrimony. There, the notary is a lawyer who represents *publica fides* and has a public function; he/she is empowered and authorized to "give faith" and authenticity according to the law to the legal acts and extra-judicial facts done before him/her.[71]

The Puerto Rican Notaries have the following divergences with their Latin standard counterparts:[72]

- They have full competence in the state[73]
- They have full autonomy and independence, impartial practice, and are under the administrative control of the Inspection Office of Notaries (*Oficina de Inspección de Notarías)*, which represents the Puerto Rican Supreme Court (*Tribunal Supremo de Puerto Rico*).
- They must provide a surety or bail of at least $15,000.00 US dollars as a guarantee of their diligence in their practice
- They can receive documents, things, assets, and money as deposits when these are provided as guarantees to transactions done before him/her.

The Lawyers' *Collegium* (also part of the organisms that regulate the Notarial Institution in this state), assigns part of the revenues of the notarial practice to community service programs, including legal assistance to indigent people, on-going education services to notaries and lawyers (Article 10 of the *Ley Notarial de Puerto Rico de 1987*).[74]

### 1.3.3. Mexico

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[69] See Annex C.
[70] Countries Word IQ, online: <http://www.wordiq.com/definition/Puerto_Rico#Political_Status>.
[71] See *Lagos, supra* note 21 at 51.
[72] Connotation used for Mexico, Ecuador, Venezuela and other Latin American countries.
[73] *Ley Notarial de Puerto Rico de 1987* Article 3. (4 L.P.R.A. sec. 2003). online: <http://www.nacln.org/FILES-HTML/Puerto%20Rico%20Ley%20Notarial%20-%20PR.html>.
[74] See *Lagos supra* note 21 at 53.

The Mexican *notario público* has its roots in Roman-Germanic Law, or the civil law tradition. Its institutional origins are those of the Latin notary public or *notario público* referred to in Section 1.2.1. The process to become a *notario* in Mexico is quite complex; one must first become a licensed attorney in Mexico, then apprentice in notarial law and practice with another *notario público* for a period of time (from 1 to 3 years, depending on the state law). After the completion of this practice time, one must pass a notarial examination and be appointed by the governor of the state to act as a *notario público* in a given geographic location (a town or district, according to the registral jurisdictions).

The government vests *notarios* with *publica fides*, which can be asserted in reference to the existence of an event they witnessed, of certain documents, or of official acts, as well as to the content of a contract, the signature of a party, and the due representation of an agent on behalf of a principal. Consequently, in Mexico, *notarios* have substantial authority. They normally perform their duties either by issuing a Public Instrument ("*Escritura Pública*") that contains what the parties seek, or by certifying the signature of a party that signs a document before them.

The notarial services in Mexico include several branches of law such as Real Estate, Corporate, Wills and Trusts, Agricultural Real State, and Administrative, amongst others.[75]

#### 1.3.3.1. Differences between the *notario público* and the notary public

This comparison takes Mexico and the United States of America[76] as primary examples of countries with two different types of notarial traditions: civil and common law, respectively. *Notaires* from Quebec in Canada will serve as a third example that provides interesting differences throughout this comparison.

According to the Federal District of Mexico's Notary Public Law, Article 10, the Civil Law governing the Latin Notary Public, defines the *notario público* as follows:

[75] See Annex B.
[76] Excepting the civil law states.

"Article 10 - The *notario público* is a certified and licensed lawyer[77] who is vested with public faith and with the faculty to authenticate and draft, within the terms of the law, all legal instruments in which are consigned legal facts and acts. The *notario*'s functions include being a counselor and legal advisor to the parties, and creating the required testimonies and certifications in the manner that the law obliges. Legal instruments and protocol deeds will only be drafted at the parties' request."[78]

In these types of jurisdictions, *notarios* are legal professionals whose practice originates from the Roman-Germanic notarial tradition. They are duly appointed officers who have received public authorization to draw up, authenticate, attest to, or certify deeds and other documents that include conveyances of immovable property. They can also certify powers of attorney concerning real and personal property; transactions regarding negotiable instruments; the incorporation, modification, and dissolution of every kind of company; the preparation of wills and testamentary documents; and the drafting of protests and other formal papers relating to occurrences on ship voyages, navigation, and the carriage of cargo.[79]

The most important general duties of the *notario público* are:

1. To listen to and counsel the parties on legal issues in an impartial manner.
2. To draft public instruments such as protocol deeds for contracts; to create companies, wills, different forms of acts, amongst others; to keep all of the records of every pertinent legal act.
3. To represent and collaborate with the government's administrative offices, such as the public registry or the treasury department; to keep records of deeds, acts,

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[77] In Nuevo Leon, as in many of the civil law tradition countries, the *notario* must have a law degree and be a member of the Bar. In some countries, such as Mexico, the Bar is not different in every state; rather, it is a nationwide Bar.

[78] *Ley del Notariado para el Estado de Nuevo León*, 1997, c.2 Art. 10 ("Art. 10.- Notario es un licenciado en derecho investido de fe pública, facultado para autenticar y dar forma en los términos de ley a los instrumentos en que se consignan los actos y hechos jurídicos. El notario fungirá como asesor de los comparecientes y expedirá los testimonios, copias o certificaciones a los interesados conforme lo establezcan las leyes. La formulación de los instrumentos se hará a petición de parte").

[79] See Theodore Sedgwick Barassi, *"The Cybernotary: Public Key Registration and Certification and Authentication of International Legal Transactions"*, online: American Bar Association <http://www.abanet.org/scitech/ec/cn/cybernote.html> [*Barassi*].

and tax collection; and to collect taxes[80] with the transactions within the protocol deeds.

In contrast, the common law system's notary public is a public officer designated by law, who has the ability to administrate verbal and written oaths, to certify, to listen, to write dictated testimonials, and to certify written papers.[81] Professor Arredondo-Galvan refers to the Anglo Saxon Notary Public as being one who offers his/her services behind the counter of a photocopy and fax shop or in the grocery store located at the gas station.[82]

The foregoing elements can summarized as follows:

**Chart 1. Differences between the *notario* and the notary public**

| LATIN/ CIVIL LAW NOTARY PUBLIC | ANGLO SAXON NOTARY PUBLIC |
|---|---|
| Licensed Lawyer and Professional; Law degree required[83] | A commissioned clerk, no degree or professional requirements |
| Due to the impartial nature of its role, limitations restrict the individual's legal or other professional practice | No impediment for other professional practice |
| The instrument is structured and written by him/her, which implies that the act is authentic, true and, in some cases, solemn | Veracity has nothing to do with the content of the document; it is rather concerned only with the signatures, even if the contract is private |
| There is a presumption that the document is inherently true and legitimate. The notarial deeds are proof in themselves (*Prima Facie*) | There is no presumption regarding the certainty of the document, only of the signatures |
| There is a compulsory requirement of being part of a | There is no compulsory membership to a |

[80] As mentioned before, the tax collection role applies only to some countries and states; an exemption is the Province of Quebec in Canada.

[81] See *Lagos, supra* note 21.

[82] See Francisco Xavier Arredondo-Galván, *Proyección del Notariado Mexicano Hacia el Siglo XXI*, 1st ed. (Mexico: O.G. S. Editores S.A. de C.V., 1998) at 33 [translated by author] [*Arredondo*].

[83] Usually in civil law tradition countries, the law degree is awarded after 4 to 6 years of legal studies and a "professional exam" at a recognized university.

| "*collegium*," that is, being incorporated to a notary public institution named "*Colegio de Notarios*" | "*collegium*" |
|---|---|
| The formalization of the Legal Act is given by the Notary | The formalization of the juridical value is determined through the Judicial process |
| Legal Counseling is an essential function | Legal Counseling is not permitted |
| One is licensed for life, and may only be suspended for ethical reasons | This commission must be renewed periodically |

In "The Civil Law Tradition", J. H. Merryman writes: "...any similarity between the notary public of the Civil Law Tradition countries and the common law countries is only superficial...our notary public is a minimum importance individual..."[84] The following example of a notary from Quebec in Canada, describes one the most important differences between the Anglo Saxon and the Latin Notaries: the Documental Public Proof.

> "...the Quebec notary has the authority to vest the private documents he prepares with an exceptionally high level of probative value, provided that he complies with the formalism required by the law. The courts rarely invalidate a notarial deed; as such, a document is endowed with the strongest possible presumption of truth. A party attempting to counter this presumption bears a heavy burden of rebuttal through a specific judicial procedure called 'improbation.' The duties (impartial counseling and expert drafting) that notaries must fulfill at all times justify probative value."[85]

This "strongest presumption of truth" is the Documented Public Proof (*Prueba Documental Pública*) used as evidence in a court. All deeds and acts created by the *notario público* embody this characteristic. It should also be noted that the evidentiary strength of a document drawn up by the *notario público* is not limited to the identification of the contracting parties, or whether they have indeed signed the document; rather, it extends to all the facts and provisions stated therein.[86]

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[84] John Henry Merryman, "The Civil Law Tradition" (1985) S.U.P. 113-115. [*Merryman*]
[85] *Lambert, supra* note 5.
[86] See *Ibid.*

Finally, in order to illustrate the non-litigious nature of the *notario público*, it is important to distinguish the Latin Notary Public from the lawyers in advocacy and litigious matters.

**Chart 2. The differences between the *Notario Público* and an American Lawyer or Advocate**

| LATIN/ CIVIL LAW NOTARY PUBLIC | LAWYER/ ADVOCATE |
|---|---|
| Impartial[87] | Partial[88] |
| Has the exclusive right to authenticate deeds and instruments, with the duty to inform all parties. | Takes sides and represents only one party. |
| Has a duty to inform and advise ALL parties. Sometimes acts as a mediator and, when "sealing" a document, can undertake the responsibility of a judge (does not represent only one party but acts on behalf of all). | Moves in adversarial surroundings and must make use of talent and professional skills to promote the interests of his clients. |

[87] By impartiality, I do not mean that notaries are neutral, as we would expect mediators and arbitrators to be. The notary must be impartially active in the sense that he must ensure the equilibrium of the parties to a transaction. In other words, he must inquire as to the level of knowledge and understanding of each party and devote his counseling and advice not necessarily equally, but rather so as to place (in so far as possible) all parties on the same level of contractual ability.

[88] In complex commercial transact In complex commercial transactions, the rules with respect to conflicts of interest, confidentiality and "solicitor/notary – client" privilege often make it impossible to maintain effective impartiality, in fact. In many cases it is absolutely necessary for the parties to be represented by different notaries or solicitors for the purposes of negotiation.

## 2. ROLE OF THE NOTARIES IN INTERNATIONAL AGREEMENTS

### 2.1. International Treaties and Agreements

The impact that International Treaties have had as harmonizing mechanisms on recent times has proven the virtue of international agreements as means of facilitating relations and transactions carried on by and between countries around the world. These treaties produce economic, social, and political consequences, which increase the possibilities for many countries to participate in world commerce, affording better employment opportunities, mutual support and feedback in multiple areas and activities.[89] Although treaties are very broad, they set the basis upon which an infrastructure is built, so that different countries can approach specific topics of interest according to their own needs.

This section of the paper will analyze the international organizations' treaties and agreements that include or have repercussions on notarial practice, focusing primarily on the notarial document's circulation as a legitimate instrument in the legal exchange between countries. This analysis will consider the notaries and notarial organisms of the countries and states included in NAFTA without limitation.

#### 2.1.1. Conclusions from the International Union of Latin Notaries (UINL)

The International Union of Latin Notaries (UINL) is a non-government organization, composed of the professional associations, *collegiums*, or bureaus of notaries in 73 countries on five continents that have Latin-style notarial systems, and that are based upon the foundations of Roman-Germanic Law.[90]

The UINL was constituted to promote, coordinate, and develop notarial activities worldwide, with the purpose of ensuring, by means of close collaboration between the

[89] It is important to note that aside from the advantages that globalization and international agreements have, there are some negative consequences derived from their implementation such as employment and environmental dislocations.

[90] International Union of Latin Notaries, online: <http://www.onpi.org.ar/ingles/informacion_inst_2.php4> [*Uinl*]

associations[91] of notaries, their dignity and independence in order to offer a better service to the community.

The UINL members have included the notarial document and its international validation in the main topics of their international meetings and events; these international congresses were the following:

- I (Buenos Aires, 1948) "The notarial document and its international validation"
- II (Madrid, 1950) "The notarial document and its international validation, inscribable documents"
- III (Paris, 1954) "The notarial document – spirit and efficacy"
- IV (Rome, 1958) "Efficacy of the notarial document in the international perspective"
- VI (Montreal, 1961) "The notarial public act"
- VII (Brussels, 1963) "Law conflicts in authorization instruments for the incapables and their international validation"
- X (Montevideo, 1969) "Material probation of Facts"
- XIV (Guatemala, 1977) "Composition of the deed. Validation, efficacy and free circulation"
- XVI (Lima, 1982) "The notarial document"
- XX (*Cartagena de Indias*, 1992) "The electronic document and legal security"[92]
- XXIV (Mexico City, 2004) "The notary and the electronic negotiation – conclusion"[93]

In general terms, the Conclusions drawn from these meetings and events of the UINL confirm the international validity and authenticity of public documents; they insist upon the eradication of legalization, they highlight the historical value of notarial documentation, and they propose the adoption of official measures for conservation and

[91] *Collegiums* or any other term used to refer to these associations. i.e. *Chambre*, Board, among others.
[92] Bernardo Pérez Fernández y del Castillo, *Doctrina Notarial Internacional* (Mexico: Editorial Porrúa, 1999) at 39 [*Perez*].
[93] Congreso XXIV de la UINL en México, online: < http://www.congresouinl.com.mx>.

access to the notarial archives and registries. They are also persistent regarding the suppression of witnesses and the simplification of the international legalization process.[94]

They emphasize the convenience of unifying the extrinsically formal requisites in accordance with international relations, and they point out the obligation of excluding actual preventive controls for the formal validation of the notarial document.

Despite the fact that the UINL Conclusions are neither an agreement nor a treaty, they are binding to its members[95], as they must be accepted by anyone associating with the Union. The UINL is considered the most important and highest ranked organization of the Latin Notariat. At every international meeting, which takes place every three years; recommendations, determinations, and conclusions are emitted that come to be considered as "International Notarial Doctrine."[96]

### 2.1.2. MERCOSUR

The economic integration project known as MERCOSUR (*Mercado Común del Sur*),[97] started in 1991 as a free commercial zone and transformed into a customs union, adopting economic obligations for its member countries that implicated a political approach. Its members are Argentina, Brazil, Paraguay, and Uruguay.

As an international engagement and organization, the MERCOSUR can be positioned between NAFTA and the European Union: NAFTA embodies a free trade zone in which its members have in common an institutional individualism that lacks commercial compromises; and the European Union, born in 1961 with the Treaty of Rome, has overcome many harmonizing and negotiation processes and today is a unique market for every member, with policies and provisions inside and outside Europe.[98]

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[94] José Antonio Márquez González, "*Circulación del Documento Notarial y sus Efectos como Título Legitimador en el Tráfico Jurídico*", (2001) 116 *Revista de Derecho Notarial* 310 [translated by author] at 320 [*Márquez*].

[95] The UINL, being the international association that represents the notariats from 73 different countries publishes these conclusions for its members, and which are compelled to adopt as directrixes for their notariats.

[96] See *Perez*, *supra* note 92 at 43.

[97] Common Market for the South.

[98] *Red Académica Uruguaya* "*Aporte a la Comprensión del Mercosur*", online: <www.rau.edu.uy/mercosur/>.

The "IV Notarial Congress of the MERCOSUR" in Cordoba, Argentina[99] in 1999, accepted the "*Las Leñas*" Protocol, which includes the possibility that instrumental documents (deeds or *escrituras públicas*) *sensu stricte* could have free circulation between MERCOSUR members without any international legalization. Its Articles 25 and 26 provide as follows:

> "Art. 25 -...Public instruments composed by a member country will have in other country the same probative force as their own public instruments or documents.
>
> Art. 26- Documents drafted by member countries' jurisdictional authorities or any official authorities, such as deeds and documents which certify their validity, date, signature or its conformity with the original, which have been issued through the Central Authority, are exempted of any legalization, *apostille*, or any analog formality when they are to be presented at any member country's territory.[100]

To many countries of the Civil Law Tradition, the extreme formalism that their legal systems require is becoming a significant problem, globally speaking, since the non-formalist countries prefer to do business with countries that offer fewer obstacles.[101] [102] MERCOSUR has overcome this problem; this project's success places it as a model for other Treaties or Agreements of Civil Law Tradition countries.

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[99] Óscar Félix Ruiz, *Congresos notariales del Mercosur*, (*Buenos Aires: Fundación Editora Notarial FEN, Colegio de Escribanos provincia de Buenos Aires*, 2000) at 72 [translated by author] [*Felix*].

[100] See *Márquez, supra* note 94 at 330.

[101] Comments by: Francisco Xavier García Más, Thierry Vachon, and Cristina N. Armella, guest speakers representing Spain, France, and Argentina, respectively, at the Work Session of the UINL XXIV International Congress at Mexico City, October 2004. Guest speakers also addressed that attacks on the Latin notariats are drawn by American-influenced institutions or organizations, such as the World Bank, which published an article named "How to do business in Mexico?" In it, the *notario público* in Mexico is described as a monopolist profession that is completely unnecessary; it includes a statistical investigation of each countries' business and economic climate by identifying specific regulations and policies that encourage or discourage investment, productivity, and growth. The formalist countries (mainly Central and South American and sub-Saharan African countries), where key indicators are used to help measure the ease or difficulty of operating a business, appear to be the worst economies for investing and having commercial relations. online: <http://rru.worldbank.org/DoingBusiness/>.

[102] "Some of NAFTA's legal discontinuities occur because different formalities are required for the same transaction in neighboring countries..." "Yet, what about such obstacles as the low esteem in which trade, credit and their practitioners have been held until very recently by Spaniards and their Latin American descendants? Such dislike and distrust have not only stunted the development of commercial credit, but has also inspired a system of monopolized enterprise which has limited the access of local and foreign merchants to numerous forms of commercial ventures and commercial credit."-Kozolchyk, Boris. NAFTA in the Grand and Small Scheme of Things, May 3, 1994. online at: <www.natlaw.com/pubs/naftabk.htm> [*Boris*].

At the First International Notarial Congress, set by the Legal Affairs Working Group from the Gulf of Mexico States Accord (GOMSA)[103] held at Cancun, Mexico in February 2004, one of the speakers, Doctor Cristina N. Armella,[104] representing the Argentinean notaries, commented that the four member countries of the MERCOSUR, Uruguay, Paraguay, Brazil, and Argentina signed this Agreement with the intention of harmonizing their local legislation. Even though there are some important differences in each country's notarial practice, the notarial development of the countries is very similar. In Uruguay, for example, *notarios* may also practice as lawyers. The country also attempted to permit the appointment of foreigners to the *notarial* profession as Argentina did; however, even though this permission was granted, the move proved unsuccessful as it was abrogated in the last legislative reform.

An important point about the members of MERCOSUR is their lack of flexibility regarding Jurisdictional Competence. In this order of ideas, *escribanos*[105] and *notarios* have a prohibition to practice in places other than their own jurisdictions.[106] In addition, the MERCOSUR Commissions have dictated "Definitions" that forbid public officers and *notarios* from offering their services or establishing themselves in any other country, including the member countries. Likewise, the Commissions have treated the document free circulation topics, which still depend on the processes that involve special legalization, *notario's* signature, and authorization from the country's foreign relations Minister as well as the other countries' Consulates. Despite its embryonic status, the advances regarding free circulation of documents are positive, but only in the judicial branch. In addition, there is an exaggerated legalization cost for each document of about US $120.00.[107]

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[103] Accord of the States of the Gulf of Mexico, online: <www.gomsa.org> (The Accord of the States of the Gulf of Mexico (GOMSA) was signed in the city of Campeche, Mexico on May 13, 1995 by the representatives of the five American states, Florida, Alabama, Mississippi, Louisiana and Texas, and the six Mexican ones, Tamaulipas, Veracruz, Campeche, Tabasco, Yucatán, and Queretaro, that share the Gulf of Mexico region. The objective of the Accord is to establish working partnerships among these states to promote economic and infrastructure development, as well as educational and cultural exchanges. The Accord brings together public officials, entrepreneurs, investors, scientists and educators from the eleven states in a collaborative effort aimed at enhancing the welfare and the quality of life of the citizens of their respective communities, and, as a result, benefiting the Gulf of Mexico region as a whole).

[104] Argentinean Notary Number 19 (*Escribanía con Registro Notarial No. 19*).

[105] The proper term for a *notario público* in Argentina.

[106] With the above mentioned exceptions.

[107] In 2004.

### 2.1.3. EU – Mexico Free Trade Agreement

In November 29, 1999, the Free Trade Agreement between Mexico and the European Union was signed. The issues discussed and implemented had to do with market access (including fish, agricultural, and industrial products), birthplace regulations, sanitary norms, safeguards, competence, intellectual property, and dispute resolution. Finally, negotiations led to agreement on many issues, and to the establishment of a base for service providers of the two member countries who can practice in the other member country's territories, sustained by the "National Treatment" and "Most Favored Nation" principles.[108]

The Agreement covers every activity regarding services, including financial services, business services, telecommunications, construction, distribution, environment and energy services, and tourism and transport services, with the exception of the audiovisual, air transport, and maritime trade.[109]

### 2.1.4. NAFTA

#### 2.1.4.1. Overview

The North American Free Trade Agreement (NAFTA), signed simultaneously in and by Mexico, Canada, and the United States on December 17, 1992, came into force on January 1, 1994. This Agreement represents a very successful mechanism that has permitted North America to build an economic power block. As time has passed, NAFTA has proven itself a convenient instrument of and for the three member countries.[110] Apart from being fully compatible with GATT, NAFTA can be understood as superseding it,

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[108] Mattias Busse and Georg Coopmann, The EU – Mexico Free Trade Agreement: Incentives, Context and Effects (2001), online:<http://www.hwwa.de/Projekte/Forsch_Schwerpunkte/FS/Handel/Publikationen/EU-MexicoFTA.pdf>.

[109] Gateway to the European Union, Bilateral Trade Relations Mexico (27 February 2001), online: <http://europa.eu.int/comm/trade/bilateral/mexico/mexico.htm> [translated by author] [*Bilateral*]

[110] See *Boris*, *supra* note 102.

partly because the National Treatment principle[111] (NT) fully replaces the Most Favored Nation principle (MFN). Moreover, the entire agreement is subject to compulsory dispute settlement; it applies to governments, not to private actors, and the majority of tariffs and export/import restrictions were supposed to be eliminated by the end of 2004, a decade after the Agreement came into force.

It can therefore be understood that the differences between the legal systems of the NAFTA member countries imply many obstacles regarding the efficiency demanded by today's transactions.[112] The "spirit" of the Agreement relies notoriously on the implementation of systems and on the environmental circumstances that could ease trade (*lato sensu*) and political relations between the signers.

#### 2.1.4.2. Trade in Services

In NAFTA, this chapter focuses primarily on:

a. the production, distribution, marketing, sale and delivery of a service
b. the purchase, use, or payment of a service
c. access to and use of distribution and transportation systems in connection with the provision of a service
d. presence in its territory of a service provider of another member country
e. the provision of a bond or other form of financial security as a condition for the provision of a service.[113]

Legal services is one of the main service sectors covered and protected by NAFTA; however, each country has excluded certain sensitive sectors from coverage.

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[111] This concept will be explained later in this subsection.
[112] Nicholson, Patrick D. Lieutenant-Colonel, "An evaluation of NAFTA after 5 years and a look at its future"(1999), online: <http://libraryjid.org/en/mono38/nicholson.htm> [*Nicholson*]
[113] NAFTA Article 1201(1).

For example, Mexico did not liberalize services, such as public notaries, that are specifically reserved to Mexicans by the Mexican Constitution.[114]

Concerning licensing and certification of professionals, the Agreement provides that entry requirements should be related solely to competence, and endorses a qualified mutual recognition principle.[115]

NAFTA does not remove or weaken any of the three member countries' licensing and certification requirements; however, consistent with the principle of non-discrimination, the certification of professionals such as doctors and lawyers should be based on objective criteria aimed at ensuring competence, not on nationality. In 1996, citizenship requirements for the certification of professionals were eliminated.[116] In order to practice in one of the member countries of NAFTA, professionals must be licensed or certified in that country.

Unlike other agreements, NAFTA contains the MFN principle, which implies that the obligation is applicable to both Parties and non-Parties.[117] These MFN and NT principles are not limited to specific service sectors; they are applicable to all services.[118] "A 'negative list' approach is adopted, whereby reservations are noted regarding particular service sectors or particular measures within certain sectors to which a Party would not want these obligations to apply... Very extensive reservations apply for one or more of the NAFTA parties regarding transportation (especially maritime shipping) and some professional services (especially law)."[119]

Even though NAFTA has not dedicated a chapter or a section exclusively to Universities or Academics, the implications and significant compromises accepted by Mexico, Canada, and the Unites States in Section A, Annex 1210.5[120] are transcendental. Their consequent repercussions in Universities and Educational Institutes for Professionals in particular and in academic sectors in general are mainly attributable to

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[114] Cross Border Trade in Services, online: <web2.alaska.edu/wtr_site/NAFTA/implementation.html> [*Service*]
[115] Contained in Article 1210.
[116] See *Services*, *supra* note 114.
[117] Article 1203.
[118] R. Howse and M.J. Trebilcock, *The Relation of International Trade* 2nd ed. (London: Routledge, 2001) at 277. [*Trebilcock*]
[119] *Ibid.*
[120] Transcribed in Annex D.

the Agreement's harmonizing orientation, intended to liberalize the quantitative restrictions related to licensing and certification.[121]

Section A from Annex 1210.5[122] regulates the procedure for the solicitation of Licensing and Certification, establishing that the Parties are obliged to make sure their corresponding competent authorities will, in coordination with universities and educational institutes, in as reasonable and prompt a term as they can, emit the authorization for licensing or certification.

Concerning the creation of professional service norms, Mexico, Canada, and the United States are supposed to encourage the correspondent organisms in their own countries to create mutually acceptable norms and criteria for the authorization of licenses and certification to the services' providers, and to submit before the Permanent Specialized Commission recommendations in order to obtain the mentioned recognition.

The Agreement's preamble establishes the interest of contributing to harmonious development, international commerce expansion, international cooperation, building an extended and secure market for goods and services produced in the Parties' territories, strengthening the competence and quality of corporations and firms at an international level, encouraging innovation and creativity, among other things. According to author Silvio Lagos, the philosophy of education must rest in these philosophical principles.[123]

There are notorious divergences between the academic and the service provider's standards in the three countries. For example, a clear change of mind is needed in Mexican universities in order to adopt a philosophy of unity regarding the productive sector, beginning with total quality norms, scientific development, and competence. Training the individual, starting from academic excellence, must be highlighted in order to create an international model of academic personnel that can meet the standards of the most prestigious universities of the other Parties.[124]

These issues have a number of probable solutions:

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[121] See *Lagos, supra* note 21 at 90.
[122] Transcribed in Annex D.
[123] See *Lagos, supra* note 21 at 103.
[124] See *Lagos*, *supra* note 21 at 90.

1. Install a permanent Panel of the three countries' educational institutions that would standardize the recognition of academic certificates until a common professional license is obtained.
2. Approve an equivalent grade system between the member countries, determining the courses or evaluations that foreign professionals must complete in order to be permitted to practice in each country.
3. Implement a programmed social service related to the profession that could aid in the creation of well-rounded professionals as a culture between the Parties in order to contribute to the human and social spirit of the countries' societies, apart from the actualization of professionals.

Also related to NAFTA's environmental framework, the 1996 document entitled "Legal Foreigners Consultants and aspects related with the Cross Border Services" compiles the recommendations of professionals from Canada, United States, and Mexico in Section B of NAFTA.[125]

Section B recognizes the sovereignty of the three countries, as the previous consultation with their respective professional organisms and associations permitted; for participation forms and procedures for the national lawyers and External Legal Advisors; and for the adoption of norms and criteria for authorizing foreign law firms.

In June 1995, representatives of the Engineering profession from the three member countries signed a mutual recognition agreement (MRA) of licensed Engineers' qualifications. Efforts are currently under way in each of the three countries to ratify the trilateral agreement regarding the MRA. Representative bodies of the Engineering profession have forwarded the agreement to their respective governments, requesting that the NAFTA Commission encourage their competent authorities to implement the agreement.[126] This has been a model for several professional unions, such as lawyers, to file projects regarding an MRA as well. [127]

In reference to Temporary Entry for Business Persons, "Chapter 16 of NAFTA reflects the preferential trading relationship between the US, Mexico and Canada, the

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[125] Transcribed in Annex B.

[126] Department of Foreign Affairs and International Trade, Report of the NAFTA Working Group on Investments and Services, online: <http://www.dfait-maeci.gc.ca/nafta-alena/report7-en.asp>.

[127] See *Lagos*, *supra* note 21 at 98.

desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures to temporary entry, as well as the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories."[128]

Individuals that are subject to Chapter 16 provisions must be citizens of a NAFTA country and must be admissible under existing immigration laws in their respective country. Four groups of business people are admissible for temporary entry under Chapter 16: business visitors, traders or investors, intra-company transferees, and professionals. Professionals are listed in NAFTA Appendix 1603 D.1. When seeking temporary entry, professionals must meet the minimum educational requirements or possess the stated alternative credentials established in the mentioned Appendix, and seek to engage in business activities at a professional level in that country.[129]

The professionals listed in Appendix 1603 D.1 are the only professionals eligible for Trade NAFTA ("TN") status. Under TN status, certain professionals from a NAFTA country may enter another NAFTA country to work in a company on a temporary basis. Apart from belonging to one of the professions listed in the mentioned Appendix, the applicant must possess the required credentials to be considered a professional. Appendix 1603 D.1 includes lawyers (including Quebec notaries) that have an LL.B., J.D., LL.L., B.C.L. or Licenciatura Degree (five years) or membership in a state/provincial bar.[130]

#### 2.1.4.3. Specific Provisions

NAFTA does not directly embody aspects associated with the notarial institution; however, some of its Articles provide the main parameters to construe the limits and the "practice area" for notarial services in the NAFTA territories.

The Agreement's limits and perspectives are set out in the General Aspects section and, although its main interest, the creation of a free trade area, is revealed, the

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[128] Department of Foreign Affairs and International Trade-DFAIT, "NAFTA Facts", online: <www.cbsc.rg/nb/bis/1294.html>.

[129] Barry Appleton, "Navigating NAFTA"-A Concise User's Guide to the North American Free Trade Agreement", (1994) Carswell Thompson Professional Publishing, at 117, 118.

[130] Henry J. Chang, "TN Status Pursuant to the North American Free Trade Agreement ("NAFTA"), online: <www.americanlaw.com/tn.html>.

specific objectives are specified in Article 102. Article 105 functions as a "funnel clause," which permits the application of different mechanisms in order to give effect to the Agreement's provisions.

Goods have always been the traditional form of trade; therefore, NAFTA discloses one of its main foundations concerning Trade in Goods as being the NT, a principle that entirely replaces the MFN. The NT was designed to prevent discrimination in favor of domestic producers and shall mean awarding "to a state or province, treatment not less favorable than the most favored treatment accorded by that state or province to any like, directly competitive or substitutable goods as of the Party of which it forms a part."[131]

In the developed industrial countries, such as the United States, services now accounts for 80% of GDP, which are the largest source of new jobs in the economy.[132] At the same time, Cross-border Trade in Services is thought to account for only about 20% to 25% of world trade.[133] As the comparative advantage in the production of many manufactured goods has shifted to the Newly Industrializing Countries (NICs), the developed industrial countries have become increasingly concerned with the enhancement of trading opportunities in services, particularly in areas such as financial services (e.g. architecture, engineering, law).[134] NAFTA adopts both the NT and MFN principles in regards to trade in services, stating that local presence is not required to provide covered services. A large number of reservations have been entered regarding which services are covered and which ones are not (Article 1206).

#### 2.1.4.4. Notarial Organisms and NAFTA

The organization of the world's diverse notarial practices is noted in the different groups that embody notary associations at local, federal, and international levels. In a

[131] See Annex A (Article 301).
[132] The World Fact book, online: <www.cia.gov/cia/publications/factbooks/geos/us.html#Econ>.
[133] *Idem.*
[134] See *Trebilcock, supra* note 118 at 271.

state or jurisdiction, there are generally "Colleges,"[135] "Boards," or associations that regroup the notaries in order to provide them with the following:[136]

1. Certified legal updates and continuing education.
2. Defense of their interests before governmental authorities.
3. Defense of their interests before institutions or individuals regarding objective responsibility in behavioral matters related to the rendering of their services.
4. A communication system at member and at organization level.
5. A system that permits the regulating and disciplining of members and their practice.
6. A commission for the protection of the public.
7. A commission of ethical standards between the members.
8. A communication link with national notarial associations, as well as with the different notarial organizations in the world, for example, the *Colegio de Notarios Públicos del Estado de Nuevo Leon, A.C.* in the state of Nuevo Leon, Mexico; the *Chambre des Notaires du Québec* in Quebec, Canada; and the Louisiana Notary Association in Louisiana, USA. (i.e. Commission for American Affairs)[137]

On a national level, an association reuniting the different state-participating *collegiums* that represent the country's notaries usually exists in each country. It usually has the same objectives and services, as it is homologous at the local or state level. Some examples include the *Asociacion Nacional del Notariado Mexicano* in Mexico and the National Association of Civil Law Notaries in the USA.

At the international level, there is the International Union of Latin Notaries *Unión Internacional del Notariado Latino* (UINL), which congregates the Latin-oriented notaries (73 member countries to date) with representation before important international organizations.[138] Besides offering services and benefits to the local and national associations, it issues notarial guidelines, as well as foundations for the professional

[135] By virtue of the notaries with Roman Germanic influence, own obligation to "collegiate".
[136] This fact does not apply to organizations that have only networking and/or trade purposes, since they have no authority or jurisdiction over their members.
[137] See *Lagos*, *supra* 21 at 151.
[138] i.e. United Nations (UNESCO and UNCITRAL), World Trade Organization, Commission of the European Communities, Organization of the American States, International Law Society, among more.

certification system actually in process, which has been one of the commitments to which the corresponding Commission has applied itself regarding NAFTA standards.[139]

It is important to highlight some of the most significant notarial organisms related to the NAFTA member countries:

In **Quebec, Canada**, the ***The Chambre des notaires du Québec*** "...is a professional order which groups together the 3,200 or so notaries of the province... its principal purpose is to ensure the protection of the public which has recourse to the services of its members."[140]

The *Chambre* and its members are ruled by the *Professional Code*[141] and the Notaries Act,[142] and the *Chambre* supervises the training and admission of candidates to the notarial profession, controls its practice, and offers a broad range of services to persons who may be dissatisfied with services they have received, fees they have been asked to pay, or the conduct of the notary they have seen.[143]

The *Chambre* has a priority to protect the public; to this end, it has established some mechanisms that include the possibility of holding an inquiry when the notary's conduct or the quality of his or her services appears to be questionable. A Committee on Discipline is an independent administrative tribunal of the Order, which is subject to rules of procedure that are similar to those of regular tribunals, and is used when complaints are lodged against a notary. It has the authority to impose penalties, including suspension. In 1966, the *Chambre* created a special fund, called the Indemnity Fund, designed to indemnify, in whole or in part, persons who are victims of fraudulent or negligent conduct from a notary. This happens when a notary uses trust funds for purposes other than those for which they were entrusted to him.[144]

In general, notaries may set the fees for their services,[145] and the client generally agrees in advance to the notary's method of calculating the fees for the services.

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[139] Comment by speaker Francisco Xavier Gonzalez Arrendondo at the First International Notarial Congress set by the Legal Affairs Working group from the Gulf of Mexico States Accord (GOMSA) in Cancun, Mexico, February 14th, 2004.

[140] *Chambre de Notaries du Québec,* online: <www.cdnq.org/index_ourmission.htm>.

[141] R.S.Q c. C-26.

[142] R.S.Q c. N-3.

[143] See *supra* note 140.

[144] *Ibid.*

[145] Most of the notarial professions that belong to the Latin type can decide the fees they charge for their services. i.e. Mexico, Ecuador, Argentina; nevertheless, there are exceptions to this. i.e. Puerto Rico.

However, the *Chambre des Notaires du Québec* has created a mechanism for any client who is dissatisfied with an account, so that he/she may apply for conciliation and, if necessary, arbitration to resolve the dispute over fees. In addition, "as a preventive measure and to assist practitioners, the *Chambre des Notaires* maintains a rigorous program of visits to and inspections of notarial offices, which ensures the constant supervision of the practice of the profession, and the respect of the numerous regulations which govern it."[146]

For all the above reasons, this advanced notarial organism functions as an organized institution that is responsible for protecting the interests of the notaries and the users of the notarial services, in terms of academic, professional and ethical ability.

In **United States**, the **National Association of Civil Law Notaries, Inc.**, founded in Florida in 1998, is the entity that serves as the complete source of information, training, practice, news, and constant notarial education for all the civil law notaries in the United States.[147] It has more than 100 listed members from Alabama, California, Florida, Illinois, and Texas. The Association's main purposes are the following:

"a) To advance professionalism in notarial practices;

b) To seek constant improvement in the ethical and practice standards of civil-law notaries in the United States of America;

c) To educate and promote understanding of civil-law practice, and the value of civil notarial practice;

d) To foster and encourage collegiality among civil-law notaries and others who wish to promote the purposes stated in these articles;

e) To foster and encourage improved relations among jurisdictions that incorporate civil-law notarial practices into their body of laws and between such jurisdictions and others that may wish to do so;

f) To advance the professional interests of the members of the Association;

g) To improve laws and regulations relating to civil-law notarial practice..."[148] [149]

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[146] See *supra* note 140.

[147] National Association of Civil Law Notaries, Inc., online: <www.nacln.org>.

[148] Article III from the Articles of Restatement of the Articles of Incorporation, National Association of Civil Law Notaries, Inc., filed in August 11th 1998 at the Secretary of State in Tallahassee, Florida, United States, online: <http://www.nacln.org/REF-NACLN-Corpdocs.html>.

[149] Does not apply to all organizations; i.e. *The Chambre des Notaires du Quebec.*

Some states also have associations that are controlled by the Secretary of State's Notary Divisions. In Orleans Parish in New Orleans, Louisiana, for example, there are 3,759 active attorney notaries, and 250 active non-attorney notaries,[150] while in Florida there are approximately 86 civil law notaries on the members list of the National Association of Civil Law Notaries.[151]

According to some experts, the presence of civil law notaries in other states is increasing. California, Illinois, and Texas,[152] for example, have some civil notaries as members of the National Association of Civil Notaries. Professor Nicholas Karambelas commented on this in a recently published article:

"At the beginning of the 21st century, each legal tradition is gradually adopting essential features of the other legal system. The law of the common law systems is becoming more statutory. The law of the civil law systems is being made increasingly in judicial decisions and interpretations of civil code provisions. The civil law notary is but another feature of the civil tradition that is receiving serious consideration in common law jurisdictions"[153]

In **Mexico**, the ***Asociación Nacional del Notariado Mexicano, A.C.***, (ANNM), founded in October 1955, organizes notaries from the 32 federative entities and represents Mexican notariat at the UINL. This institution emits the criteria for notarial practice and updates in notarial matters nationwide. Its journal is the most acknowledged notarial publication in Mexico and the presidents of the state's *collegiums* are generally directors in the Association's organization. The ANNM has signed a variety of agreements with the Mexican government. It has an important role in society, providing *pro bono* services, participating with the government to develop special campaigns, and representing the country in many international events and solemn acts.

The following are among the multiple functions and roles of ANNM:

- To promote and extend the values of the notarial profession.

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[150] E-mail Interview of Ann Wakefield, Archivist from the New Orleans Notarial Archives Research Center (June 22, 2005) on Louisiana Secretary of State's Notary Division.
[151] National Association of Civil Law Notaries, Inc., online: <http://www.nacln.org/MEM-List.html>.
[152] *Ibid.*
[153] See *Karambelas*, *supra* note 18 at 28.

- To make investigations, projects, and initiatives focused on the development, stabilization, and academic, and moral development of the notarial institution.
- To determine the content of notarial laws and promote the integration of the federal and state bodies of laws and academic programs in universities.
- To propose law reforms to the correspondent authorities and realize agreements with the government so that the national notariat can participate in public interest programs.
- To advise and respond to written consultations made by *notarios*, authorities, and the general public.
- To represent and defend the notarial institution (*collegiums* or individuals) before any authority or individual.
- To promote, support, and organize notarial meetings at the national, state, or regional level in order to integrate Mexican *notarios* and ensure adequate communication with and professional updating of every *notario* in the country.
- To establish and operate a Notarial Law Specialized Research Center officially recognized by the competent authorities.
- To represent the Mexican notariat before the UINL and other national and international organizations that have relations with the notariat.
- To establish a permanent office in order to operate, function, and, particularly, to serve members of the Association.
- To promote and assist the creation of *collegiums* and notarial associations in the different states and municipalities of the Federation in order to defend, train, and aid the local notariats.
- To sanction the conduct of those *notarios* who betray the values of the notarial practice in their professional practice.[154]

[154] Article II from the ANNM bylaws.

Internationally, the International Union of Latin Notaries (UINL), as mentioned before, is an organization founded in 1948 by the professional associations of notaries in the five continents with Latin-style notarial systems based upon the foundations of Roman-Germanic law. It can be considered the most important notarial authority worldwide, since the first International Congress in Buenos Aires, Argentina, had the assistance of 19 countries *quorum*. The UINL has 73 member countries and has held 24 international congresses. Its aims and objectives include the following:

> "a) The promotion, evolution and application of the principal fundamentals of the Latin Notarial system as approved by the Permanent Council at its meeting in the Hague in March 1986;
>
> b) Representation of Notariats before International Organisations;
>
> c) Collaboration with and participation in activities of International Organisations;
>
> d) Collaboration with National Bodies, more particularly with Notarial Bodies;
>
> e) The study of law in the field of notarial practice and collaboration in matters leading to its harmonisation;
>
> f) The study and systematic collection of legislation relating to Latin Notaries;
>
> g) The promotion of international congresses and support for professional meetings which go beyond purely national interests....
>
> ...The establishment of relationships:
>
> a) with developing Notariats and with Notaries in countries which have no notarial organisation to assist their development and organisation with a view to their joining the Union;
>
> b) with notarial organisations within legal systems which are capable of belonging to the Latin Notarial System;
> c) with organisations which are not compatible with those of the Latin Notarial System in order to collaborate with them in areas of common interest." [155]

The UINL structure comprises four main institutions to attain its objectives: a) the Permanent Office for International Exchanges (ONPI), responsible for information about and communication with notaries; b) the Permanent Secretariats, responsible for storage and dissemination of documentation related to the activities of the Union; c) the Administrative Secretariat, responsible for the preparation of documents, files, and

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[155] International Union of the Latin Notaries, online: *<www.uinl.org/ingles/informacion_inst_est.php4>*.

minutes of the various bodies of the Union, as well as being the administrative accounting and financial centre of the UINL; and d) the International Congress of Latin Notaries.[156]

One of the most important functions of the UINL is the harmonization of the international bodies of law in order to transform the conclusions and decisions drawn from the Union's international meetings into specific proposals for legislators in their respective countries. Some examples of these proposals are the protocol regarding the powers of attorney legal regime, private international uniform rules regarding marriage regimes, adoption, and informatics and the notary.[157]

[156] *Ibid.* Article 7.

[157] Ríos Hellig, Jorge, *La práctica del Derecho Notarial*, 5th ed. (Mexico: McGraw Hill, 2001) at 116 [*Hellig*]

## 3. IMPORTANT ASPECTS OF THE NOTARIES IN THE NAFTA TERRITORY

This chapter analyses the long-standing controversy of the nature of the notarial profession. Is a notary a public officer, a liberal professional, or both? This chapter evaluates the roles and functions of notaries in an effort to define the nature of the notary. It also undertakes an examination of the origins and evolution of the form of the notarial document, and pretends to complete a comparative analysis of the notarial document's actual form, codification, notarial law, and private international rules across NAFTA's member countries, taking into account the cross-border transactions and notarial document circulation in the three countries. Finally, it approaches the intersection of technology, the notarial documentary form and the implications of its international circulation, and considers an Electronic Public Instrument.

### 3.1. The Notarial Nature and Services between NAFTA Member Countries

As mentioned previously, cultural diversity and the sharp differences between the legal systems adopted by NAFTA member countries have been an endless obstacle when "building a bridge" between the countries' dissimilar institutions, such as the notary and its practice.

Even with the presence of NAFTA, the different formalities that are required for the same transaction in neighboring member countries produce inevitable legal problems. While agreeing on similar concepts or homologating statutes and regulations could remove all of these problems, it is impossible to equate the enforceability of the notary public document with that of the *notario* because the institutions are completely dissimilar.

Together with lawyers from Mexico, the USA, and Canada, Quebec *notaires* are included in the "Professionals Under the North American Free Trade Agreement" category of the NAFTA Professional Job Series List. Therefore, *notaires* who fulfill the correspondent requirements may work in a NAFTA country.[158]

[158] United States Immigration Services, online: <http://www.usais.org/naftavisas.htm>.

In many cases, nationals and immigrants from member countries have no knowledge about the differences in the functions and roles of notaries in their neighboring countries.[159] In this regard, Professor Pedro Malavet declares that misconceptions about notaries and their functions in the USA have allowed unscrupulous persons to take advantage of USA citizens of foreign origin and aliens seeking entry to or living in the USA, misleading them into believing that they could provide legal services, or that their services have the same legal effect in the USA as in the home countries of the immigrants. "This problem has lead several states to enact laws that specifically require notaries to indicate that they are not lawyers when advertising in a language other than English and prohibit the literal translation of the title 'Notary Public' to the Spanish '*Notario Público.*'"[160]

Because of the large difference between notary publics and *notarios*, it is prohibited for a notary who is a national of one of the parties to NAFTA to become a notary in another member country. In addition, Mexico did not liberalize *notarios públicos*' services 1994 NAFTA negotiations, as Mexico's Constitution specifically reserves such services for Mexicans. Moreover, Article 54 of the Notarial Law for the Federal District (*Ley del Notariado para el Distrito Federal*) includes Mexican birth among its compulsory requisites. Quebec's stated requisites for becoming a *notaire* do not mention nationality.

With respect to the professional services of lawyers and notaries, Annex VI of NAFTA in the Schedule of Canada permits lawyers authorized to practice in Mexico or in the USA and law firms with headquarters in Mexico or in the USA to provide foreign legal consultancy services, and to establish for that purpose in British Columbia, Ontario, Saskatchewan, and any other province that so permits by the date of entry into force of the Agreement. The same applies in the Schedule of Mexico, where it is limited to foreign legal consultancy. In the Schedule of the United States, the same applies to Alaska, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Michigan, New Jersey, New York, Ohio, Oregon, Texas, and Washington, and any other state that so permits by the date of entry into force of the Agreement.[161]

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[159] Malavet, Pedro, Counsel for the Situation; The Latin Notary, A Historical and Comparative Model, (1996) 19: 3 Hastings International and Comparative Law Rev. 394 [*Malavet*]

[160] *Ibid.*

[161] SICE, Foreign Trade Information System, online : <http://www.sice.oas.org/trade/nafta/anx6.asp>.

### 3.1.1. Different Roles and Functions of the Notaries

In order to define the kind of documents the notario público creates, it is essential to define the nature of the notario público itself. Taking Mexico as an example, there has always been a controversy as to whether the notario público is a public officer or an independent professional. Article 26 is purported to contain the dogmatic solution, which states that the notario has a "complex nature." The notarial function is at once a public and a private one. It is public by virtue of the fact that the state delegates its sovereign authority to authenticate it, but it is also a liberal private profession that is subject to the same governmental regulations that the state imposes on other professional branches. A person occupying the office is a private legal professional to whom the state entrusts the public function of authenticating and giving proper legal form to what would otherwise be a private transaction, making it a public act by memorializing it in a public document. The notario público combines in his or her acts the competence that is traditionally associated with a public official, with the discretion and responsibility of a private legal professional.[162] He/she is also appointed to be a mediator, an adviser, and a conciliator, despite the fact that the notario must be a lawyer.[163]

The notarial institution has a very special position in legal and administrative structures; different roles and natures have been attributed to notaries, such as public officer, independent professional, impartial legal counselor, mediator, and certification authority, among others.

In words of Professor Pedro A. Malavet, the notariat is part of a professional structure that includes governmentally defined specialities.[164] Malavet also considers the Latin notary to be, in the celebrated words of Justice Louis D. Brandeis, a "counsel for the situation." "On a number of occasions Brandeis suggested to his clients that he might be of greater value as a 'counsel for the situation' rather than as an attorney for one faction or another. In such role, he attempted to strike a balance between the obligations of each party and work out a solution equitable to all. This judicial posture accurately reflected his efforts to create a new

[162] *Supra* note 159.
[163] *Supra* note 154 Articles 32 and 33.
[164] *Malvet, supra* note 159 at 401.

type of lawyer who could rise above partisan advocacy."[165] One of the most important roles of the *notario* is the prevention of disputes; this is the main reason for its existence. Being an experienced legal specialist who uses impartiality to obtain the ideas and interests of all parties involved, the *notario* also qualifies as a model for alternative dispute resolution. When advising the parties, the objective of the *notario* must be to focus on their interests and not on their positions. A story of two girls arguing in the kitchen serves to illustrate this point. One girl needs the juice of an orange and the other, the peel for a cake. The mother divided the orange in two and neither girl was satisfied; however, she could have accommodated both by peeling the orange and giving each daughter the part of the fruit she required to fulifll her needs.[166] Similarly, the *notario* must take the role of the mother, who advise and tries to satisfy and protect both interests. [167]

There has always been controversy regarding whether the *notario público* is a public officer, an independent professional, or both. In the author's opinion, this institution is not of a hybrid nature; however, the different roles and functions of the *notario* can be familiar with and categorized in diverse legal specializations. This is why most Latin-oriented countries (i.e Mexico) have reserved a special denomination for the *notario's* nature: "*Fedatario Público.*"[168]

Acknowledging authors' contradictory definitions of the *notario*'s nature, Professor Agustín Basave cites Giménez-Arnáu, who considers that notarial practice cannot be assimilated to that of the judges, because notaries do not have "*imperium.*" Basave also alludes to Vázquez Campo's comments in the following ideas: 1. The *notario* acts in a positive sense when private interests act in accordance to stated law; while the judge intervenes or must intervene when at least one of the parties acted contrary to laws or norms. 2. The notario intervenes in a preventive manner; the judge in a restorative one. 3. The

[165] Urofsky, Melvin I., Brandeis, Louis D., and the Progressive Tradition 112 (1981) cited in *Malavet, supra* note 159 at 412.
[166] Fisher, Roger & Ury, William, *Getting to Yes: Negotiating Agreement without Giving in*, 2nd ed. (United States: Pengion Books, 1991) at 40.
[167] *Ibid.*
[168] Referring to *publica fides*, which is deposited on the indivual.

notarial intervention is solicited by common or separate interests; the judge by counterview interests.[169]

Despite the fact that *notarios* have similar roles to that of a public officer, it can generally be considered that *notarios* are not public officers because of the following:[170]

- The certifying role of the *notario* acts in its own name and not that of the state.[171]
- The *notario* does not have an employer.
- The notarial institution does not belong to the hierarchy stated in Public Administration Law.
- The *notario* does not receive remuneration directly from the government.
- The *notario* is impartial.

Professor Malavet mentions that European compàrativists indicate that the Saxon notary, in the USA and England, for example, "...is not really a public officer in the traditional sense of being an employee of the state having special faculties and functions. The state does establish the requirements for becoming a notary, but she is still a private person."[172] In the USA, "the office of notary public is technically classified as a ministerial office, meaning it does not involve significant judgment or discretion of the notarial acts being performed...It is not a judicial or legislative position."[173] In contrast, the *notario* is a legal professional with considerable discretion and responsibility. [174]

Unless there are controversial interests, *notarios* must serve the general public; this usually places the notary in a public functionary position. Nevertheless, because he/she combines in his or her acts the competence traditionally associated with a public official with the discretion and responsibility of a private legal professional, the *notario* represents a liberal profession performing a public function. The *notario* is a public official by virtue of the delegation of the state's sovereign authority to authenticate and a liberal private

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[169] Basave Fernández del Valle, Agustín, *Structure, mission and dignity of the notariat*, 1st ed. (Mexico: 2003) *Nuevo Siglo Ediciones*, at 27.

[170] Even though these apply to most of the latin type notariats, there are some exceptions; i.e. Quebec, Belgium and France, among others.

[171] Article 26 from the Federal District Notarial Law in Mexico.

[172] See *Malavet, supra* note 159 at 431.

[173] Piombino, Alfred E., *Notary Public Handbook: A Guide for New York* 1, 1993 cited in *Malavet, supra* note 159, at 432.

[174] It is important to highlight that the American notary's power of authentication and of certification is derived from the Law and in those situations the notary acts as an officer of the state.

professional, as he/she is subject to the same governmental regulation that the state imposes on other professionals.[175]

From the Public Administration perspective, Professor Rios Hellig holds that the Mexican *notario público* belongs to a collaboration decentralization scheme (*descentralización por colaboración*). Decentralization is a legal form in which the government, in collaboration with lawmakers, creates public entities endowed with independent legal personality and patrimony of their own in order to be responsible for a specific common interest activity. Under the collaboration decentralization scheme, the state authorizes particulars (individuals or institutions) to collaborate with him or her through tasks in which they are specialists, but without directly pertaining or forming part of the public administration or government.[176]

Simply put, the private practice of public functions is the answer to the necessity of associating the public functionary and the liberal professional. This gives rise to new concepts: intermediate suppositions where public interest demands, the incorporation of the professional elements with their own characteristics (organization, competence, and initiative, among others), as well as the submission to a general order, laws, and the government.

### 3.2. The Notarial Document

"A document is a factual by-product of humanity's natural way of life; the notary is the essential element, if desired, for the composition and determination of the legal quality."[177]

In the beginning, one's given word, the simple promise, and then the oath (invoking a divine authority) were enough for an individual to oblige himself to undertake or not undertake a given action. As time went by, the diversification and increasing complexity of commercial relations rendered society's collective respect for the given word, promise, or oath insufficient for securing legal commitments. This change was the impetus for the genesis of the documentary form.

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[175] See *Malavet, supra* note 159, at 434.
[176] See *Hellig, supra* note 157 at 178.
[177] See *Bautista, supra* note 6 at 5.

### 3.2.1. DOCUMENTARY FORM (Origins and Evolution)

#### 3.2.1.1.Ancient Codifications

The **Hammurabi Code** (Mesopotamia, XVIII B.C.) is a collection of laws, supposedly given to King Hammurabi by God, which dictated that the contract and the signatures of the parties, as well as those of the witnesses, were to be carved onto stone tablets. When a contract ended, the tablet was destroyed and any money, land, or compensation reflected in the contract would be returned to its original owner.[178] In order for the contract engraved on the stone tablet to be considered valid, it had to be engraved with a personal marking. Once the contract was written on the sand-like stone, an oath was made before a judge and a number of witnesses, whereupon the stone was engraved with the personal marking.[179] This code required signatures and a seal in order for a contract to be authenticated; moreover, it insists upon the presence of witnesses for the validation of a contract between the two or more parties. These requirements are also present in today's civil law tradition.

Concerning oaths, the **Eshnunna Code** (Babylon, 1925 B.C.) contains a provision related to the binding nature of an oath. At that time, one needed only swear of one's innocence before a divine statue in order to prove one's personal morality.[180] The basis for this belief was that no one would dare to perjure themselves, since they would then be subject to the wrath of the gods.

The **Lipit-Ishtar Code** (Mesopotamia 1868 B.C.)[181] states that a contract that lacks the required formalities can incur harsh penalties.[182]

Furthermore, when real estate properties were bought, large stones were placed at the limits of the property as a distinctive signal:

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[178] See Federico Lara Peinado, *Código de Hammurabi*, 1st ed. (Madrid: Editorial Tecnos, 1992) at 7 [translated by author] [*Lara Hammurabi*].
[179] See *Ibid.*at 8.
[180] See Federico Lara Peinado & Federico Lara González, *Código de Eshnunna*, 1st ed. (Madrid: Editorial Tecnos, 1992) at 90 [translated by author] [*Lara Eshnunna*].
[181] German L. Hoeh, "Dinasty of Isin", *Compendium of Wold History* (1962), online: <http://www.b17.com/family/lwp/places/isin.html>.
[182] See Federico Lara Peinado & Federico Lara González, *Los primeros códigos de la humanidad*, (Madrid: Editorial Tecnos, 1994) at 107 [translated by author] [*Lara Codigos*].

"This heap is a witness, and this pillar is a witness that I will not go past this heap to your side to harm you and that you will not go past this heap and pillar to my side to harm me." [183]

The Law of the XII Tables (Rome, 450 B.C.)[184] laid open the law before the eyes of the people so they could know their rights, puts forth important legal provisions regarding contract formalities, namely, the binding value of generic rules: *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto.*[185]

A special section from the **Justinian Digest** (6th century A.D.) refers to the surety of documents and to their probative value. The "instruments" can be defined as "any means of litigious evidence"; for instance, this Digest considers the documents as well as the people ("the witnesses") to be "probative instruments."[186] The Justinian Digest contains precise provisions regarding the composition of contracts. Because they were intended to be pronounced with precision, the words possess an almost sacramental formal nature. Any erroneous expression of the words of the Digest would render the contract null and void. Oral agreements, which may be comparable to the modern verbal agreement, were comprised of a series of questions and answers.[187]

### 3.2.1.2.Medieval Codifications

The **Koran** (7th Century) is the Muslim collection of religious, moral, and juridical matters. It imposes a Muslim rule, which states that an agreement between two parties does not require written documentation. Above all, the Koran recognizes and acknowledges the binding effect of one's word before Allah.[188]

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[183] Bible Getaway, Gn. 31; 52, online: <http://bible.gospelcom.net/cgibin/bible?language=english&passage=Gn.+21&version=NIV>.
[184] The Law of the Twelve Tables, online: <http://members.aol.com/pilgrimjon/private/LEX/12tables.html>
[185] The Twelve Tables, online: <http://www.fordham.edu/halsall/ancient/12tables.html> ("When one makes a bond and a conveyance of property, as he has made formal declaration so let it be binding").
[186] See *Marquez*, *supra* note 94 at 310.
[187] *Ibid.*, at 311.
[188] The Koran, s. 2, v. 94, online: <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=1320>.

"**[16.91]** And fulfill the covenant of Allah when you have made a covenant, and do not break the oaths after making them fast, and you have indeed made Allah a surety for you; surely Allah knows what you do."

The ***Fuero Juzgo*** is a collection belonging to the Visigoths, compiled during the year 654 by King Recesvinto. This Visigoth collection, named *Liber Iudiciorum*, or *Liber Iudicum*, includes many classic laws of the Roman Period. At the same time contains the Visigoth rules as written documentation. The contracts, which could only be undersigned by the parties in front of a judge,[189] contained the day and the year on which they were written. The scribe was obliged to make a duplicate of the document and to file it in the official archive; archiving is still an obligation for the modern *notario público*.

King Alfonso *'El Sabio'* (1252-1284) enacted important laws in Spain, three of which were: *Fuero Real*, *Speculum*, and *Siete Partidas*. *Fuero Real* (1255) is also known as *Fuero del Libro* or *Fuero de las Leyes.* One of its books (Book III) outlines specific rules concerning the deeds by which parties should carry out business. Such rules had to be recorded by Court Clerks; however, if none was available, Common Clerks would consider the documents valid as long as there was a minimum of three witnesses present.

***Siete Partidas*** was written from 1256 to 1263. The Third Entry mentions that man-made objects and ideas are easily forgotten; therefore, they must be recorded in written form so that they are not forgotten. The deed, as the documentary proof *par excellence*, had to be written by a Court Clerk of Council, or sealed by the King or any other officially certified person. In addition, the Entry warned judges against making any changes. The *Siete Partidas* contains provisions concerning the characteristics of the seals and the quality of the people placing the seal. This legislation contains diverse examples of deeds and authentic certificates that include Bargain and Sale Agreements, Loans, Lease Agreements, Surety Bonds, Spouse's Consent for carrying out Sales, Exchanges, and Donations, among others.[190] Regarding wills and witnesses, the

[189] See *Márquez, supra* note 94 at 316. (There is evidence that affirms that the contract made between the Germanic tribes demanded physical manifestations; i.e. a wooden stick (*wuardia, festuca*). The people involved in the contract would often pat each other on the back as a symbol of agreeing to terms, especially price. This tradition persisted throughout the Medieval Era until the beginning of the XIX$^{th}$ century in North continental Europe. Still, it is said that a single handshake formalizes a contract).
[190] See *Ibid.* at 326.

***Ordinamiento de Alcalá*** resulted from the legal compilation made by King Alfonso XI in the Courts of *Alcalá de Henares* in 1348. The only law included in the *Ordinamiento de Alcalá* refers to formalities in wills, including a rule about the required number of witnesses, the qualifications the witnesses must have, and whether or not the notary has to be present, as the case may be.[191]

The **Laws of Toro** are the ordinances that were dictated by Toro's population in Spain and were enacted in 1505 by the Catholic King Fernando. They refer almost exclusively to private law provisions, specifically to such family matters as relationship issues and wills. They also mention the requirements for writing out the *noncupativo* will, or sealed will,[192] which entails at least seven witnesses, and for the will for the blind and for those needing legalized codicils.[193]

In 1567, Philippe II systematized and categorized different laws under the name "***The Collection of the Laws of These Kingdoms***." Its Title XII refers to the Notaries of the provinces and to the need for good, honest, erudite, and discreet men with good reputations to manage offices. Title XXVII refers to a Court Clerks' fees list regarding both deeds' rights and civil and criminal procedures.[194] Notaries could not charge more for their services than what the Title's list of fees specified.[195] Another law demanded that the notary write the exact fee on the back of the document, as well as the Court Clerk's signature.[196] In Madrid in 1566, Philippe II issued a mandate making these functions exclusive to the notary, whereupon Court Clerks were stripped of such rights.

### 3.2.1.3.The West Indies and *Novísima* Recompilations

**The Collection of the Laws of the Kingdoms of the West Indies** established specific provisions that only affected the new American territories. Concrete problems resulting from the new juridical, political, and social orders of the colonies prompted the

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[191] See *Ibid.* at 328.
[192] *In Scriptis* (Latin).
[193] *Fuentes del Derecho Castellano en la Edad Moderna,* online: <http://www.aldeavirtual.com/cultura/pandectas/no200109/tema09b.html> [translated by author].
[194] See *Froylan, supra* note 1 at 365.
[195] *Ibid.* at 366.
[196] *Ibid.*

creation of the West Indies provisions. One law addresses the demand for *notarios* from the *collegiums* to write the sentences, thereby preventing other officers from writing them.[197] Another law included in this collection insists that the *notario público* must sew-bind and sign the official registries at the end of every year.[198] The authentication of colonial documents required that they be sealed with the royal seal, which was given by the *metropolis*.[199] The majority of Latin-type notarial legislations still use these dispositions; in Nuevo Leon, Mexico, for example, each protocol book is composed of 200 sewn-bound, sealed, and signed pages. The seal is provided by the government administration.[200]

**The *Novísima* Collection of Spanish Law**, dating approximately from 1805, collected all the laws that were enacted for the Peninsula as well as for the Colonies overseas. This *Novísima* Collection compiles the laws and accords from the Legislative Assembly of the Seven Entries and the Royal Order; the Laws of Toro, the Collection of Felipe II, and includes the accepted rulings issued by the Royal Council. This collection contains a detailed chronological Table of Contents of its included laws that were enacted over the 503 years between 1302 and 1805. The law established the need to keep recordings of deeds and agreements, and added that such recordings must be filed and sewn.[201] This same part of the *Novísima* Collection contains a detailed schedule of fees, which specifies the fees for each official document, provision, grant, title of occupation, and public deed; such fees were mainly a result of the need of using stamped paper.[202] The Collection also included the initials of the officer responsible for the act. Due to the authenticity that this mark gave the document, the Court Clerk could not alter it.

### 3.2.2. Documentary Form and Authentic Acts in NAFTA Countries

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[197] *Legislaciones Coloniales,* online: <http://www.oni.escuelas.edu.ar/olimpi97/Pase-a-la-Historia/legcoloniales.htm#b> [translated by author].
[198] *Ibid.*
[199] also referred as "The Administration".
[200] *Ley del Notariado para el Estado de Nuevo León* (13 October 2000) II title ch.2 Art. 103; ch3. Art. 113. [translated by author].
[201] *Las Leyes de las Indias Occidentales, o*nline:<www.members.tripod.com/~Panamahistoria/leyes.htm>.
[202] *Ibid.*

According to Professor Malavet, the Latin notary performs his/her functions within a unified legal system. "It is a set of legal norms because Notarial Law is supplemented by various rules included within the legal systems' specific legislation, Civil, Registry or Mortgage, Penal and Evidentiary Codes, etc., and, at the same time, it constitutes a defined and identifiable branch of the legal tree, with its own characteristics."[203]

*Notarios* are required to be experts in the substantive laws of each of the transactions or acts they authenticate or certify. This can be considered a natural characteristic of the notarial profession in a civil code system, in which the laws are not only expected but required to interact.[204]

This subsection includes a brief comparative examination of the civil codes, notarial law, and private international law rules related to Canada, the USA, and Mexico (taking into consideration Quebec, Louisiana, and the Federal District of Mexico as practical examples) for the authentic act and its documentary form perspective.

#### 3.2.2.1.Quebec Civil Code[205]

The Civil Code of Quebec, enacted in 1991 and put into force in 1994 (replacing the Civil Code of Lower Canada of 1866), consists of ten books and is one of the Civil Codes that has experienced the most recent significant reform. The text of Article 1385 states:

> "A contract is formed by the sole exchange of consents between persons having the capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement. It is also the essence of the contract that it has a cause and an object."[206]

Their relevance to new rules for electronic contracts renders the provisions contained in Article 1387 highly noteworthy. The Article affirms that any contract is formed when and where acceptance is received by the one who made the offer, regardless

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[203] See *Malavet, supra* note 159 at 455.
[204] *Ibid.*
[205] *Code Civil du Québec* / Civil Code of Québec.
[206] C. C. Q., online: CanLII <http://www.canlii.org/qc/laws/sta/ccq/20040323/part1.html>

of the method of communication in question and of whether the parties have agreed to reserve agreement as to secondary terms.[207]

Article 1414 contains another provision that relates to the form of contracts,[208] and Book VII addresses the rules pertaining to evidence (Articles 2803-2874). Article 2811 states that "proof of a fact or of a legal act may be made by writing, by testimony, by presumption, by admission, or by the production of material things, according to the rules set forth in in this Book and in the manner provided in the Code of Civil Procedure or in any other Act".

Also, Section VI of Chapter I of this title relating to writings refers to a technology based instrument, its legibility and trustworthiness as writing as a means of proof when it is sufficiently guaranteed and intelligible, although the courts must take into account the circumstances under which the information was processed and those under which the document was reproduced. This same presumption is also stated when the process is carried out systematically, without gaps, and when the computerized data is protected against alterations. [209]

Regarding authentic acts, and their probative value, Article 2813 states, "An authentic act is one that has been received or attested by a competent public officer according to the laws of Québec or of Canada, with the formalities required by law. Every act whose material appearance satisfies such requirements is presumed to be authentic."[210] Notarial acts are considered authentic acts in particular if they conform the requirements of law. [211] Article 2818 mentions that the recital, in an authentic act, of the facts which the public officer had the task of observing or recording makes proof against all persons. The formalities required include that the notarial act shall be signed by all the parties so that it constitutes proof against all persons of the juridical act it sets forth.[212] Also, Article 2820 refers to authentic copies of documents, that make proof against all persons of its conformity to the original and replaces it.

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[207] Art. 1414 C. C. Q., online: CanLII <http://www.canlii.org/qc/laws/sta/ccq/20040323/part1.html>.
[208] *Ibid.*
[209] Art. 2838 C. C. Q., online: CanLII <http://www.canlii.org/qc/laws/sta/ccq/20040323/part1.html>
[210] Art. 2813 C. C. Q., Online: CanLII <http://www.canlii.org/qc/laws/sta/ccq/20040323/part1.html>.
[211] Art. 2814 C. C. Q., Online: CanLII <http://www.canlii.org/qc/laws/sta/ccq/20040323/part1.html>.
[212] Art 2819.

Copies of the authentic act are authentic as long as they are attested by the public officer who has custody of them.[213] The Register system rests in the custody of the public officer or the keeper of the *Archives nationals du Québec*.[214, 215]

### 3.2.2.2.Province of Quebec Notaries Act

Although the notarial institution in Quebec in Canada has Latin origins, as mentioned in Chapter 1, Section 1.3, it has some critical differences with respect to the Latin system. These include, among others, the election of the domicile[216]and the relationship of the notary in order to practice.[217] Concerning the form of the documents, Article 35 highlights that deeds can be executed in two different ways: the *minute* and the *brevet*. "An act *en minute* is an act that a notary must deposit and preserve in his or her notarial records, and from which authentic copies or extracts may be issued." In contrast, Article 38 states that: "An act *en brevet* is an act, in the form of one or more originals that a notary executes and may deliver to the parties. No authentic copy of or extract from an act *en brevet* may be issued". Article 36 states that, when dealing with minutes that form part of notarial records, a notary must execute each deed separately and number them consecutively.[218] Article 45 indicates that notarial acts must be written in ink of good quality, typewritten or printed legibly and permanently, and that any technical means can be used as long as they have the same characteristics as typewritten or printed acts.

Regarding the description of notarial deeds *en minute*, Article 56 provides the following: "A notarial act *en minute* under the authority of which an act is executed, must be sufficiently described in that act by the nature and date of the notarial act, the name of the notary who executed it, the minute number given to it, and the designation of

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[213] Art. 2815.
[214] Art. 2816.
[215] It is important to note that the notariat has developed a very advanced Registry system in British Columbia with indefeasible titles that is in custody of the government. After the six years it took 6 years to digitalize the system, they now have an "Electronic Filing System," which implements the use of the electronic signature. This information was provided by the representative of the British Columbia Notaries Society at the XXIV International Congress of the UINL in Mexico City, October 2004.
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid.*

the notarial records in which it is kept and, where applicable, its registration number in the appropriate register for the publication of rights. No copy of a notarial act *en minute*, is to be annexed to the act. All other acts and documents under the authority of which an act is executed must be annexed and sufficiently described, acknowledged as true, signed in the presence of the notaries by the party or parties who produced them, and countersigned by the notary. Any other document which the parties wish to annex to an act may be so annexed by complying with the formalities prescribed in the second paragraph." With respect to documents in a medium that requires the use of information technology, the notary's signature may be affixed to the act by any means apt for the medium,[219] for example, by electronic signature.

#### 3.2.2.3.Civil Code of Louisiana

The first Civil Code of Louisiana was enacted in 1808, inspired by the 1804 *Code Napoleon.* "Beginning in 1976, the Louisiana State Law Institute, now responsible for the Code, has secured the adoption by the Louisiana Legislature of various partial revisions.[220] Among the most important of these is the new Book IV on Conflict of Laws (Articles 3514-3549 c.c.) adopted in 1991."[221]

With respect to the definition and form of an authentic act, Article 1834 states, "An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed. The typed or hand-printed name of each person shall be placed in a legible form immediately beneath the signature of each person signing the act..."

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[219] Article 22, Notaries Act, R.S.Q. c. N-3

[220] Yiannopoulos, ed., *Louisiana Civil Code*, 1986 Ed., West Publishing Co., St. Paul, Minn. (1986), cited by William Tetley Mixed Jurisdictions: common law vs. civil law (codified and uncodified), online: <www.mcgill.ca/maritimelaw/conflicts/canlook/>.

[221] La. Act No. 923 (1991), in force 1 January 1992, cited in William Tetley, Mixed Jurisdictions: common law vs. civil law (codified and uncodified), online: <www.mcgill.ca/maritimelaw/conflicts/canlook/>.

An act is not considered authentic when there is lack of competence or capacity of the notary; however, as in most civil law legal traditions, when a defect of form is present, it may still be valid as an act under private signature.[222]

Authentic acts constitute full proof between parties and successors by universal or particular title.[223]

Finally, according to Article 1840, when certified by a notary or other authorized officer, copies of authentic acts constitute proof of the contents of its original.

#### 3.2.2.4.Louisiana Notary Public Law

As mentioned in Chapter 1, Section 1.3.2, notaries in the United States, with the exception of Louisiana, Alabama, and Florida, belong to the common law tradition; therefore, there are significant differences regarding the form of the documents from those seen in civil law systems.

Louisiana is the only civil-law jurisdiction in the USA (not including the territory of Puerto Rico). Florida and Alabama civil law notaries are probably most analogous to Notary Publics/Scrivener Notaries in London, as they prepare documents in a common-law jurisdiction that are qualified for use in civil-law ones. Louisiana, colonized by the French as it was, had French civil law as a model for its legal system.

The notarial situation in the USA is very odd: in general has very limited notarial practitioners compared to those on the civil law systems; Louisiana has "civil law notaries"; and Florida and Alabama certify experienced US Attorneys as "civil law notaries" (for lack of a better name) as well as American notary publics.[224] Louisiana will likely remain an anomaly, but the rest of America may develop a bifurcated system of American notary publics and international/civil-law/scrivener notaries. This future is uncertain and depends on communicating to American jurisdictions that in foreign jurisdictions, notaries are nearly always lawyers and can therefore provide the notarization process with more legal security.

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[222] Article 1833 C.C.Q.
[223] Article 1835 C.C.Q.

[224] Interview of Benjamin G. Snipes, (April 8, 2004), representative of the NACLN.

The American Civil Law Notariat (ACLN) from Louisiana is member and founder of the UINL. In order to become members of the UINL, Florida and Alabama purport to develop their structure and law; moreover, an interest in adopting the civil law notarial system does exist in some American states.[225] Nevertheless, notarial laws in the other states have some important provisions that intersect with the civil law-influenced territories; this text can be found in placed as Annex 3, and belongs to the Montana State Notarial Act 1.5.608, regarding the effects of the foreign notarial acts.[226]

There are some interesting provisions related to notarial acts in the Louisiana Notary Public Law. For example, Article 3 states that any acts, oaths, and acknowledgements may be taken or made by any notaries duly appointed and qualified by the state. Despite its civil nature, this law includes a provision where this Article's content extends to any qualified notary in any other state of the USA territory.[227] It is also stated that all acts passed before any notary public and two witnesses in any state of the USA shall be authentic acts and shall have the same force and effect as if passed before any notary in Louisiana.[228] Notaries in Louisiana have a jurisdictional limit; all their notarial acts shall be made and executed there.[229]

When an act involving the transfer of real estate property is passed before a notary, it is his/her duty to file a copy of any such act with the board of assessors for the Parish of Orleans within 15 days from the date of the property transfer. Whenever the property affected is situated outside the Parish, the notary shall deposit the copies of the act, together with all resolutions, powers of attorney and other documents annexed to or made part of the act, in the office of the clerk and recorder of the parish where the property belongs within the same 15-day term.[230]

#### 3.2.2.5.Federal District Code[231]

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[225] According to Professor Arredondo Galvan, in the First International Notarial Congress in Cancun (February 2004).
[226] This same provision is a model for several notarial acts in the United States, i .e. Indiana, Maine, among others.
[227] Article 5 from the Louisiana Notary Public Law.
[228] Article 6 from the Louisiana Notary Public Law.
[229] Article 10 from the Louisiana Notary Public Law.
[230] Articles 281 and 285 of the Louisiana Notary Public Law.
[231] *Código Civil Federal.*

The *Código Civil Federal* was enacted in 1928 with the official title, the Civil Code for the Federal District and Territories in Ordinary Matters, and for the Entire Republic in Federal Matters (*Código Civil para el Distrito y Territorios Federales en Materia Común, y para Toda la República en Materia Federal*). As its title indicates, this Code applies nationally when to Federal matters. The latest reform to this Code was published in the Federal Daily Gazette on 29 May 2000, and includes in its modifications the electronic mediums for contracting. It conserves the formalist essence laid out in the 1884 Napoleonic Code.

In Articles 1832-1834, the Mexican *Código Civil Federal* (1928) discusses matters concerning formality: "Whenever the execution of an agreement is required to be carried out in writing, the relevant documents shall be signed by all the parties thereto." Conversely, the general principle stated in this legislation is the parties' mutual consent of agreements. Moreover, "In the Civil Agreements, each party obliges itself in the manner and in the terms in which each one of the parties wished to oblige itself, not being necessary that certain formalities be shown to validate the contract, with the exemption of those cases specifically assigned by law."[232] Article 1834 BIS refers to the validity of the suppositions described in Article 1834, even if electronic or optic media or any other technology is used. As long as the information generated is communicated integrally, this information can be associated with its creator and can be consulted later.

Article 2317 holds that any act that includes an immovable property change requires due formalities, such as the participation of a *fedatario*, and that these acts must be recorded in the Public Registry in order to have full effect before third persons.[233]

Mexican doctrine considers the juridical or legal act as being a manifestation of the human will that is susceptible to producing legal effects.[234] The act's essential, or existence elements are the Main Object of the Act and Consent. In order to be valid, the act must contain elements such as capacity of the authors and form of the act. Whenever it is stated by law, the form of the act comprises the participation of a functionary empowered with *publica fides*; consequently, the valid acts attested or passed by *fedatarios* are called authentic acts, which have probative value to all its extent.

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[232] *Código Civil Federal* (November 1993) Book 4 Title I Ch. 1 Art. 1832 [translated by author].
[233] *Código Civil Federal* (November 1993) Book 4 Title I Ch. 1 Arts. 2320-2322.
[234] Borja Soriano, Teoría General de las Obligaciones, (México: Editorial Porrúa, 1993) at 96.

### 3.2.2.6.Notarial Law for the Federal District

The year 1862 saw the establishment of Spanish Law regarding the Notarial Profession, the law that governed the legislation of Notarial duties and the corresponding document forms in an orderly, systematic, and modern manner. The term "Notary" first referred to an court clerk[235] in the decree of February 1, 1864. On December 30, 1865 in Mexico, Emperor Maximiliano enacted the Organic Law of the Profession of a Notary and the Occupation of County Clerk, which President Benito Juarez replaced on November 29, 1867 with the Organic Law of Notaries and Actuaries of the Federal District. On January 1, 1902, during the presidency of General Porfirio Diaz, the Law of the Profession of the Notary was enacted, and on January 20, 1932, President Pascual Ortiz Rubio enacted the Law of the Profession of the Notary for the District and Federal Territories. The Law of the Profession of the Notary for the Federal District and Territories was enacted on January 23, 1964, and the Law of the Profession of the Notary for the Federal District was enacted in1980.[236]

The Legislative Assembly of the Federal District enacted the "*Ley de la Profesión del Notario Público,*"[237] which replaced the law of January 8, 1980, issued by President Jose Lopez Portillo. The new law (*Ley del Notariado para el Distrito Federal*) was published in March 28, 2000 and took effect on May 27 of the same year.

It consists of 267 Articles (plus 13 transitory Articles), in contrast to the 154 articles of the 1980 law. It is crucial to emphasize that Article 3 points out that when the law grants institutional importance to the empowered individual, it shapes its profile and basic requisites *a grosso modo* as follows: "The Profession of a *notario*, as an institutional guarantee, is based on a notarial system for which this law organizes and establishes the necessary conditions so as to be exercised correctly, impartially, and by a qualified professional, as a member of a notarial association and with freedom in terms of

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[235] Bernardo Pérez Fernández del Castillo, *Derecho Notarial*, (Mexico: *Editorial Porrúa*, 1989) at 35. [translated by author] [*Castillo*] (At the same time, this same legal reform had a place in Law 94, *Ley Orgánica del Notariado para el Estado de Veracruz*, by Juan Enríquez in the year of 1887. Artícle 1 of this law stated that clerks should be divided into notaries and actuaries).

[236] *Ibid.* at 63.

[237] Notarial Professional Law.

the law"[238]. The essential values for which the law calls as its foundation are counseling, impartiality, equity,[239] and casuistical fairness.[240] The law also unveils some principles that attempt to regulate the performance and functions of the notarial practice:

1. Conserve the formality and legal merit of the instruments formalized before a *notario público*, as well as the suitability of their legal effect
2. Safeguard the notarial instrument, its historic sequence, its matrix, and its copies, so that they are available at anytime
3. Foster the principle of the notarial function as an institutional guarantee
4. Safeguard public service and legal peace, as well as respect for and compliance with the law
5. Perform its duties by strictly following the legal provisions applicable to each specific case in an impartial, voluntary, preventive manner, and as an auxiliary to the administration of justice when concerning undisputed matters
6. Ensure the quality of public service as part of the notarial function, as well as the quality of documents formalized before him/her

Regarding the public or authentic instrument, the main tool for notarial practice is, according to the Federal District Notarial Law's regulation, the protocol. That is, the group of books made up of numbered and sealed *folios*[241] in which, considering the formalities provided for by this law, the *notario público* records and authenticates deeds, and certifies that they, along with their corresponding documents, were issued before him/her.[242] The procedures employed to record, write, or print the documents in the *folios* must be firm, indelible, and readable.[243]

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[238] *Ley del Notariado para el Distrito Federal* online: <http://www.asambleadf.gob.mx/princip/informac/legisla/leyes/L110/l110p.htm#ART.%203> [translated by author] ("*...El Notariado como garantía institucional consiste en el sistema que, en el marco del notariado latino, esta ley organiza la función del notario como un tipo de ejercicio profesional del Derecho y establece las condiciones necesarias para su correcto ejercicio imparcial, calificado, colegiado y libre, en términos de Ley...*").

[239] Not the "Equity" concept as in the Common Law Tradition, but as "fairness".

[240] These values are present in the following provisions: Articles 6, 26, and 264 of the *Ley del Notariado para el Distrito Federal.*

[241] The special watermarked and security sheets used by *notarios.*

[242] *Supra* note 238 article 76.

[243] *Supra* note 238 article 85.

Notarial acts in Mexico are drafted in notarial deeds (*escrituras públicas)* or in notarial certificates (*actas protocolarias)*. Notarial deeds are the original documents[244] of one or more legal acts that the *notario* drafts and authorizes with his/her signature and official seal after they are printed in *folios* and signed by the parties.[245]

The *notario público* does not only draft notarial deeds. He also produces notarial certificates, the original public instruments through which the *notario*, at the request of an interested party, connects one or more events he/she has witnessed or of which he/she is certain and records them in the protocol under his/her care with his/her signed and sealed authorization.[246]

As long as it is not proven null or false, every notarial act will have full proof with respect to the parties' expressed will to celebrate the act consigned in the deed or certificate; the parties' ownership of the declarations mentioned in the act; the authenticity of the act; the truth of the facts to which the *notario* attests; and the observation of formalities under the supervision of the *notario*.[247]

Unless otherwise stated in a provision, documents in deeds drafted by *notarios* are presumed to be authentic and shall be conserved in the correspondent Registry. Any act passed before a *notario* and transformed into a notarial deed becomes an authentic act and has full proof.

Regardless of the fact that notarial law is considered the most archaic legislation in Mexico,[248] there are significant differences among the notarial laws of the states in this country.

There are different legal bases for the creation of the protocol. A "closed" protocol is one that is recorded in covered books, numbered in a progressive manner, in which the *notario público* records the deeds. Conversely, the "open" protocol, on the

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[244] This original shall be drafted with the due formalities stated by the Notarial Law and the Civil Code, signed in each *folio* by each of the individuals participating in the act, and an appendix shall be created to record the act and its annexes.

[245] Article 100 from the *Ley del Notariado para el Distrito Federal.*

[246] *Supra* note 238. See also Article 125 from the *Ley del Notariado para el Distrito Federal.* (Despite this, in many more states of Mexico, the notarial certificates or *actas protocolarias* are not meant to be included in the protocol. In it, they are called *actas fuera de protocolo* "non protocolary certificates," and they are certifications of original documents, signature ratifications, identification of persons, or certifications of a witnessed event).

[247] Article 156 from the *Ley del Notariado para el Distrito Federal.*

[248] i.e. Colima State (1964); Baja California, Guerrero and Veracruz States (1965); Puebla State (1968), and others.

other hand, is a group of loose *folios* that have received special treatment, for example, they are issued by a government authority or showing a progressive number. Some Mexican states apply the "special open protocol," used only in cases of massive recordings, for events of public interest with respect to immovable property that are financed by government offices or private companies.

Another critical issue is the requirements and processes through which foreign documents must pass in Mexico. The applicable legislation, certification (*apostille*), eventual translation, and protocol of the foreign documents must be analyzed. In the *Ley del Notariado para el Distrito Federal* and in fifteen other states,[249] instruments issued abroad can be authenticated at the request of the interested party once they are legalized or *apostilled* and translated by an official translator,[250] without needing a judicial order. Conversely, once the foreign powers of attorney are legalized, or *apostilled*, and the necessary translation has been made, they must be protocolized in order to have legal effect in accordance with the law. Five states[251] do not include provisions regarding requisites for foreign documents in their notarial law, and ten states[252] demand a judicial order for the protocolization of this kind of document. In contrast, eleven states do not demand a judicial resolution; they ask only for expert translation when it is required.

#### 3.2.2.7. Private International Law

Private International Law, or conflict of law, as it is known in the USA and Canada, governs the decision of which law to apply when domestic laws of different countries are related to private transactions. The issues in disputes or transactions commonly involve what jurisdiction applies, what law to apply, and the recognition or enforcement of a foreign judgement. It is important to consider conflict of law rules for the jurisdictions in question as well as all applicable treaties and agreements.

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[249] Baja California, Baja California Sur, Campeche, Coahuila, Chihuahua, Durango, Estado de México, Jalisco, Puebla, Querétaro, Quintana Roo, Tamaulipas, Yucatán and Zacatecas.
[250] *Supra* note 238 article 139.
[251] Colima, Guanajuato, Michoacán, Nayarit and Sonora.
[252] Aguascalientes, Baja California, Campeche, Guerrero, Nuevo León, Oaxaca, Tabasco, Tamaulipas, Tlaxcala, and Yucatán.

Although the conflict of law systems are quite interesting in the USA as a whole and the English part of Canada, this brief comparative analysis is limited to Louisiana, to the Quebec Civil Codes, and to the Civil Codes in Mexico, by virtue of the fact that these are the only comprehensive conflict statutes in North America.

In Quebec, Book Ten of the Civil Code of Quebec is dedicated to Private International Law. Its general provisions include a special consideration for when a country has several territorial units with different legislative jurisdictions; each territorial unit is regarded as a country. When dealing with different legal systems in a country, one of the basic principles is to refer to the legal system most closely connected with the situation.[253] Article 3079 supports this, stating that where legitimate and manifestly preponderant interests so require, a mandatory provision of another country can be applied if it is closely connected with the situation and when the application of the provisions of a foreign country are manifestly inconsistent with public order, as understood in international relations.[254]

Characterization is achieved according to the legal system of the court seized of the matter. When dealing with property, characterization occurs according to the law of the place where it is situated, as well as the property's real rights and the publication thereof. Also, foreign law may also be taken into account where a legal institution is either unknown to the court or is known to it under a different designation or content.[255]

In relation to the form of juridical acts, Article 3109 states the following:

"The form of a juridical act is governed by the law of the place where it is made. A juridical act is nevertheless valid if it is made in the form prescribed by the law applicable to the content of the act, by the law of the place where the property which is the object of the act is situated when it is made or by the law of the domicile of one of the parties when the act is made..."

Article 3110 is a very interesting provision, as it permits a Quebec notary to make an act outside the province if the act pertains to a real right of an object that is situated in Quebec or if one of the parties is domiciled in the province.

Regardless of whether it contains any foreign elements, a juridical act is governed by the law designated in the act; if it is not, its designation can be inferred from certain elements

[253] Article 3077 C.C.Q.
[254] Article 3081 C.C.Q.
[255] Articles 3078 and 3097 C.C.Q.

of the act's terms. In contrast, an act containing no foreign elements remains subject to the mandatory provisions of the law of the country that would apply if none were designated. The law of a country may be expressly designated as applicable to the whole or part of a juridical act.[256]

When no law is designated in the act, or if the designated law invalidates the juridical act, the courts must apply the law of the country with which the act is most closely connected, attending to the view of its nature and the circumstances of the attendant.[257] Article 3113 provides a practical example of close connection. It states, "A juridical act is presumed to be most closely connected with the law of the country where the party who is to perform the service which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, his establishment."

Chapter I, Title Three of the Civil Code addresses the special provisions for the international jurisdiction of Quebec authorities.

Quebec authorities have jurisdiction to rule in the absence of any special provision when the defendant is domiciled in Quebec,[258] and in an incidental demand or a cross demand when they have jurisdiction to rule the principal demand.[259] However, while a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party decline jurisdiction when it believes that the country's authorities are in a better position to decide.[260] In contrast, when a Quebec authority has no jurisdiction over a dispute,, it may hear it if the dispute has sufficient connection with the province where proceedings cannot possibly be instituted outside Quebec or where these foreign proceedings cannot be required. In such cases, it may still order provisional or conservatory measures, if necessary.[261] [262]

In Louisiana, Book IV of the Civil Code of Louisiana relates to conflict of laws rules. Article 3515 presents the following rules regarding the determination of the applicable law: "Except as otherwise provided in this Book, an issue in a case having contacts with other

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[256] Article 3111 C.C.Q.
[257] Article 3112 C.C.Q.
[258] Article 3134 C.C.Q.
[259] Article 3139 C.C.Q.
[260] Article 3135 C.C.Q.
[261] Article 3138 C.C.Q.
[262] In cases of serious inconvenience and emergency, Quebec authorities may take such measures as they consider necessary for the protection of the person or property present in the province. (Art. 3140) C.C.Q.

states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."[263]

Similar to the word "country" in the Civil Code of Quebec this Book uses the word "state" as a representation of: the United States or any state, territory, or possession thereof; the District of Columbia; the Commonwealth of Puerto Rico; and any foreign country or territorial subdivision thereof that has its own system of law.[264]

Usually, when the law of another state is applicable under the conflict of laws provisions, that law shall not include the law of conflict of laws of that state. However, the law of conflict of laws of the involved foreign states may be taken into consideration if a law of a state is applicable to an issue under Articles 3515, 3519, 3537, and 3542.[265]

Article 3519 states that, with respect to the status of a natural person, the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue.

With respect to real rights in immovable property, those situated in Louisiana are governed by the law of that state. When the immovable property is situated in another state, they are governed by the laws of that state. The substantive law of the state in which the thing is situated is the general rule for determining whether a thing is an immovable.[266]

Article 3537 states the general rule related to issues of conventional obligations that are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to those issues. "That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place

[263] Article 3515, Civil Code of Louisiana.
[264] Article 3516, Civil Code of Louisiana.
[265] Article 3517, Civil Code of Louisiana.
[266] Article 3535, Civil Code of Louisiana.

of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other."

The validity of contracts is subject to the form. They must be made in conformity with the law of the state of making; the law of the state of performance, to the extent that performance is to be rendered in that state; the law of the state of common domicile or place of business of the parties; or the law governing the substance of the contract under Articles 3537 or 3540. However, for reasons of public policy, the law governing the substance of the contract under Article 3537 requires a certain form; it must be made in conformity with that form.[267]

Either the law of the state in which a person is domiciled at the time of making a contract or the state whose law is applicable to the contract under Article 3537 will determine if that person is capable of contracting.[268]

In Mexico, the first Article of the Federal Civil Code states that the provisions in this body of laws must rule within the Mexican territory in issues related to federal order. According to fraction XVI, Article 73 of the Mexican Constitution, if foreign individuals or legal entities intervene in the conflict of law, the dispute becomes of federal order.

Article 12 of the Federal Civil Code[269] contains the territoriality principle, which states that Mexican laws rule and apply to any person (both individuals and legal entities) found[270] in the country; to those acts and *de facto* situations that occur in national territory, jurisdiction; and to those acts that submit to the mentioned laws, except when those laws specifically remit to the application of foreign laws. Agreements in treaties and conventions in which Mexico takes part also override this code.

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[267] Article 3538, Civil Code of Louisiana.
[268] Article 3539, Civil Code of Louisiana.
[269] Código Civil Federal, published in the Diario Oficial de la Federación "Official Diary of the Federation" (Mexico, 1928).
[270] Considering not only persons domiciled or with residence in the country, but also any person that is in the country. This extends to individuals physically in the Mexican territory and to entities that have a special link to the country, such as the constitution of their entity in Mexico and its headquarters in the national territory, among others.

- Article 13 describes a set of specific rules regarding the application of laws. The application of laws shall be determined according to the following rules: I. Juridical situations that are validly created in the Mexican states or in a foreign state consistent with their laws shall be recognized. II. The status and capacity of an individual is ruled by the laws of the place where he/she is domiciled. III. The constitution, regime, and extinction of real rights over immovable property as well as rent or lease contracts, and for the temporary use of real property and immovable property will be ruled by the laws of the place where they are located, even if the owner or titular of those real rights is a foreigner.[271] IV. The form of juridical acts will be ruled by the laws of the place in which they occur. V. With the exception of the above cases, the legal effects of the acts and contracts will be ruled by the law of the place in which they are supposed to be executed, unless there is previous and valid designation of a different applicable law. The rule applied to numeral III is *lex rei sitae*, which applies to movable and immovable property. With respect to numeral IV, the applicable norm is *locus regit actum*; for numeral V, *lex loci executionis* is the applicable principle.[272] Article 14 addresses general rules for the application of foreign laws in Mexico, which include the following. First, a judge in Mexico shall apply foreign laws the same way the correspondent foreign judge would apply them; for these means, the first may require the necessary information with respect to text, legal reach, sense, and in-force terms of the foreign laws.[273] Second, foreign substantive law will be applied unless, given the special circumstances of the case, the conflict of laws of the situation make Mexican or third-state substantive laws applicable. Third, if there are analogous institutions or due processes included in Mexican laws, the application of foreign laws will not be an impediment when Mexican laws have not made any allowances to the foreign essential institutions or due processes that pretend to apply. Fourth, when various legal systems regulate

[271] The rule *lex rei sitae* is admissible to movable and immovable property.
[272] Carlos Arellano Garcia, *Derecho Internacional Privado*, 12th ed. (México: Editorial Porrúa, 1998), at 792-803.
[273] This provision's *ratio legis* is to line up with the private international law Inter-american Conventions of International Cooperation rules, as commented by Professor Carlos Arellano Garcia. See *supra* note 272.

the diverse aspects of a juridical relation, foreign laws shall be applied to harmonize them in order to achieve all of the objectives of the laws in each legal system. The difficulties caused by the simultaneous application of the diverse legal systems shall be resolved by considering the equitableness of the concrete case.

In contrast, Article 15 states provisions for the exceptions for the application of foreign laws . Foreign laws are not to be applied when fundamental principles of Mexican law are intentionally eluded and the corresponding judge determines the fraudulent intention of such elusion, and when foreign provisions or the result of their application are contradictory to the fundamental principles or institutions of Mexican public order.

#### 3.2.2.8.Cross Border Recognition of Authentic Acts in the NAFTA Territory

From the description of the notariats in the Province of Quebec, Louisiana State, and Mexico, it can be considered idealistic to pretend a short-term absolute harmonization of the laws and procedures related to the cross-border recognition of authentic acts. This is mainly because of the dissimilar institutions involved in the different legal systems within the territories and the specific restrictions that the provisions of each correspondent law have applied. It is noteworthy that custom, traditions, and usage of the known procedures may represent a sinuous obstacle to the beginning of a harmonizing process. However, societal feedback generated by recent commercial practice and the affluence of the international transactions has resulted in manifest persuasive measures, such as publications (i.e. World Bank's "Doing Business in 2004/2005") and publicity that severely criticize the formalist requisites of some countries, in terms of being one of the parties in an international transaction or of being the place for establishing or starting a business. It is at this point that the unavoidable tension between efficiency and security arises.

In the author's opinion, both efficiency and security are essential elements to any kind of transaction; consequently, any theory or legal practice that excludes one or the other is

wrong. This is why international institutions have aimed to create common mechanisms to provide security and certainty in modern transactions through a system that can facilitate and expedite the acts. Notarial participation involves necessarily authentic acts, as the notaries' mission is to authenticate those acts. Notarial documents are deemed authentic; in addition, they constitute proof of the facts asserted therein. It is therefore necessary that those acts can be applied or executed in a different state or country without having to fulfill the formalisms and requisites of each participating state or country.

The performance of the functions of notaries abroad for documents intended for use in their own state or country is generally governed by multilateral treaties, local federal law and regulations, and the laws of the foreign country. Attesting or notarizing a document outside the notaries' jurisdictions may be a violation of the laws of the foreign country, unless the attesting or notarizing officer is specifically authorized by local (foreign) law or applicable international treaty.

One of the most important institutions to implemented measures with this aim is the Hague Conference on Private International Law through its multilateral treaty The Hague Convention of 5 of October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents[274] (Hague *Apostille* Convention). The main purpose of this treaty is to facilitate the circulation of public documents issued by a state party to the Convention to be produced in another state party to the Convention.[275]

This Convention includes ten simple provisions that, among others, consider the following rules:

1. The Convention shall apply to public documents that have been executed in the territory of one contracting state and must be produced in the territory of another one. The following are deemed to be public documents: documents emanating from an authority or an official connected with the courts or tribunals of the state; administrative documents; notarial acts; and official certificates that are placed on

[274] Concluded in 5 October 1961 and entered into force in 24 January 1965).
[275] Hague Conference on Private International Law, online: <http://hcch.e-vision.nl/index_en.php?act=text.display&tid=37>.

documents signed by persons in their private capacity (such as notarial authentications of signatures).[276]

2. Contracting states shall exempt from legalizing documents to which the Convention applies and which must be produced in its territory. Legalisation, here, means the formality by which the diplomatic or consular agents of the country in which the document has to be produced, certify the authenticity of the signature, the capacity in which the person signing the document has acted, and the identity of the seal or stamp which it bears (if appropriate).[277]
3. The only formality legalisation requires is the addition of a certificate issued by the competent authority of the state from which the document emanates. This certificate shall be placed on the document itself, or on an "*allongue*," it shall be in the form prescribed by the Convention, and it may be drawn up in the official language of the authority by which it is issued. Also, the title "*Apostille* (*Convention de La Haye du 5 octobre 1961*)" shall be in French and the certificate shall be issued at the request of the person who has signed the document or at that of any bearer.[278]
4. Each contracting state shall designate the authorities who are competent to issue the certificate; they also shall keep a register or card index that shall record the certificates issued.[279]
5. When the provisions in a treaty, convention, or agreement between two or more contracting parties contain more rigorous formalities than the rules stated by the Convention, the last will override such provisions.[280]

Mexico and the USA are parties to this Convention. Their accession was 1 December 1994 and 12 December 1980, respectively; their entry into force was in 14 August 1995 and 15 October 1981, respectively. They both have one designated authority, the governmental sub-secretary representation office for Mexico, and the Secretary of State in the USA. Fees

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[276] Article 1 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, online: <http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=41>.
[277] Article 2, *supra* note 276.
[278] Articles 3, 4 and 5. *supra* note 276.
[279] Articles 6 and 7, *supra* note 276.
[280] Article 8. *supra* note 276.

range from between US$8 to US$40 in Mexican states and from US$0 to US$25 in USA states.[281]

At the end of May 2005, the Hague Conference on Private International Law and the International Union of Latin Notaries jointly organized an International Forum on *e-notarization* and *e-Apostilles*. The goals of the Forum were to conduct a representative international survey of technologies for e-notarization currently available or in the process of being developed; assess these technologies, particularly with respect to their possible relevance for *e-Apostilles*; and perform a legal analysis of the impact of these technologies on the *Apostille* Convention. This was inspired by the Special Commission of October/November 2003 on the Practical Operation of the *Apostille* and on Recommendation No. 24 of the Evidence and Service Convention, which holds, "a State party and the Permanent Bureau should work towards the development of techniques for the generation of electronic Apostilles."[282]

*Notaire* Jeffrey Talpis, also a representative of the UINL before the Hague Conference,[283] was a guest speaker at the forum. He presented, "Legal and Technical Questions Arising from the Use of Information Technologies under the Hague Apostille Convention," a topic that is sure to become increasingly relevant as globalization and efficiency's demands from the modern world extend.

In the United States, state laws also make specific provisions for the recognition of documents executed outside the USA territory. Most states have enacted legislation similar to the Uniform Recognition of Acknowledgements Act, the Uniform Acknowledgments Act, and the Uniform Law on Notariats, which recognize the admissibility of documents executed outside the United States before an ambassador, minister, consul general, consul, vice consul, or consular agent of the USA. Within the United States, a notary public is authorized to perform notarial services within the jurisdiction provided by a commission. Several states have enacted legislation that provides for the performance of notarial functions outside their home states of commission-filing or licensure, provided the documents notarized are

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[281] US Department of State, online: <http://travel.state.gov/law/legal/treaty/treaty_783.html?css=print>.

[282] Hague Conference on Private International Law, online: <http://www.hcch.net/index_en.php?act=text.display&tid=39>.

[283] Notaire Talpis, from the Province of Quebec has noted, in the Valencia, Paris and Quebec notariat Assemblies, the relevance of the Convention of jurisdictional competence and foreign judicial resolutions recognition, UINL official web site (institutional information news) online: <http://www.uinl.org/informacion_not_inst.php4>.

intended for filing or recording in the home states of the notaries. A few states have enacted reciprocity laws that authorize a notary from a neighboring state to act as a notary in another state, provided the neighboring state has adopted a reciprocity provision. Finally, some states have enacted legislation authorizing notaries to perform notarial functions outside the USA for use in the USA. It should be noted that the laws of the foreign country might not authorize the notary public to perform this function, the local law of the USA state notwithstanding.[284]

If a deed from a foreign notary is deemed authentic in one country or state, its evidentiary force fundamentally corresponds to that of the country or state where it was deemed authentic, provided the foreign notarization or foreign authentication procedures are comparable to the appropriate counterpart. In contrast, in the USA, for example, the deed from a notary public cannot be classified as a "deed" (from the civil law perspective), even if the notary public testifies that he has read out the written record and that it has been approved and personally signed by the interested parties.[285]

The NAFTA provisions do not consider the recognition and effect of notarial acts received between notaries from Canada, the USA or Mexico; therefore, the applicable laws are those of each of the countries. For example, Article 3006 of the Federal Civil Code of Mexico states that the acts or contracts assessed in any Mexican state or in a foreign state or country can be subject to the Public Registry, only if they reunite the elements prescribed by the Mexican laws concerning authentic acts. If the documents are written in a foreign language and include due legalisation, they shall be previously translated by an official certified translator and protocolized before a *notario público*.

In the Federal District Notarial Law, the foreign instruments that are legalized, *apostilled*, and translated by the authorized officials can be protocolized without a judicial order.[286]

In Louisiana, Revised Statute 35:5 and 6 states that oaths, acts, and acknowledgements taken, made, or executed by any notary public in the USA territory or the

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[284] US Department of State, "American Notaries Abroad" online: <http://travel.state.gov/law/info/info_630.html>.
[285] Geimer, Reinhold, The circulation of notarial acts and their effect in law. UINL web site.
[286] Article 139.

District of Columbia shall be authentic acts and shall have the same force and effect as if passed before a Louisiana notary. Regarding foreign acts, this same Title refers only to acknowledgements; it explains that all instruments requiring acknowledgment, if acknowledged outside the United States, shall be acknowledged before an ambassador, minister, envoy, or charge *d'affaires* of the United States in the country to which he is accredited. This acknowledgement can also take place before one of the following officers commissioned or accredited to act at the place where the acknowledgment is taken and having an official seal: any officer of the United States; a notary public; or a commissioner or other agent of this state having power to take acknowledgments.[287] Every acknowledgment or proof of any legal instrument and any oath or affirmation taken before one of the authorities previously named will have the same force and effect of an authentic act in Louisiana, when duly certified. However, as the USA and Mexico are parties to the "Apostille Convention," every state in those countries' territories can produce legalized acts with the effects produced by that legalization, as previously described. Hence, it is only the legalization of such acts, not the value of their content, which is recognized.

In Quebec, Article 2822 from the Civil Code states, "An act purporting to be issued by a competent foreign public officer makes proof of its content against all persons and neither the quality nor the signature of the officer need be proved. Similarly, a copy of a document in the custody of the foreign public officer makes proof of its conformity to the original against all persons, and replaces the original if it purports to be issued by the officer."[288]

### 3.2.3. Documentary Form and Technology

Despite the fact that modern technology and the role of the notary in electronic documents and transactions has nothing particular to NAFTA, the consideration of past, present, and future perspectives, as well as the changes that society demands, is essential to do an analysis of notarial practice within the NAFTA environment. The Digital Era is perhaps the most important challenge for notaries, as in order for the notarial profession to maintain its role and status in society, traditional notarial practice requires a complete reevaluation and adoption of new technology and processes.

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[287] §551.

[288] Article 2822. C.C.Q.

This chapter addresses some of the new procedures and security measures for notarial documents that have been implemented worldwide, and performs a brief analysis of the electronic document and its implications, especially amongst NAFTA participants. This chapter will also examine the Cybernotary project that was launched in response to the development of electronic documents and transactions. Despite its partial acceptance in many countries, notaries and institutions continue to develop this and similar projects in order to satisfy the standards required to safeguard the security and certainty of a legal act that is trusted to a notary.

* * *

Had da Vinci not dreamed of flying and, in turn, created the helix, the helicopter might not exist today; had those who imagined overcoming the barriers of what was once believed to be impossible not dreamed at all, we would never have known the world that today's modern technology offers, projects, and promises.

Today's society not only welcomes, but demands the optimal usage and application of every available resource and virtue in order to benefit and satisfy the needs of humankind; a trend that is geared towards seeking change and creating new and better methods and systems that can be applied to that which already exists.

Similarly, we must ensure that the science of law is not being excluded from this trend of constant change; indeed, it requires a new perspective and an amplified field of action that is enriched by the "stella," the trail left by the enormous growth of technological advances.

* * *

The growth-related aspects of every country, the peaked social, economical, or political growth, implies short-term problems and risks and demands the adaptation or creation of laws on every level. It also demands a more effective and complex framework for the administration of the legal systems that will control the subject matter.

Such is the case in the development of technology and specifically the Internet, which has brought about innumerable questions and legal issues as its users explore its limits.

This is an era in which almost every commercial activity and transaction can be made on a personal computer from anywhere in the world, where communication processes have been reduced to turning on machines, and, sadly, where issues such as piracy, infringement, and the sabotage of property are becoming more prevalent, devastating the "ecosystems" of industries to a seemingly unstoppable degree. Everyone, in both the private and the public sectors, is affected. Technology is outrunning the creation of laws and legal provisions that govern these matters; the fact that technology is winning the race against the creation of laws and legal provisions, against which all other opponents have failed, is not even front-page news.

Still, traditional paper-based documents, such as contracts, purchase orders, invoices, and bills of lading have thus far remained the predominant means of recording and sharing commercial information. The advent of the telegraph allowed for the paperless electronic communication of commercial information, after which the telex and the fax were introduced as the trend that allowed computer-to-computer communication (electronic data interchange, or EDI). Today, with the creation of Electronic Commerce (E-Commerce), the Internet is quickly becoming the most important electronic medium for doing business.[289]

### 3.2.3.1.Security measures

**Chart 3. Notarial Document Security Measures in the Americas**

| Country | Seal and Signature | Document Composition | Measurements | Others |
|---|---|---|---|---|
| Mexico | -Authorization seal and signature is required on each | -Watermarked official paper for the Protocol Deed. | -Testimony paper and Protocol Deed paper must have the same | -Numeric chronology for Testimony Paper and Protocol Deed |

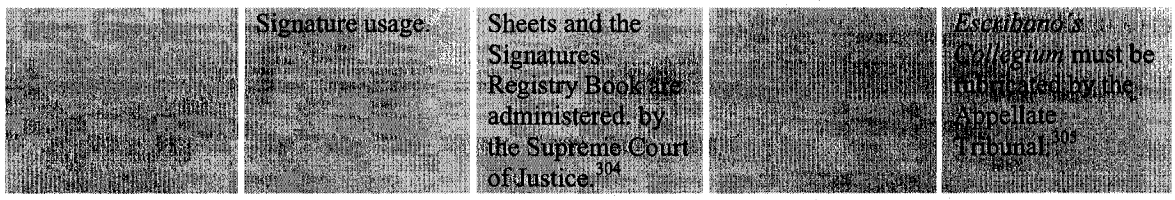
[289] See George S. Takach, *Computer Law*, 1st ed. (Canada: Irwin Law, 1998) at 336. [Takach].
[290] Article 109 from the Federal District's Notarial Law.
[291] *Márquez, supra* note 94 at 443. ("...height of 36cm and width of 16.5cm...", Article 69 from the Baja California's Notarial Law).

| | | | | |
|---|---|---|---|---|
| | document[290] | | dimensions.[291]<br>- Paper has specific weight.[292] | Paper.<br>-The use of Holograms in some states. |
| Canada[293] | -Signature is required for the closing act in notarial practice.[294]<br>-Some signatures are required to validate documents.[295]<br>-When authorized by the *Chambre des Notaires*, the notary's signature may be affixed to the act by any means suited to the medium, i.e. Electronic Signature.[296] | | | -Integrity verification systems.[297]<br>-Verification of the persons' identity through remote access and biometric implements. |
| United States | -In some states the Notary Public has an Embosser as a seal; however, the known reading "L.S." (*locus sigilli*) substitutes the notarial seal.[298]<br>-In the civil law tradition states (such as Florida, Alabama, and Louisiana), the notary's seal and signature are used.[299] | | | |

[292] *Ibid.* ("The paper's weight must be more than 60kg", Article 27 from the Puebla's Notarial Law).
[293] The Province of Quebec.
[294] Article 21, Notaries Act.-R.S.Q., c. N-3.
[295] *Ibid.,* Articles 50, 53. (2000, c.44, s.50) (2000, c.44, s.53).
[296] *Ibid.,* Article 22. (2000, c.44, s.22).
[297] Notaries Act-R.S.Q., chapter C-1.1 An Act to Establish a Legal Framework for Information Technology, Articles 6, 9. (2001, c.32, s.6), 2001, c.32, s.9).
[298] *Márquez, supra* note 94 at 445 (Or as in the Uniform Commercial Code § 2-203: "Seals inoperative. The affixing of a seal to a writing evidencing a contract of sale or an offer to buy or sell goods does not constitute the writing a sealed instrument, and the law with respect to sealed instruments does not apply to such a contract or offer").
[299] Model Law for the Civil Law Notary in Florida, National Association of Civil Law Notaries Online: <www.nacln.org/FILESHTML/20020424%20Spanish%20Translation%20of%20the%20Florida%20CLN%20Act.htm>.

| | | | | |
|---|---|---|---|---|
| Argentina | -Seal and Signature usage. | -100% bleached cellulose. 20% cotton fiber and 80% chemical cellulose made of wood and sulfate. White non fluorescent color | -A standard height and width 32 x 22 cm. | -A money-like metallic string in the left margin placed inside the paper. -An image with micro-letter, a National Emblem, and a *collegium*. Seal security picture. -A multi-national and tri-dimensional filigram. |
| Bolivia | -Seal and Signature usage. | -The so-called "sealed paper" is dispatched in numerated series with an authorized impression by the corresponding Ministerial entity.[300] | -Has to have 30 lines on each face of the document and nine millimeters width between each line. -Necessarily 75 grams paper. | |
| Chile | -Seal and Signature usage. | There are no provisions regarding the notarial document.[301] | There are no provisions regarding the notarial documents. | |
| Brazil | -Seal and Signature usage. | -"*Papel Padronizado*" (uniform or standard paper) authorized by the General Assembly and the Notarial College. -Uses the Rio de Janeiro shield of arms with the correspondent data from the "*tabellio*" (notary).[302] | | -Invisible background reactive to hypochlorite. -Background seen exposed to ultraviolet light. -Composed by micro-letters and technical voluntary errors. -Watermark. -Ink reactive to alcohol and acetone.[303] |
| Paraguay | -Seal and | -Security paper, Legalization | | -Official stamps created by the |

[300] See Ignacio Vidal Domínguez,"*Forma y Medidas de Seguridad del Papel para Extender Escrituras Publicas*", 1st ed. (Chile: 1999) at 1. [translated by author].
[301] *Márquez*, supra note 94 at 347.
[302] *Ibid* at 348.
[303] *Ibid.*




The most common security measures used in recent worldwide notarial practice are:

1. Official, progressively numbered paper for notarial documents, provided by government or the notarial *collegiums*. The notarial seal has official dimensions and is used with an indelible ink, in addition to the *notario público*'s signature.[306] A translucent water seal may also be used on the official paper, which allows for the reading of the document. The seal can also be an embosser or a seal with ink that can only be seen with ultraviolet light
2. A fiscal seal stamped on the paper to ensure the easy identification of the notarial document
3. Watermarks are placed in the paper when it is fabricated
4. Chemical compounds, or tiny colored particles in the paper paste that can only be seen using different kinds of light, such as ultraviolet Galaxy Technique.
5. A special mixture of chemical elements that chemically react when adulteration or modification, or scanning or photocopying, of the document is attempted
6. Security holograms, whose verification of authenticity is possible through electronic means
7. Complex bar codes that indubitably identify the document and can be verified through electronic systems and passwords
8. Security Informatics' Circuits with the Feedback Technique
9. Security threads, as in money
10. Micro printing procedures, which necessitate the use of magnifying lenses to read what is printed

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[304] Rubén Ocampo Ramírez, *Legislación y propuesta, en relación con la debida identificación de las personas, forma y medidas de seguridad que deba adoptar el papel para extender las escrituras públicas, sus copias y otras actuaciones notariales, la obligatoriedad de su uso y sanciones por la omisión,*(Paraguay, 1999) at 9-10.

[305] *Ibid.*

[306] This is a formal requisite for almost all of the Civil Law tradition *notario público.*

11. Special security perforations in paper using codes.

Although every security measure is an advantage, its potential is limited as it is adopted by one country or state. The full capability of these measures is achieved when they are implemented as a system for a group of countries, for example for the member countries of the UINL or the EU civil law tradition countries; consequently, this provides the impetus for the worldwide harmonization venture.[307]

### 3.2.3.2.The Electronic Document and its implications

The world is ever changing, and people must adapt and evolve with it. Attempting to maintain the same ideas, actions, and necessities without growing to adapt to the times is not only shortsighted, it is impossible; this holds true in law as well, as the law is a human creation, and is one of our greatest tools in the aim to live and coexist peacefully in communities.

The creation of the Internet has completely altered the traditional way of carrying out everyday activities like getting the mail, using the phone, going to the bank or the supermarket, and attending school, as everything can now be done with the comfort and ease of home computers and the Internet.

### 3.2.3.3.The Private Electronic Document

Polemic commentaries have surrounded the idea of the electronic document since its very inception, and the validity of the electronic document has become the most significant and troubling concern. This concern has forced upon every country and international organization the obligation to address this issue; many have started diverse projects, systems, and law enactments in order to establish a platform for handling the inevitable reality of electronic contracting.

An analysis of the concept of the document, its nature, formalities, authors, efficiency, validity, and legal basis, must accompany the discussion of this issue.

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[307] It is important to note that independently from the material support of the document; in order to compare the certified documents from a notary public and a *notario público*, these public officers would need to have equivalent qualifications, professional integrity and status.

The document can be understood both *structurally* and *functionally*. *Structurally*, it is a "corporal thing," constituted by a *corpus* or material element and a *graphium* or intellectual element that shows something. *Functionally*, it is "something used to represent another thing."[308] In other words, in a strict legal sense, it reduces something to its mandatory written expression. It also must have a probative objective; it must demonstrate the represented "thing."[309]

After attributing *legal* quality to it, the document acquires a new element that constitutes a value; this valorization will grant the document an *efficacy* level. This efficacy level will be set according to the nature of the document: *public* or *private*. To determine the document's nature, it is essential to know who the author is, and whether he/she is a public functionary.[310]

In order to comprise a real importance in legal life, the document must be divulged and should exhibit the appropriate conditions. Regarding the paper, these conditions are low cost, duration, capability to make alterations recognizable, communication ease, achievability, and, most importantly, the possibility for the authors to undersign the document and issue their declarations. This signature is the written expression of the contracting parties' will.

There has been a recent parallel coexistence of two contractual systems: a) the *classic* contractual system (*per cartam*), developed in Roman law and based in the *notario público*, which has satisfied the individuals' necessities by providing legal security and certainty to the instruments;[311] and b) the *electronic* contractual system, or the data interchange system, which originated with the electronic document. It uses a similar contracting form but is different from the classic system in that: 1. The material elements or means destined to give the same its corporeality are, for the *corpus*, the support system or computer where the contract would be stored, and for the *graphium*, the binary language utilized by the electronic medium. 2. Regarding the *form*, amongst

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[308] Francesco Carnelutti, *Sistema de Derecho Procesal Civil*, 1st ed. (Buenos Aires, 1944) at 414. [translated by author] [Carnelutti]

[309] See Eugenio Alberto Gaete González, *Instrumento Público Electrónico*, 2nd ed. (Spain, Editorial Bosh, 2002) at 86. [Gaete]

[310] *Ibid*, at 99.

[311] Public documents.

others, the legal act is the unity, attested faith, the perfect moment of the contracting parties' will.[312]

The advantages that the electronic document presents in relation with the *per cartam* are:

1. Easy creation
2. High level of security in its digitalized signature and authorization
3. Easy and prompt to create copies or solicit testimonies
4. Archival security due to effortless search actions (through software)
5. Elimination of linguistic difficulties (through a standard script)

When contracting in cyberspace, the contract suffers essential variations in both the documentary form and its contents, specifically in its essential, natural, and accidental elements. The alterations are in:

- The consent, respect to the offer, and acceptance stages of the contracting operation, besides the place and moment of its formation
- The legal act's lack of unity regarding consent expressions from the parties
- Variation in contractual experiences due to document interactivity and dynamism
- The means of proof of the obligations generated in the contract change
- In relation to Private International Law, several problems arise, as to:
    i. The Competence of the Tribunals that will file the demands in cases of application, interpretation, validity, and execution of the electronic contracts
    ii. Applicable law to specific cases
    iii. Vis-à-vis refutability of the jurisdiction prorogue clause[313]

In order to be assimilated and valid as a probative instrument, the electronic document should meet at least four basic requisites:[314]

1. *Authenticity*, through a minister of public faith[315]

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[312] See *Gaete, supra* note 309 at 138.
[313] Gaete, supra note 309 at 227.
[314] *Gaete, supra* note 309 at 231.
[315] *publica fides.*

2. *Individualization of the parties*, of the document and of the certification authority
3. *Security of the document*, with a secret code system or cryptology
4. *Digital signatures* from the contract

The electronic document cannot presently be considered an instrument; it cannot be considered as a public document unless the essence of the Latin notarial tradition is present. The main principles include at least: conservation and reproduction (the matrix principle); the capacity to facilitate copies and to have an original archive; the law formalities for public documents; the Date (*datatio*); appearance before a *notario público*; identification of the participants; unity of the legal act; stipulations from the parties; and finally, the *completio* that comprises the authentication of the document and the act of making an instrument in writing.

Not surprisingly, one of the first responses to the presence of the electronic document was to endow this document with sufficient security measures that it could be reliable and valid enough to independently impede the concurrency of the inherent risks of the memorization, elaboration, and transmission of information, whether these were voluntary or not.

Creating a security infrastructure supports not only the document, but also the electronic commerce through which it is performed.

### 3.2.3.4.Cryptology and the Digital Signature

From the legal point of view, the earliest measures that provided security to the electronic document user against criminal intervention were civil and penal protection.[316] Regarding technicalities, secret codes known exclusively by the users were established. These secret codes, called numeric cryptology, operate based on *personal identification numbers* (PIN) that are still in use in the banks, electronic money transfers, and several

[316] *Gaete, supra* note 309 at 188. (The United States has the leadership in this means, as it promulgated the 1995 Digital Signatures Act from the State of Utah, followed by its homologous 1995 California, the 1996 Arizona, Delaware, Washington, and Wyoming and 25 more from different States in 1997. The USA Electronic Document was born in its documentary system, the private document system, where the public document is not known; where the electronic document is a new sealed document (act under seal); where the so-called digital signature is not a signature but a seal. A new Act from California, and from Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, and Virginia Acts).

other types of electronic transactions.[317] These systems can work in direct machine-person relation, but they are not real and efficient protection for the electronic document; indeed, they are much less so if the document is going to be immersed in distant contracting, where there is a fundamental need to place the contractual relation on record and, even more so, to fulfill the proof of the certainty of that relation.

Later, *cryptology* emerged with several technical possibilities from which symmetric cryptology, or the *Data Encryption Standard* (DES),[318] uses algorithms to encrypt and decode a message with a single code or key shared by the two parties. The inconvenience of this system is that at least two people must know the shared single code or key: the sender and recipient. This implies that when the code or key is sent from one to another by any uncertain means (e-mail, fax, mail, or online) the possibility of interception by a third party who intends to decode the message will increase, thus negating the security system's main purpose.

Conversely, asymmetric cryptology, also called public key system or Digital Signature (DS),[319] uses two keys: the *public* and the *private* keys. The former, as its name implies, is knowable and accessible to any person, while only its holder knows the latter, as a message is encrypted with the private or secret key. This key is obtained through application to a Third Service Provider, through a system that will be explained later.[320] Another important benefit of this system is the impossibility for either the sender or the recipient to modify the message or document, since the private key holder is the only person that can decrypt the document after it is encrypted. Not even the original sender who encrypted it can return the document to its original form through the public key, thus eradicating the weaknesses of the symmetric cryptology. Unfortunately, the encryption and decryption processes of this system are quite slow.[321]

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[317] Apolonia Martínez Nadal, Comercio *electrónico: firma digital y autoridades de certificación*, 3rd ed. (Spain: Civitas Ediciones, S.L., 2001) at 251. [translated by author] [Nadal]

[318] Developed in 1977 by the National Security Agency (NSA) to be used by the North American public administration.

[319] See Serge Parisien and Pierre Trudel, *L'identification et la certification dans le commerce électronique*, Cowansville, Y. Blais, 1996, 270. [translated by author] [Parisien Trudel] (Developed on 1975 in Stanford University, California, USA by two electric engineers, Whitfield Diffie and Martin Hellman. Further to its creation, was then applicated by the Massachussets Institute of Technology (MIT) engineers to the Digital Signature and Electronic Document Encryption).

[320] See Section 3.2.3.5.

[321] *Nadal*, *supra* note 317 at 256.

When used properly, the DS system should demonstrate the following things with certainty: a) Who is sending the message; b) The integrity of the message's contents, meaning it was not altered or modified; and c) When, and whether or not, the message was effectively received.[322]

DS also guarantees that an addressee cannot refuse the receipt of information sent to him/her; thus, the DS has the same legal value as does the traditional holographic signature in many countries (especially in countries with a Digital Signature Law).

The process begins by obtaining a Digital Certificate that the user generates at his/her computer with the certification requirement form and his/her private key. With the certificate requirement form and the personal documented proof of his/her identity, he personally appears before a Notary, who reviews the information and documents presented by the user, attests to and authenticates the user's identity, and proceeds to create a digital certificate. Through an online process, the Notary then links up to the Certification Agency and the Certification Agency links up to the Registration Agency for the application of the Definitive Digital Certification, a process through which the verification of the keys' non-duplicity is made. Finally, the Notary receives the Digital Certificate that will allow the user to initiate his/her E-Commerce transactions securely.[323]

Recent times have seen the use of a combined system (*Triple DES*) through which the DES system is used to encode the text of the document, and the asymmetric system is used for digital or electronic signatures. In this Triple DES system, the message is utterly free of falsification, and is free from alleged ignorance regarding the sending or receiving of the message.[324]

Taking into account the necessary time and costs of the process, the asymmetric system requires two participants: the Third Service Provider, who normally facilitates the technical equipment for the operations; and the Certification Authority, who will issue a certificate or abstract that must meet the terms of the correspondent digital signature law.

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[322] International Union of Latin Notaries, online: <www.onpi.org.ar/roleimportanciadel.htm> [translated by author].

[323] *Asociación Nacional del Notariado Mexicano* online: <www.notariadomexicano.org.mx/red_benefi.htm>.

[324] See *Gaete supra* note 309 at 112.

This "certificate will generate a unique and inalterable secret code that together with the public key of a person or organization would guarantee that the information contained in the key is in force, authentic, unaltered and that the same corresponds to that person or organization".[325]

### 3.2.3.5.The Certification Authority

One of the complications of the asymmetric system is the need for a Third Party to certify the abstract that will later generate the digital signature. To this same Third Party, the so-called Certification Authority (CA)[326] is called upon to produce, distribute, and control the digital signature.

In the early stages of the digital signature system, the United States Federal Government designated CA's as a different kind of functionary, such as state Governors, personnel from public administration, lawyers, notary publics, and some insurance companies.[327] The USA government later encountered problems in its commercial relations with other countries, as the authenticity and validity of their CA digital signature certificate was not sufficient.

The USA government's problem dwells in its lack of functionaries or institutions that, according to the point of view of international commerce, could satisfy the profile needed for the CA role. In response, the American Bar Association (ABA) urged the government to consider the Latin Notarial figure as the perfect CA for the system. Nevertheless, the American notary public is a simple signature authorizer, and does not meet the proper requisites of the *notario público*; ergo, the ABA launched the *Cybernotary Project*[328] that retains a highly qualified jurist to carry out this important role in the international contracting field.

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[325] *Proyecto de Ley sobre Documentos Electrónicos, República de Chile*, Arts. 2 and 4, online: <*http://www.informatica-juridica.com/anexos/anexo72.asp*> [translated by author].

[326] Named by the anglo-saxon tradition (USA) when the encryption systems were created as a consequence to the necessity of a Third Trusted Party that could authenticate the veracity of the legal act and the identification of the participants involved in the use of the system.

[327] Mario Miccoli, Cybernotary, (Montevideo: UINL, *Informe de la Reunión Permanente*, 1996) at 6, [translated by author] [Miccoli]

[328] See Section 3.2.3.7.

### 3.2.3.6.The *Notario Publico* as Certification Authority

As the Digital Signature and Cryptography systems emerged in some states of the USA, the civil law tradition countries, particularly the EU, started strong movements focused on considering the *notario público* as the ideal public officer to adopt the CA role and digital signatures authenticator,[329] an imposition born as a natural consequence of the *notario público*'s profile and competence. The unique difficulty of this move relates to the *legality principle*[330] pertaining to notarial function that prohibits the *notario público* to exercise its function or to act without the duly enacted laws that give him/her this faculty in the correspondent area of law.

After 1999, the European Parliament Directive 1999/93 CE established common guidelines for digital signatures that consider a wide margin of liberty with respect to certification services,[331] including the existence of the authority to offer certification services, free accreditation, free determination of the states regarding the probative value of the document and the digital signature, and equivalence of the *per cartam* to the electronic document. As a result, the *notario público* has lost exclusive popularity as provider of these services.

Advances in many countries' notarial law concerning electronic documents and areas of practice frequently exclude immovable property transactions that involve the authentication of digital signatures in electronic documents. This exclusion occurs because this is a very delicate matter, and because there is no way of controlling the registry when cyberspace is involved. Still, when technology reaches the point at which the real estate commercial and legal systems can be electronically controlled, the *notario público* will be, without a doubt, the ideal professional to adopt this "multi-service" provider role.

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[329] *Gaete, supra* note 309 at 245.
[330] *Principio de legalidad* (Civil Law Tradition term).
[331] *Legislation Communautaire en Vigueur*, online: <http://admi.net/eur/loi/leg_euro/fr_399L0093.html > [translated by author].

In Quebec, the digital signatures and the authentication of electronic documents are taken into account when provisions of the "Act to establish a legal framework for information technology" were embodied.[332] The main object of this Act is "to ensure:

- the legal security of documentary communications between persons, associations, partnerships, and the state, regardless of the medium used
- the coherence of legal rules and their application to documentary communications using media based on information technology, whether electronic, magnetic, optical, wireless, or other, or whether based on a combination of technologies
- the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies
- the linking of a person, an association, a partnership or the state with a technology-based document, by any means allowing them to be linked, such as a signature, or any means allowing them to be identified and, if need be, located
- concerted action for the harmonization of the technical systems, norms, and standards involved in communications by means of technology-based documents and interoperability between different media and information technologies."

This Act states that the signature can be affixed to a document, despite the medium used to create the signature or the document (Article 39). Article 40, which states, "The document may be transmitted in any medium, provided that confidential information is protected," admits the use of the DS. With respect to the reception and control of the registry in cyberspace, Article 31 states the following:

"A technology-based document is presumed transmitted, sent, or forwarded when the action required to send it to the active address of the recipient has been accomplished by or on the instructions of the sender, and when the transmission cannot be stopped or, although it can be stopped, is not stopped by or on the instructions of the sender.

A technology-based document is presumed received or delivered when it becomes accessible at the address indicated by the recipient as the address where the recipient will accept documents from the sender, or at the address that the recipient publicly represents as the address where the recipient will accept documents, provided that the address is

[332] R.S.Q., c. C 1.1.

active at the time of sending. The document received is presumed intelligible unless notice to the contrary is sent to the sender as soon as the document is accessed."[333]

The *notario público* actually and historically represents[334] a jurist empowered by the state who gives public faith to legal acts in which he intervenes, or, as is mentioned in Article 1, Section 1 of the Spanish notarial law dating from May 28th, 1862, "he/she is the public functionary authorized to give faith, according to the laws, about the contracts and every extrajudicial act."[335] Thanks to these qualifications and competence, the law gives the *notario público* to be the one who drafts the electronic document, and, specifically, who provides the digital signature[336] with certainty, authenticity, and *publica fides*.

The Notarial intervention provides authenticity to the document in several ways:

a) Identifies the contracting party requesting notarial intervention [337]

b) Relates his or her power or capacity to act

c) Attests to the certainty and exactness of the content and date of the document

d) Verifies the signature(s)

e) Ensures the guarantees and security provisions included in the contract

f) Conserves, archives, and protects the confidentiality of the contract.

There are at least two problems related with notarial practice that demand a solution before the *notario público* can be considered as a possible candidate for this new function: problems relating to the *subject* and the *territory*.[338]

Regarding the *subject*, the lack of enacted laws in these matters demands that bodies of law consider the following issues: the existence of the electronic document as a public instrument and its duly formal and material regulation, and the application of the

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[333] Les Publications du Quebec, online: <http://www.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_1_1/C1_1_A.htm>.

[334] See *Gaete, supra* note 309 at 256. (Since the 12th Century).

[335] From this is attributed the dual role of the *notario público*, as a law professional and a minister of the *publica fides*.

[336] See *Gaete, supra* note 309 at 256.

[337] See Julio Téllez Valdéz, *Derecho Informático*, 3rd ed. (Mexico: McGraw Hill, 2003) at 207. [translated by author] [Tellez]

[338] See *Gaete, supra* note 309 at 267.

electronic document according to its nature (civil, commercial, or otherwise.). In terms of *territory*, generally the *notario público* is restricted to practicing only in its territorial competence or jurisdiction. When a contract is made between parties who are not present, often called distance contracting, one of the contracting parties may be in one continent and the other party in another continent, thus impeding the *notario público*'s ability to act, unless he/she has universal jurisdiction regarding territory permitted by the corresponding law or the matter is one over which the *notario público* has competence (i.e. immovable property located in its area). However, the *notario público* acts only respecting the digital signature and the certificate he/she emits, thus authenticating the instrument from its actual territorial jurisdiction.

#### 3.2.3.7.The Cybernotary Proyect

Certain fundamental directives, principles, and rules facilitate successful inter-personal relationships within every society, community, or group of people. Due to its intangible and impersonal nature, the emerging Internet community requires a very different set of rules in order to create order and efficiency and to legitimatize its activities. Thus, the creation of E-Commerce brought with it a new challenge: the need to establish an impartial authority that would be able to intervene in electronic transactions.

This impartial authority or Third Trusted Party (TTP) is the common name used to describe the judge, arbitrator, notary, customs agent, or certification authority who ensures that a transaction or legal act is as legitimate as possible, and who ensures the legal security and certainty of the transaction. The TTP used in E-Commerce should be the Cybernotary, a kind of agent that: "...would possess the authority and responsibility to administer oaths or declarations, to attest to or acknowledge acts, and to certify facts and authenticate the legality of acts, all in keeping with the traditional role of notaries in countries that follow the Romano-Germanic civil law tradition. Additionally, the CyberNotary, unlike his or her traditional (non-USA) counterpart, would possess a high-level qualification in information security technology that would allow him or her to electronically certify and authenticate each of the elements of an electronic commercial transaction that are necessary for its enforceability under USA and foreign law. This new

specialty would appear to represent a truly unique merger of law and technology in a specific legal professional who is a security officer in electronic commerce."[339]

The Cybernotary Project was developed pursuant to a 1994 Resolution taken by the Information Security Committee (ISC) of the American Bar Association (ABA).[340] The ISC considered two main problems concerning international electronic commerce. First, that this type of commercial success depends on the trustworthiness of the parties in relation to the transmission and content of the system communications, and second, that adequate recognition is necessary to assure the enforceability of these communications in any foreign or domestic jurisdiction.[341] The ISC contacted the International Union of Latin Notaries (UINL), which, in its Permanent Council Reunion,[342] created the Informatics and Legal Security Committee of the UINL; in this way, a joint Committee was created, destined to develop the standards and basis of the Cybernotary project.

Recently, the ABA and UINL Committees, in cooperation with the *United States Council for International Business*, are working toward the creation of an *attorney-notary* in the USA who could be a TTP in International Electronic Commerce matters. A special Commission, the *U.S. Notaire Task Force*, is creating the professional legal aspects regarding the international practice of the Cybernotary.[343] The progress that this joint effort has made relies on:

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[339] Joseph Kornowski , "The Specter of the Cybernotary, Science Fiction or a Legal Speciality?", Los Angeles County Bar Association, online: <http://www.lacba.org/lalawyer/tech/notary.html> [Kornowski].

[340] This Committee was created in order to examine the digital signature system and its effect in the notarial document.

[341] *Kornowski, supra* note 339.

[342] 1996, Montevideo, Uruguay.

[343] Joseph H. Alhadeff , American Bar Association, online: <http://www.abanet.org/scitech/ec/cn/home.html> ("The Division's Cybernotary Subcommittee continues to work towards its goal of creating an enhanced notarial profession in the United States to support secure electronic commerce. The committee has focused its efforts on defining the scope of electronic notarial practice, setting qualification criteria, and working with individuals and organizations to ensure acceptance of CyberNotarial acts in the U.S. and abroad. To date, the Cybernotary Subcommittee's members represent the notarial bars of Germany, Ireland, Italy, Mexico, Quebec, Puerto Rico, United Kingdom, and the United States, as well as the International Union of Latin Notaries and the International Section of the American Bar Association. The Cybernotary Subcommittee is working closely with the International Section's Notaire Task Force regarding acceptance of enhanced notarial acts under the North American Free Trade Agreement. It is also providing guidance to the Secretary of State of the State of Florida, who is sponsoring legislation in Florida to create an enhanced notarial practitioner under Florida law. The Cybernotary Subcommittee has been given observer status on the International Union of Latin Notaries' Committee on Electronic Legal Issues, to assist that body in setting global standards for electronic notarial practice and to promote acceptance abroad of the acts of U.S. CyberNotaries").

1. The definition and enactment of the main functions for the *attorney-notaries*
2. The creation of a project for the Cybernotaries Association, a private entity intended to educate, regulate, and coordinate the discipline system for the cybernotaries' prospects
3. In legislative efforts, the ISC has participated in the Florida Notary Public Law enactment process[344]

The Cybernotary Project is a balanced blend of the elements from the two Legal Traditions that are focused on the administration of justice and legal practice: the legal certainty and security of the transaction (from the civil law), and the prompt and efficient manner in which the transaction is carried out (from the common law).

The Cybernotary will be enabled to "guarantee that his acts will be given full force and effect in foreign jurisdictions which heretofore have viewed USA notarizations with considerable skepticism, and which have refused on procedural grounds to enforce many documents bearing a USA notarization. Because the specialist will be a common law lawyer whose function would resemble that of a notary found in civil law jurisdictions, he will be a bridge between the two legal traditions, assuring that transactions he processes meet the requisite procedural and legal formalities under both civil and common law based jurisdictions"[345]

The Cybernotary concept is in the process of being adopted by the United States Department of Commerce (DOS). The Cybernotary has been implemented in Puerto Rico and in Louisiana, as well as in several states of the USA.[346]

Besides the normal functions of the *notario público*, the Cybernotary will be responsible for the electronic legalization of digital signatures; the verification and authentication both of the terms and execution of a document, and that they have been made according to the law in which the document has been executed and would have its effects; and safeguarding the documentation archive.[347]

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[344] Theodore Barassi, "The Cybernotary" (1996) 1 Notarius International, Kluwer Law International 3 at 111 [Barassi Notarius].
[345] *Ibid.*
[346] *Gaete, supra* note 309 at 242.
[347] See *Parisien Trudel, supra* note 319 at 128-129.

The Cybernotary is a law professional of the common law system that will be adopted solely by the states of USA that approve it, since the existence of the *notario público* renders its implementation in a civil law tradition country unnecessary.

### 3.2.4. The Electronic Public Instrument

In order to conceive of the existence of an Electronic Public Instrument, it is necessary to consider that its essential traits must be flexible enough to be accredited as such. Different law systems have dissimilar parameters, even in terms of the terminology they use, which is why the implementation of this new system has been postponed several times. Evidently, the real breakthrough in the application of an electronic public instrument could result in the homologation of laws with respect to the territoriality between districts, provinces, states, or countries. The more boundaries and sovereignties dismissed in this concern, the greater the utility and efficiency of the electronic public instrument platform.

The materialization of the legal act involves the universal rule over the paper-based document. Nevertheless, it is important to make the following considerations:

1. We are looking at a document, albeit an electronic one, that would not reduce its quality as such. In essence, a document is, from a functional point of view, a tool of representation; since its materiality changes in a structural sense, only its expansion, not its contents, differs. It fulfills, then, all the other essential requirements that a document must possess.
2. It is an electronic document; therefore, from a structural point of view, it expresses itself in an electronic base, not in a paper-based support. This same circumstance makes one have different characteristics from another, namely:
    a) A physical object whose aim is to conserve and transmit information.
    b) Its functions are realized through an electronic computer system.
    c) The information is transmitted from a distance.
3. It is an electronic document that, once the legal elements of value are added, passes from being a simple historic document to being an electronic public instrument (EPI).

4. This EPI *ad sustantiam*, can change into one *ad solemnitatem*, destined to fulfill some consubstantial formalities for the act or contract it involves, the same formalities that represent the essential requirements for validity.
5. The EPI fulfills an *ad probationem* finality and, can in fact constitute a means of proof in agreement with the respective procedural legislation of each country.[348]

Therefore, in **Chile**, the EPI has the value of a judicial presumption[349] or an expert formal declaration.[350]

In **Spain**, under the use of the Civil Judgment Law of January 7, 2000,[351] an EPI that has an advanced digital signature can be admitted as evidence to trial. If it has only a simple electronic signature, its legal effects will not be denied, nor will it be excluded as evidence *per se*. Moreover, documents can exist that are utterly devoid of digital signature; however, there are certain methods to investigate the origin and author of the document. Still, there remains a significant problem related to hardware, the solution to which has manifested itself in vain attempts to transform the IP address of a computer into a number or unique code that corresponds inherently to that computer alone.

However, this system is vulnerable, by virtue of the fact that its addresses or numbers are completely modifiable and extremely easy to hide. The problem of the piracy of music, MP3's and other electronic documents has similar roots. The manufacturing process could provide a more realistic solution. That is, to imprint the computer with a number or unique code that is impossible to modify, so that the owner of a given computer could always be identified through the specific computer that is being used and the status that the user has. This could also be required for the use of some services, such as the Internet. This system could function like an electoral register that has some user responsibility. For example, each time a computer changes owners, or is not used regularly, a database, controlled by an institution, would be updated.

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[348] *Gaete, supra* note 309 at 243.
[349] "Judicial presumption" is the term used when a Chilean judge has to take as true or legitimate a document or declaration.
[350] The expert formal declaration in Chile has the same probative value as the judicial presumption.
[351] *Ley de Enjuciamiento Civil de España, online: <http://noticias.juridicas.com/base_datos/Privado/l1-2000.l3t1.htm>.*

The special treatment of public computers and "internet cafes,"[352] as well as their regulation, would mean hard work; however, a system of this kind can help fight those who act illegally in cyberspace, or, more specifically, those who damage third parties.

In **Italy**, the *Legge 15 marzo 1997 n.59* (*Legge Bassanini*), *Ley sobre Actos Telemáticos de la Administración Pública*[353] states that *per cartam* and electronic documents have the same effectiveness and probative value.[354]

In Quebec in **Canada**, the Civil Code of Quebec, Article 2837[355] states that all electronic acts have an expressed probative value. In the "Act to Establish a Legal Framework for Information Technology," a document is any information inscribed on a medium. It goes on to say that the information may be rendered using any type of writing, including a system of symbols that can be transcribed into words (referring to binomial system, used as default computer language), sounds, images, or any system of symbols.[356]

In the **USA**[357], the document that is signed by one of the parties, if it has tangible form, it is valid in itself, even in those acts and contracts that must be stated in writing even though they were generated in transmissions made by electronic means.[358] In addition, the Electronic Signature in the Global and National Commerce Act of July 1 2000 establishes a rule, which says that a "Transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."[359]

In **Mexico**, Art. 210-A of the Federal Code of Legal Procedures (*Código Federal de Procedimientos Civiles*) recognizes the information generated or communicated

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[352] Small stores where public internet access is offered.
[353] The Public Administration Telematic Law.
[354] *Legge 15 marzo 1997 n.59* (*Legge Bassanini*), online: <http://concilianet.infocamere.it/intranet/Conciliane/Legislazio/Commercio-/Legge-15-marzo-1997-n.59--Legge-Bas.html_cvt.html> [translated by author].
[355] R.S.Q., c. C-1.1, "2837. A writing is a means of proof, whatever the medium, unless the use of a specific medium or technology is required by law. Where a writing is in a medium that is based on information technology, the writing is referred to as a technology-based document within the meaning of the Act to establish a legal framework for information technology".
[356] R.S.Q., c. C-1.1.
[357] Applied to the states that have adopted the Uniform Commercial Code.
[358] U.C.C. §2
[359] Electronic Signatures in Global and National Commerce Act (2000), online: <http://www.ffiec.gov/ffiecinfobase/resources/elect_bank/fdi-fil-72-2000_e_sign_glob_and_nat_comm_act.pdf>.

through electronic, optical, or any other technological means as evidence. Art. 1298-A of the Code of Commerce (*Código de Comercio*) considers data messages as evidence; however, Art. 1205 of that Code distinguishes between "public or private documents" and "data messages." Article 52 of the Law of Credit Institutions (*Ley de Instituciones de Crédito*) includes permission for banking institutions to agree on the celebration of their operations through automated systems through which they will be able to determine the means of identification for users, rather than being restricted to the autographed signature and the authentic documentation of the service. According to this article, the laws will provide for automated identification in the same manner as it does for corresponding documents; consequently, automated identification will have the same probative value.

On April 6th 2000, the "*Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal en materia común y para toda la República en materia federal, del Código Federal de Procedimientos Civiles, del Código del Comercio y de la Ley Federal de Protección al Consumidor*"[360] was promulgated. Aspects in Articles 1803, 1805, and 1811 of the Federal Civil Code concerning the incorporation of electronics, optics, or any other technology where electronic contracting is compared to an offer made to a person as if he/she were present were modified to state that there is no need for previous stipulation between the contractors. Even in Art. 1834-bis concerning the intervention of public faith officers is stated as follows:

> "...In cases where the law establishes as a requirement that a legal transaction has to be provided for in an instrument before a public faith officer, this and the obliged parties can generate, send, receive, archive or communicate the information containing the exact terms in which parties agreed to oblige, through the utilization of electronic, optical or means of any other technology, in which case the public faith officer, has to point out in the proper instrument the elements through which said information is attributed to the parties and conserve under his/her protection an exact version of the same for its ulterior investigation, providing said instrument according to the applicable laws that governs it."[361]

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[360] (Decree by which diverse dispositions of the Civil Code for Mexico City in a Common Matter and for all the Country in a Federal matter; of the Federal Code of Civil Procedures, of the Commerce Code, and of the Federal Law for Consumer Protection are Reformatted and Added).

[361] *Márquez, supra* note 94 at 360.

Also in Mexico, the Reception doctrine is the recognized doctrine concerning the improvement of the act in case of electronic contracting. Article 1811 of the Federal Civil Code (*Código Civil Federal*) prescribes that previous stipulation is not required for electronic contracting; consent that has its origin in this type of contracting must be expressed.[362]

Can a computer-printed document be considered to be of the same value as the original? According to the Article 210-A of the Federal Code of Civil Procedures, a printout can be considered original only if the information has not been modified in any way and if the information it contains can be consulted afterwards.

However, a new problem arises when determining which document is the original of a digital-based document – the one that is inside the computer, the one that is received by the addressee, the document that is certified by the CA, or any of the digital copies that can easily be made. **Brazil**, for example, tries to differentiate between these documents by considering the electronic document without physical materiality signed by the emitter as the original, and the electronic document resulting from the digitalization of the physical document as well as the physical materialization of the original document as a copy.[363]

In contrast, Article 12 of **Quebec**'s "Act to establish a legal framework for information technology" states, "A technology-based document may fulfill the functions of an original. To that end, the integrity of the document must be ensured and, where the desired function is to establish

1. That the document is the source document from which copies are made, the components of the source document must be retained so that they may subsequently be used as a reference;
2. that the document is unique, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, in particular through the inclusion of an exclusive or distinctive component or through the exclusion of any form of reproduction;

[362] According to Art. 1803, 1
[363] See *Márquez, supra* note 94 at 396.

3. that the document is the first form of a document linked to a person, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, to identify the person with whom the document is linked and to maintain the link throughout the life cycle of the document..."[364]

As previously mentioned, the notarial instrument is perfect documentary evidence, being that its probative force is its most important element; it is presumed legitimate because it was created by someone vested with *publica fides*.

The complexity of electronic contracting requires that three circumstances must be examined in order to measure the probative force of an electronic document: reliability of the method, personal attribution, and accessibility for its later consultation.

In the interest of homologating the laws concerning the formal requirements for documents, and the admission of documents and informatics, the EU's Ministry Council Commission has, in its Recommendation R.81/1981, urged the member countries to examine the possibility of suppressing the requisites that demand written proof, and to adapt their legislations to include as valid micrographic and computer-based reproductions of documents. In the same manner, it provides directives for the admissibility and recognition of the validity of documents that were originated, transmitted, and gathered in a computer or informatics medium in order for them to be admitted as documentary proof in the judicial process.

The EU's Community Council and Ministry Council Commission also adopted in February 17, 1997, the 97/7 CE Directive from their Parliament and Council in matters concerning contracts entered into at a distance (*contrats à distance*); the (98)297/2 Communication addresses a common platform for the digital signature, Brussels, May 13, 1998.

Several countries have made advancements in the establishment of administrative and technical *e-government*[365] and digital signature norms. Registry offices and notarial

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[364] Publications du Quebec, online: <http://www.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_1_1/C1_1_A.htm>.

[365] This connotation is used for the services that some countries and states created for the community in order to have interactive communication and to do administrative payments to the government's administrative offices.

institutions are starting to implement systems and technology that will simplify their practice, considering that the legislation and systems of many states and countries are so archaic that legal security is threatened. This also permits fraudulent actions from corrupt or bad intentioned third parties that can interfere with the transactions. The more processes are placed in human hands, the larger the potential for mistakes and vulnerabilities. Nevertheless, there are certain processes from which human participation cannot be excluded.

#### 3.2.4.1.The International Circulation of the Electronic Public Instrument

Taking the *Apostille* created on the Hague Convention of 1961 as an example, some authors[366] imagine a procedure of legislation through the "electronic *apostille*." The 1516 and 1812 Laws of the state of Florida anticipate this hypothesis, referring to the *apostille* that is certified by the civil-law notary authority.

The possible function of an international system of "crossed" or "reciprocal" certification (that consists of the equivalence to the certificate emitted by public code certifiers licensed in another country) can be considered possible as long as the requirements from one country and those in the destination country, and the security level in the host and destination country can be considered equivalent.

Several countries have anticipated the aforementioned in their electronic laws. Almost all provisions are similar and limit their reach to prevent the recognition of certificates made by foreign authorities, as long as they fulfill the general requirements for national homologation based on standardized technical procedures.

Some laws and projects that establish the admissibility of signatures and foreign electronic certificates are the following:

1. The European project named: "Draft of Law on the Framework Conditions for Electronic Signatures and to Amend Other Regulations" (2000)[367]

[366] Accord to *Lagos, supra* note 21 and *Gaete, supra* note 309.
[367] § 23.

2. The Directive of the EU Parliament 1999/93 and of the Council of December 13th 1999 establishes a communitarian frame for the electronic signature[368]
3. The Law of the Digital Signature in Germany[369] addresses foreign certificates
4. In Spain, The Royal Decree-Law 14/1999 of September 17th 1999 addresses the theme of equivalence on certificates[370]
5. Peru's Law No. 27,269 of Digital Signatures and Certificates recognizes certificates made by foreign entities[371]
6. In Colombia, Decree No. 1747 in which Law 527 of 1999 is regulated and the concept of reciprocal certifications is defined.[372]

In Singapore, the Electronic Transactions Act recognizes foreign certification authorities[373]

### 3.2.4.2.The Electronic Public Instrument in the NAFTA territory

Some Canadian Provinces, US States and Mexico[374] have implemented different mechanisms to construct the path towards the efficient and secure circulation of the public document in electronic form. Recommendations from the UINL seem to predict the inevitable future adoption of a system that recognizes the Electronic Public Instrument. Together with the Hague Conference on Private International Law, the UINL organized the first international forum on e-notarization and e-Apostilles.[375] Speakers from Mexico, Quebec, British Columbia, and the USA, among others, presented

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[368] See *Márquez, supra* note 94 at 401.
[369] Article 15.
[370] Article 10.
[371] Article 11.
[372] *Ministerio de Comercio, Industria y Turismo de la Republica de Colombia*, online: <http://www.mincomercio.gov.co/VBeContent/documentos/normatividad/decretos/decreto_1747_2000.pdf >.
[373] Electronic Transactions Act, Article 43, online: Ida Singapore <http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=&infopageid=I237&versionid=2>.
[374] In Canada; the Province of Quebec and British Columbia, among others. In the United States; Louisiana and Florida, among others. In Mexico; nationwide.
[375] End of May 2005, in Las Vegas, Nevada, hosted by the National Notary Association of the United States.

technological breakthroughs related to notarial practice in their areas. For example, representing Mexico, Hugo Ricardo de la Rosa, explained the Integral System of Registry Management "SIGER" (SIGER), which includes tasks related to data entry, storage and custody, security, information search, reproduction, verification, management, and the transmission of registry information.[376] The FEDANET, which is a subsystem within SIGER, was developed to allow *notarios* to consult databases of the Public Commercial Registry over the internet. *Notarios* can also register and follow up the registry status of the common transactions of their clients. FEDANET has the following characteristics: it uses a recognized electronic signature implement; it is designed for public electronic documents; it provides certainty of the authenticity of the signature and the capacity of the person signing the document; it is intended for use by an officially designated Certification Authority (by the Secretary of Economy in Mexico); it provides integrity, confidentiality, authenticity, and avoids the rejection of registration; and it is based on the Model Law of UNCITRAL on Electronic Commerce and e-signatures.

Richard J. Hansberger, the Director of e-notarization of the National Notary Association (NSA), clarified the Electronic Notary Seal Program (ENS), which is an online application that provides states and private industry with technologies to facilitate secure electronic notarizations within and across jurisdictions and with the standards to promote interoperability across transactional partners that rely on notarization.[377] The ENS's primary goal is to authenticate notaries in real time. This service must be free to any participant state, and anyone must be allowed to verify the status of an ENS at no cost, in real time. With this system, state governments can issue, revoke, suspend, and renew ENSs securely online.

Issues that have prompted the creation of this program are: the lack of uniform legislative/regulatory framework hinders progresses; industry complains that the USA system lacks technological predictability; and there is a need for no- or low-cost notary authentication technology. The ENS program components are the following: notary

[376] Field investigation by the author. Las Vegas, Nevada, United States, May 30th-31, 2005. Supported by presentations of the speakers, found online: <http://www.nationalnotary.org/news/index.cfm?Text=newsNotary&newsID=648>.
[377] *Ibid.*

authority (notary registry, notary digital certification authority), electronic notary seal (image, XML, digital certificate secured in Notary Authority, accessible only by a notary, "released" for use by a notary upon proper authentication), electronic journal (web based record-keeping that provides independent record of transactions), electronic notary certification (provides XML store of compliant certificate date for use by notaries), notary exchange standard, (a secure exchange standard, through which transacting parties can access web services). The general benefits of the program are: state governments can regulate notaries in the electronic age; allows relying parties to verify the facts of a notarial act performed on both paper and electronic documents; supports the certification of public documents between states and internationally (e-*Apostilles*); avoids fraud; facilitates the emergence of a burgeoning "e-notary" market in which competitive solutions translate into competitive pricing for the average notary; provides a common (national and international) notary authentication protocol; and further promotes the professionalization of the American notary office.

G.W. Wayne Braid of British Columbia presented the e-notarization program, which is an online application for the use of the government, officers, and the general public to access information on Land Titles, Property Assessment, British Columbia Companies, and registrations under the Personal Property Act, among others.[378] It includes electronic submission and filing, the transfer of titles and deeds, mortgages, the discharge of mortgages, the discharge of financial encumbrance, the digital registration of land surveys, the payment of electronic funds transfer, and front-end to existing Land Title system. Rather than using the present Manual Registration System, the Professional Electronic Filing offers efficiency and security in its use. The process implicated with it is the following: first, through the BC online portal,[379] the user prepares the form for the intended action and uses the account for deposits as well as a digital signature system to import and export data securely. Then, in the Electronic Front Center, the submission of the documents, collection of fees and taxes, verification of digital signature, timestamp, assignation of numbers, post-pending application to registry, and conversion of form to a compatible image format is done in this stage. Finally, the items are queued for examiner

[378] *Ibid.*
[379] BC Online, online: <www.bconline.gov.bc.ca>.

registration (with priority services and work assignment) after which the Certificate Registry emits a valid certificate after the final verification of the digital signature. The importance of this e-notarization system is that it prevents document changes and allows for the identification of the person who signed it as well as their capacity, without requiring much resources, effort, or time spent.[380] Some of the most important unanimous conclusions and recommendations from the meeting are summarized as follows:

1. The application and operation of the Convention can be further improved by relying on modern technologies.
2. An interpretation of the Convention in the light of the principle of functional equivalence permits competent authorities to both keep electronic registers and issue electronic *Apostilles* to further enhance international legal assistance and government services.
3. States are encouraged to continue reviewing and enhancing the legal framework for allowing the use of electronic signatures and electronic documents.
4. States and their competent authorities are encouraged to further explore the possibilities of setting up electronic *Apostille* registers.
5. Competent authorities are encouraged to issue electronic *Apostilles* for public documents submitted in both paper and electronic form. Because the *Apostille* does not certify the content of the underlying public document, only its origin, competent authorities can issue electronic *Apostilles* either for public documents received in paper form and subsequently scanned by the competent authority, or for public documents received in electronic form.
6. Electronic *Apostilles* need to fulfill certain basic requirements to ensure non-repudiation. In particular, the fact of the issuance of the *Apostille* by the competent authority must be independently verifiable.
7. States are encouraged to develop technologies to facilitate the performance of electronic notarization and the issuance of other electronic public documents. However, electronic notarial acts and other electronic public documents need to

[380] See *supra* note 376.

fulfill certain basic requirements to ensure non-repudiation. In particular, the fact of the issuance of the electronic public document must be independently verifiable.

In order to assist states in the development of electronic *Apostilles* registers and the issuance of electronic *Apostilles* and electronic public documents, it would be desirable for detailed guidelines to be drafted by the Permanent Bureau of the Hague Conference in consultation with outside experts.[381]

[381] UINL, First International Forum on e-Notarization and e-Apostilles, online: <http://www.uinl.org/ingles/lasvegas.htm>.

# 4. FUTURE PERSPECTIVE OF NOTARIAL PRACTICE IN NAFTA COUNTRIES

## 4.1. Scenarios

One can hardly presume to know what the future position and practice of notaries will be; however, one can indeed affirm that the notarial practice is in need of a complete reevaluation. Technological advances and demand for efficiency worldwide have prompted the concept that the *notario público* may be an endangered profession. Despite the fact that actual statistics and practical experience show the profession to be in no danger, the formalisms involved with the practice are in many ways considered obstacles to efficiency in modern transactions.[382] Yet, in the words of Professor Arredondo Galvan, the *notario público* meticulously considers and cares for many details that prevent controversial situations, countries that have adopted the *notario público* in their legislations have much fewer problems and litigious controversies related to property and corporations in regard to their legitimacy, constitution, and transactions. Such details associated with registry, powers of attorney, authentication, and all the rules and formalisms that define the legal security and certainty philosophies are the foundation of the *notario público*'s existence.

For this reason, numerous countries that do not have *notario públicos* have recently begun seeking a similar professional for their legal ecosystem, or considering the adoption of the Latin notarial system. For example, some states in the USA have adopted the Cybernotary Project,[383] and others have taken into account the possibility of the adoption of the civil notary institution. Also, China adopted the *notario público* in 11 October 2003 and became a member of the UINL.[384] In 2002, a project called Reform of the Notarial Profession in China from the Canada-China Electronic Project Map emerged. Its objectives were to support China's legal reform exercise by increasing the capacity of the notarial profession in China; to formulate, implement, and regulate new policies within the overall reform process of the "Notariat"; and to share experiences and provide

[382] See *Arredondo, supra* note 82 at 54.
[383] See Section 3.2.3.7.
[384] *Uinl, supra* note 90, online: < http://www.onpi.org.ar/informacion_not_inst.php4>.

training to the Chinese notaries to enable them to gain access to a broad range of Canadian expertise, new ideas, approaches, and experience. All this occurred in preparation for the gradual change that China started as it moved from "rule by law" to "rule of law."[385] Dr. Jose Javier Cabrera Roman, president of the Ecuadorian Notariat and secretary for the Permanent Council for the UINL, formed part of the work group[386] that helped the exhaustive investigation done by Chinese authorities previous to the adoption of the civil law notariat. He holds that the expected impacts, output, and outcome from the Project can be used as an important reference to valorize the advantages of the adoption of the Latin notarial system in a given country.[387] These parameters are the following:

> **"Expected Impacts**
>
> 1. A stronger notarial profession that is moving towards a self-governing institution and is able to offer a higher degree of protection to the public and increased security of legal transactions.
> 2. Changes are considered by Chinese authorities in the reform of the notarial profession, namely in a new notarial legislation with major international standards.
> 3. Notaries functioning according to new regulations and by-laws of high notarial standards.
> 4. Autonomous profession able to offer a degree of protection to the public.
>
> **Expected Outcome**
>
> 1. Strengthened, streamlined professional association - better able to carry out its role as the professional body for notaries, able to offer better guidance and services.
> 2. Increased demand for notarial services.
> 3. Increased availability and effectiveness of legal expertise within the Chinese institution.
> 4. Increased capacity on the part of the notarial profession to improve the legal system and strengthen the "rule of law".
>
> **Expected Output**
>
> 1. Notaries better trained; quality of service improved.
> 2. Efficient system of licensing, discipline, training, support and norms of practice developed, adopted, distributed and available to notaries and the public.
> 3. Professional standards and liability established.
> 4. Legal mechanisms to support reinforcement of market economy (facility of property transfer, security of transactions)

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[385] In reference to the abandoning of the common law system, and the adoption of the civil law system.
[386] The participation of the *Chambre des Notaries du Quebec* was very significant in this special commission.
[387] Interview of Jose Javier Cabrera Roman, president of the Ecuadorian Notariat (September 15th 2005) in Quito, Ecuador.

5. International standards of the International Union of Latin Notaries adopted by the Chinese notarial profession."[388]

**Modernization.** As in every evolution process, persons or entities that do not adapt or update becomes obsolete. Despite the enormous challenge this implies for formalist and conservative laws, thus, the majority of notarial laws from the Latin tradition countries, these countries must make changes, like abandoning paper-based documents and the autographed signature in order to remain flexible in the changing realm of notarial practice. The notarial institution is undergoing a vast evolution process, the objectives of which have to do with acquiring a balance between the philosophies of efficiency and legal security and certainty, and with being open to the prompt utilization of technology that can improve, strengthen, and efficiently modify not only the notarial practice but also the direct interests and participation of the users of notarial services.[389]

In order to retain its importance in future legal processes, the *notario público* must not only be modernized but must also be the model and foundation for any universal project that deals with a *publica fides* authority.

The notarial practice is intimately related with some public offices, such as the Public Registry of Property and Commerce[390] or the State Treasury[391]; therefore, despite the hybrid nature of the *notario público*, the government role is essential to the *notario público*'s quest for modernization. The modernization of these public offices must therefore initiate or at least emerge *ipso facto* to the *notarios'* effort.

As previously mentioned, because the government depends on him/her to provide an efficient and highly qualified service, the *notario público* is also a public officer. Government participation occurs with respect to the administrative offices involved with daily notarial practice, such as the registries of immovable property or the treasury department.[392] A good example of a modernized government is that of Quebec, which,

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[388] Canada-China Electronic Project Map, online: <http://www.cccsu.org.cn/epm/projectdetails.asp?id=694>.

[389] This is also in benefit of the transparency culture, being that monopoly and demagogy are present when there is a privileged union where consequently the users of an obligatory service (such as the notarial) are affected.

[390] *Registro Público de la Propiedad y del Comercio.* (proper name in Mexico)

[391] *Tesorería General del Estado.* (proper name in Mexico)

[392] This applied to Mexico and some of the countries in South America, i. e. Ecuador and Argentina.

through the *Ministère des Ressources naturelles, de la Faune, et des Parcs*, launched the "*Québec cadastre reform program*" in 1992. By the end of the reform process, scheduled for 2011, the Quebec cadastre will comprise around four million separate lots, all linked together in space. Land owners and other users can already consult the cadastral plan online, and identify and order printouts of specific descriptive and geometric data using a web-based system for the management and publication of cadastral data known as *Infolot*."[393]

With respect to land registration, "in 1997, the Québec government began to modernize the land registration system in order to adapt it to the needs of contemporary society. In 2001, the interactive consultation of the Land Register became a reality, thanks to the establishment of a computerized Land Register, the computerization of Québec's 73 registry offices of registration, and the digitization of existing documents... The modernization process is also intended to ensure the conservation of the document base over time and the security of the land registration system, and to make the Québec Land Register a high-performance, secure, and remotely accessible system."[394]

The advantages and benefits of the online Land Register are:

1. It is accessible to both citizens and real property rights professionals
2. Documents to be published in the Land Register can be sent by e-mail at all times
3. Consultation is instantaneous
4. Access is controlled
5. Guarantees the authenticity of information related to real property rights
6. Security for electronic interchanges is provided by a Public Key Infrastructure (PKI). Thus, all clients who wish to register documents remotely must be identified beforehand by the certification service provider approved by government authorities, namely the *Chambre des notaires du Québec*. This provider will give a key and electronic signature for each authorized client to use to registering documents in the Land Register. For additional security, encryption formulae will be used during transmission.

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[393] *Ministère des Ressources naturelles, de la Faune et des Parcs*, online: <http://www.mrn.gouv.qc.ca/english/land/index.jsp>.
[394] *Ibid.*

7. Payments are made electronically. Mandatory for all remote transactions, terms of payment are executed over a secure connection on the payment server of the Ministère des Finances of Québec.[395]

In order to protect its own rights and the rights to land it grants to third parties, the government of Quebec keeps an inventory of all publicly owned land and a register of all rights granted or acquired. "The Department is currently continuing work to set up a computer-based register, to be known as the Public Land Register (*Registre du domaine de l'État*). The register will record, preserve, and disseminate information about units of land under public ownership, the rights and concessions affecting each unit, protected areas, and any restrictions on how the land may be used. The Public Land Register will allow official, complete, and up-to-date information to be made available over the Internet to all stakeholders, especially to public bodies that grant rights on public land, who will now be able to verify existing rights before granting new rights."[396]

### 4.1.1. Legal Traditions influence Commerce and People's Perspectives

The inevitable influence of legal traditions in everyday practice comes to be an interesting factor that sometimes constitutes an obstacle to globalization and *stricto sensu* to the notarial practice, which generally has well-rooted customs and principles. In countries with civil law traditions, the criteria seems to give extreme importance to certainty and legal security; however, in many cases its inherent formalisms permit viciousness such as bureaucracy and corruption,[397] as the formalist processes require several authorities and steps to complete a transaction, use an official channel, or conduct certain business.

It is also important to consider how the members of business communities from the member countries would be better served in their trade activities, according to the legal tradition or notarial system's characteristics. Again using the civil law system as an

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[395] *Ministère des Ressources naturelles, de la Faune et des Parcs* online: <http://www.mrn.gouv.qc.ca/english/land/register/register-computerization-benefits.jsp>.
[396] *Ibid.*
[397] Mostly in the third world, developing countries and newly industrialized countries (NICs).

example, the Latin Notariat provides members of business communities with important advantages, such as equilibrated (and in some cases, limited) professional fees; the legal security and certainty of the instrument it creates; the "matricity principle" that the *notario* must follow; and being a custodian of public instruments. In addition, among other advantages, the importance of the joint responsibility of the *notario* together with the client over the transaction promotes a more translucent and secure "environment" for doing business.

In contrast, sometimes these economies include procedures that are so burdensome that entrepreneurs must bribe officials to speed up the process, or decide to run their business informally. The economic profile of Mexico was detailed in the "Doing Business in 2005" Project, a survey that investigates the required procedures that an average small-to-medium-sized company needs to start operation legally, including obtaining all necessary permits and licenses and completing all the required registrations, verifications, and notifications with all requisite authorities to enable the company to start operation. The survey calculates the costs and time necessary to fulfill each procedure under normal circumstances, as well as the minimum capital requirements to operate. The assumption is that information is readily available to the entrepreneur and that all government and non-government entities involved in the process function efficiently and without corruption. The summary indicators from January 2004 are expressed as follows:[398]

Mexico-**Entry Regulation-**

| | |
|---|---|
| Number of procedures | **8** |
| Time (days) | **58** |
| Cost (% of income per capita) | **16.7** |
| Minimum capital (% of income per capita) | **15.5** |
| **-Registering Property-** | |
| Number of procedures | **5** |
| Time (days) | **74** |
| Cost (% of property value) | **5.3** |
| **-Contract Enforcement-** | |
| Number of procedures | **37** |
| Time (days) | **421** |
| Cost (% of debt) | **20.0** |

[398] Mexico Economy Profile, Doing Business in 2005, online: <www.worldbank.org>.

With respect to "Entry Regulations" (time to start a business), the same source that gives 58 days to Mexico, gives 5 to United States and 3 to Canada; regarding the cost, Mexico has 16.7% of income per capita, the USA has 0.6%, and Canada has 1.0%. According to the parameters in relation to time to register property, Mexico needs 74 days, the USA needs 12, and Canada needs 10. The cost to register property in Mexico is 5.3% of property value, 0.5% in the USA, and 1.7% in Canada.

In the author's opinion, these figures are inaccurate with respect to some states in Mexico, since every Mexican state has its own local laws that dictate the term for registering property and limit the costs. Moreover, the survey focuses on the capital cities of the countries and not on the average of the country or even of the most important or industrialized cities. In the Mexico, Monterrey (the capital city of the state of Nuevo Leon) is one of the most industrialized cities in the country. There, new companies are regularly created (without external factors such as bribes, corruption, etc.) in less than 25 days, a time frame that includes registry and the tax contributor's license.

Regardless of the accuracy of this information, however, it is indeed indisputable that the easier an economy can give birth to a company, enforce a contract, or register immovable property transactions, the more attractive that economy is to investors. A clear example is Delaware in the USA, where the ease in the processes and some tax advantages led to the incorporation of many companies. Foreign investment is a very important element for economies, particularly developing ones; this could be the reason for such investigations that compare process and efficiency in determined countries. Nevertheless, adoption of the *notario* in a given economy requires that other mechanisms and institutions, such as the Public Registry and Cadastre, be present. With this, less vulnerable rights and stronger warranties are reachable for the users. Also, modern tendencies indicate the increasing need for a Third Trusted Party (TTP) in order to prevent litigious situations, which are present in the vast majority of common law-oriented economies.[399] The *notario público* is indeed a proven solution; however, the author holds that it is imperative to submit the notarial practice to more efficient processes, as well as an intense academic program that could immediately provide better

[399] See *Karambelas*, *supra* note 18 at 28-31. See generally *Barassi*, *supra* note 79 at 68.

trained professionals who must meet the scheduled requisites and certification updates, and well-prepared public officers with technical and moral expertise.

Despite the deeply differences between most legal systems, institutions, such as the *notario público*, need time to be born and proven in order to find their way into practice. This is a long process that demands the investment of numerous resources, which is perhaps one of the reasons a common law environment has rejected ideas that verge on the *notario* implementation.

Independent of the culture, people need to trust a country's institutions: hospitals and doctors, banks and bank functionaries, properties, and officers. As a doctor protects and cares for people's health, the *notario* protects and cares for people's patrimony.

*Notarios* and lawyers do not belong to the same practice or area. History has showed us that none of them shall replace the other; rather, they should coexist. For each profession, there is a place and an attractive future in society; however, they must adapt, innovate, update, and develop in order to pertain to the actual demanding world that is constantly in need of legal security, certainty, and efficiency.

### 4.2. Specific Proposal (related to technology)

1. Concerning the notarial document's security measures,[400] it is proposed that the agreed security measures be acceptable at local, national, and Treaty levels, since any other manner would be impractical and would hinder the intended proceedings and effectiveness.
2. A technical Commission with experts in the field must exist in order to implement measures for the constant assurance of the notarial document's authenticity. This Commission shall give constant support to the notaries, and shall implement and create new systems so that the technology can insure and protect, and so that this technology will not become obsolete. The security measures that will be adopted regarding the notarial paper-based document must have a permanent mark on the paper, as do embossers or highlight seals. Likewise, each notary must personalize

[400] Connotation used to describe the security measures referred at the beginning of this chapter.

his/her seal or some other proper accessory with a voluntary error or something only he/she knows. This secret measure should be registered in the *Collegium*, Board, or Association to which he/she belongs, and at the corresponding governmental administrative office, if legislation causes him/her to be subject to the same, as is the case before the *Archivo General de Notarias* in Nuevo Leon, Mexico.

3. It is suggested that the notaries from the countries and states of NAFTA adopt an integral system with biometrical implementation. Said system[401] is software that can be created on a .NET setting and an SQL database, and that would allow for the digital recollection of either dactylic fingerprints or cornea registries from the contract's granting or participating parties. With this system-generated registry, a special "key" could be embodied at the public document. Thus, the notarial instrument would be directly related to the grantors' identity, thus providing better legal security and certainty than the one presently in force. This tool could help solve litigation, or even help to avoid it altogether.
4. It is suggested, that the electronic notarial document could be adopted by each country law in order for the document to have free international circulation.
5. A valid electronic public instrument (EPI) should be registered in such a way that this instrument could be valid and efficient. As a start, the digital asymmetric undersign system is a viable and appropriate option if it could be implemented with the systems' own public and private keys, and with the co-participation of a biometrical proof to identify users and authorities entering said system. The EPI must have the value of a legal presumption, a documentary proof; it must have the same efficiency and legitimatization as the paper document. Likewise, a system must be implemented in order to guarantee the non-alteration of the original electronic document. Theoretically, this will be resolved when notaries, as users of a controlled

[401] The only software with such characteristics was created in 1998 in Nuevo León, México by the author. (www.notariatres.com).

system, are forced to register their actions in the server of a system of the corresponding government offices.

6. It is proposed that the one commissioned to be a Certificate Authority (CA) be a *notario público*, since he/she is the most formal and prepared authority to identify individuals, and to draft and authenticate legal acts.
7. It is proposed that the Cybernotary project be analyzed in depth, and be considered and authorized only by the UINL, so as to safeguard the Latin notaries' interests and, equally, to prepare the notary for the "parallel universe" that the absolute inclusion of the EPI in the legal environment would create. It is suggested that the Cybernotary's competence, be at first limited to the countries and states included in NAFTA, for better control and exclusiveness regarding the Treaty's spirit.
8. It is suggested to form a monitoring commission which task is to be in constant search for the technological needs of the business community and users of notarial services. This commission would implement changes and technological innovations that clearly derive a benefit in terms of security, efficiency and economy to the users.

# CONCLUSIONS

The main objective of this thesis is to perform a comparative analysis of the notarial institution and the form of the notarial document in regards to the past, present, and near future, in order to lay out proposals that offer a basic platform for the notary's profile under the outline of an international treaty. This thesis is exclusively concerned with the services and the free circulation of the notarial document section of a treaty, particularly in NAFTA, which has placed Mexico, Canada, and the USA in a free trade zone. The subsequent rendering of services and endless growth possibilities create an integral monolithic structure in economic, political, and social matters that has sufficient resources to endure in times of crisis without catastrophe. The following conclusions are therefore evident.

The developing process through which the notarial profession is making its way allows for appreciation of the position that the legal system awards the notary, and, likewise, the importance and benefits that the notary offers to his/her legal system. Since the most ancient cultures, notaries have had a special function; they have kept the essence of their profession, and that essence has led to raw models that are respected in most Latin-oriented legislations. Some of these ancient models include the utilization of written contracts, witnesses attending legal acts, and the respect, trust, and moral solvency held by public officers.

Likewise, so that the organization, knowledge, and acts carried out by individuals would not be forgotten, notaries (scribes, *tabellios*, logographers, scribans) were commissioned to crystallize them into a tangible form, and were entrusted with the custody and archiving of such documentation.

The historical analysis contained in this investigation goes from general to specific, and emphasizes the countries and states that are part of NAFTA. However, by virtue of their quality as precursors on the matter, the cultural differences that detach one continent from the other, as well as the lead they have over many American countries, this thesis has also taken into account important knowledge or practices of the European Union,

NAFTA allows antagonistic legal systems to interact within the Agreement itself, like the Roman-Germanic law or Civil Law Tradition in Mexico, in the Province of Quebec in Canada, and in the state of Louisiana in the USA, and the Common Law Tradition in the rest of Canada and the USA. This interaction brings difficulties when dealing with specific issues, like Notarial law. This thesis also illustrates the significant differences between the Common law notary public and the Roman-Germanic law-oriented notary. Nevertheless, it is important to highlight that, due to the lack of a notarial institution regarding the concepts of the security and legal certainty inherent to a document that must properly be named a public instrument, apparently, the common law attorney is the ideal individual attempting to act as *notario* before Common law, however an attorney cannot represent both parties in principle, since that would contravene the standard rules with respect to conflict of interests and roman concept "*prevaricato*". The problem is not who a person is, but what that person represents. Generally, the lawyer represents an individual protecting or defending himself/herself from another. Ideally, the Notary represents all contracting parties, delivers security to the parties' needs and wishes, drafts a legal document, advises, avoids possible litigation, and responds for his/her acts, not forgetting that he/she is endorsed by and in representation of the government itself. Hundreds of years of proof and confidence back this institution that has conveniently provided the best security to its users in most part of the world. This situation inspires and motivates this investigation.

The evolution of the law has largely been left behind until the last two decades during which interesting reform projects have arisen that integrate new technology with efficiency overtones for notaries and their functions. To obtain a less superficial understanding of notarial law and its essence, a brief examination was made of civil codes from the different countries and states involved in this investigation, which are the foundations for every notarial law. This examination made clear that almost all civil codes are based on one raw model code. The French Code of Napoleon, of 1804, religiously represents at least 75% of the articles in the Latin-American civil codes. Having a model is not a bad thing, but not attending to the legislative work required by a law promulgated for a completely different society is irresponsible, as each country's

circumstances vary so much that one country's legislation may be useless to the other, even though they inhabit the same hermeneutic space.

An *a priori* homologation of notarial legislation is ambitious, particularly when dealing with the countries in question. Nevertheless, the basic concepts may be outlined, thus granting righteousness to those who correspond to the same empiric knowledge. Furthermore, we may consider the harmonization of notarial systems as a sensible and unavoidable solution, taking the Latin notaries as a platform, as this investigation proposed. In particular, Mexico's notarial law is at a most precarious level, because of its disparity among the different states and by virtue of the later reforms that have already existed in Europe and other North American countries for many years. The majority of Canada is ruled by the common law; the country is therefore rife with lawyers. Nevertheless, due to its admirable history and particular defense of its culture, the Province of Quebec holds the notarial institution of civil law in its legal system. For its part, the majority of the USA's citizens lack even the knowledge of the existence of the notary or of the notarized document. Louisiana, however, is similar to Quebec, in that it has kept its civil and notarial law traditions. Recently, hope was born for more Americans to be able to enjoy the security and certainty offered by the Latin notaries, thanks to the intention of other states in the USA to look into the possibility of adopting the proven system referred to in this paper.

The most important organism or institution related to notarial functions is, without a doubt, the UINL, which embodies 73 represented countries. In addition to what was discussed in this investigation and to its inclusion of many organisms and institutions, the relevance of Directives and Recommendations, the support and advice in the lawmaking process of each member country, and many other functions must all be acknowledged and learned from. Through the UINL, the possibility of implementing a certification and licensing system so that notaries from the countries and states of NAFTA will have sufficient updating and certifications to be under the MRA, and so that users of notarial services will be certain that their patrimony and legal situations are handled by expert hands.

This thesis also concludes that lawmaking requires major effort in order to achieve the efficiency and harmonization of the notarial function in the member countries

of the NAFTA. This is not necessarily regarding the regulation of specific issues, as the simple circulation of the notarial document in the Treaty's territory, determining the notary's deontology, or creating a new complex juridical figure as the Cybernotary would be. Moreover, an integral reform based on analyses of the processes and tasks that obstruct the notary's efficiency of practice, and, at the same time, an examination of the optimal manner in which the legal security and certainty that the notary offers can be preserved or, better yet, strengthened. Common sense dictates that with fewer obstacles in the processes for investing, contracting, purchasing, or selling in national or international territory, there will be more economic opportunities for the three NAFTA countries.

In comparison, technology and communications development has reduced or eradicated time as an obstacle, reducing it to its minimum expression in regards to processes, contracts, and their execution. Nevertheless, the daily transactions have grown to such a degree that in some places control systems are not sufficient. The entrance of *E-commerce* containing cybernetic technology and information and digital signature systems has placed the notary at a crossroads:[402] either continue operating in the same manner he/she always has, until new systems and methods render his/her position obsolete; or reach out for the necessary informative and cybernetic knowledge, implement the required systems, and enter into the new panorama, full of possibilities, that technology promises as it renders its services of notarial law. This is a great opportunity for the notary, that of being depositary of the trust and public faith, a condition that automatically positions him/her as the first candidate to be a Certification Authority (CA), not to be left out of the battle, but rather to strengthen legislation with his/her knowledge and experience for the very near future.

Apart from change coming merely because of technology, the notary is presented with new opportunities and projections. Therefore, the notary will not disappear, but will rather adapt, update, and contribute to a new system that is changing some of its pillars and foundations, as it was until recently, solely and exclusively the document in support paper.

[402] The notary public is left out of the analysis for lack of profession, knowledge, and all the rest exposed in chapter 1.3.

In order to strengthen legal security and certainty regarding an individual's identification, we must adopt an integral administrative system with biometrical technology that could relate the biometrical registries to notarial instruments through a particular code. This would bring great benefits and protection, both to users and to the notary, since every time an illegality or fraud is committed that relates to some notarial documents, the notary bears the objective and the joint responsibility. The author himself created this system, which has functioned in a Nuevo Leon, Mexico notary's office since 1998, with good acceptance from users. Moreover, on two occasions it has helped to present proof in trials regarding fraud concerning individual's identities.

Many aspects of the notary's profile have been discussed that, related to law and its practice, would make the notary a professional able to offer more to our changing society. Nevertheless, the deontology of the same was left in suspense, as well as the notary's axiology, which marks the difference between a vocation and a profession. In the author's opinion, the notary has a special social role; in theory, he/she must dedicate time for social labor to support low income or low education communities. Therefore, bringing about any transcendental change requires employing or sacrificing a little time and egocentrism. This time of change, technology, and reform is, without a doubt, ideal for the notary to dedicate a space to update and prepare himself/herself and seek new possibilities offered simply by virtue of his/her position. Furthermore, it is an opportunity to do something to bring meaning to the social role that he/she occupies: that of a trusted, proven individual with a distinguished position.

Apart from the *notarios'* perspective, this thesis intended to show how would the members of business communities from the country members are to be better served in their trade activities with the presence of *notarios*. Is concluded that some external factors surveys and investigations, independently whether they are accurate, affect business communities in their criteria, however, important advantages with respect to the adoption of the *notario* are displayed, with the imperative consideration that the *notario*, with its actual characteristics is not suitable for every country, unless some changes occur to the notarial practice and the institution itself.

Finally, this investigation provided answers to the questions laid forward at the beginning, from which the difficulties the notarial institution will face have been made

apparent. At the same time, the potential is there for this noble and important vocation, of yesterday, today, and tomorrow, the notarial institution, to continue and to ease the transition into the future.

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- Louisiana Notary Public Law
- Notaries Act of Florida

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## ANNEX A

❖ Notarial services in British Columbia include the following:

1. Affidavits for all documents required at a Public Registry within the Province.
2. Authorization of minor child travel.
3. Business purchase or sale.
4. Certified copies of documents.
5. Commercial leases and assignments of leases.
6. Contracts and agreements.
7. Easements and rights of way.
8. Estate planning.
9. Execution and authentication of International Documents.
10. Health care declarations.
11. Insurance loss declarations.
12. Letters of invitation for foreign travel.
13. Manufactured home transfers.
14. Marine bills of sale and mortgages.
15. Marine protestations.
16. Mortgage refinancing documentation.
17. Notarizations and attestations of signatures.
18. Passport application documentation.
19. Personal property security agreements.
20. Powers of attorney.
21. Proof of Identity for travel purposes.
22. Purchaser's side of foreclosures.
23. Representation agreements.
24. Residential and commercial real estate transfers.
25. Restrictive covenants and builders' liens.
26. Statutory declarations.
27. Subdivisions and statutory building schemes.
28. Will preparation.
29. Will searches.
30. Zoning applications.[403]
31.

❖ Some interesting aspects of British Columbia notaries include the following:

- The provision of services such as real estate conveyance, mortgage documentation, and refinancing as well as will preparation, contracts, powers of attorney, and other types of personal documents is not limited to notaries. These services are also provided by lawyers; British Columbia

[403] British Columbia Notaries Society, online: <www.notaries.bc.ca/about/services>.

notaries compete for work in these limited areas, thus providing the public with an alternative for these professional legal needs.[404]

- The Society of the Notaries Public of British Colombia has been presence as an observer at all UINL Congresses since the 1970s and is currently seeking full membership in the UINL.
- The Society has made efforts to propose that the notary act as the required "third trusted party" in electronic international commerce transactions.[405]
- British Columbia notaries are governed by the Notaries Act of British Columbia. This Act defines the notarial services and limits, by law, the number of practicing notaries to 323.[406]
- Like their Quebec counterparts, British Columbia notaries are also covered by an insurance plan that protects users of the notarial services.
- More than half of British Columbia notaries are female.
- British Columbia notaries give high priority to service in their local communities; about 30% are involved in social service and fundraising, over one third are involved in business associations, and over one third are involved in youth sports and recreation.[407]

Since 1985, the Notary Foundation has been a non-profit organization that receives interest earned on the general trust funds held by members of the Society of Notaries Public of British Columbia. The sum of money received and distributed by the Notary Foundation is specifically designated to provide legal aid in the province and to assist in the education of members, applicants, and the general public. The Notary Foundation also gives grants to other British Columbia organizations in legal research, legal education, and law libraries.

[404] British Columbia Notaries Society, online: <www.notaries.bc.ca/article.php3?193>.
[405] *Ibid.*
[406] *Ibid.*
[407] *Ibid.*

## ANNEX B

**Real Estate.** In cases where a real estate title of ownership is transferred, *notarios* are charged with the preparation of the title transfer document/contract (their own document or a draft given by the intervening parties that they will review and revise as needed). This takes the form of a Public Instrument to which the *notario* attaches any documentation evidencing the seller's ownership, any power of attorney (in the event of an agent acting on behalf of a principal), the certificate of non-encumbrance and titleholding from the corresponding Public Registry of Property, an affidavit of appraisal, non-debt of water, and non-debt of land taxes. The *notario público* also calculates the taxation and fees that will be payable to government agencies and collects them from the intervening parties. When the parties so request,[408] the *notario* also performs the registry of the new title at the corresponding Public Registry of Property.[409]

**Corporations.** In cases where companies are incorporated, *notarios* will be charged with the preparation of the incorporation document, which takes the form of a Public Instrument, as well as the acquisition and attachment of the permit to incorporate and any power of attorney (if such representation exists[410]). The *notario* also calculates the taxation and fees that will be payable to government agencies and collects them from the intervening parties, and performs the registry of the new company at the corresponding Public Registry of Commerce.[411] In order to confirm the understanding between themselves, the articles of incorporation, bylaws, and shareholders' ordinary or extraordinary meetings are normally prepared by the *notario* or by the attorney of the participating parties prior to going to the *notario*. Once that is accomplished, the documents are given to the *notario*, who will transcribe them into the Public Instrument.

**Wills and Trusts.** The most common manner to issue wills and trusts in Mexico is through the Public Instrument that the *notario público* will prepare and execute.

**Public Instruments.** *Notarios* perform the majority of their work via the Public Instrument. This document consists of several sections. In its first section, an introductory portion identifies the *notario público* intervening, the time and place of the act, the participating parties, and the type of act that will be performed. Its second section contains the content of the event (e.g. incorporation, sale of real estate, will, power of attorney, or other). The third portion is the certification portion, in which the *notario* will certify who participated and that each participant was advised of the content and consequences of the act, identify the personal data of the intervening parties, identify the powers of attorney with which they acted, and transcribe corporate existence documents. The *notario* then witnesses the signatures of the participating parties and provides the *publica fides* certification, giving the document the quality of an authentic act. Regarding private documents, (i.e. a private sale contract) the *notario* can certify the identification, the knowledge, and the will with respect to the contract, as well as the signatures of the parties in order to give authenticity to the contract and convert it into an authentic act. [412]

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[408] This because the parties can always do the payments on their own.
[409] *Registro Público de la Propiedad y del Comercio.*
[410] In Mexico, every corporation or corporate entity has to be necessarily represented by a person.
[411] *Registro Público de la Propiedad y del Comercio.*
[412] See Malavet, supra note 159 at 84.

The specific notarial services that notarios in Mexico provide include the following:[413]

- Public Instruments that contain contracts involving real estate or *dominium* transactions, such as purchase/sale contracts, donations, barter/exchange, *mutuum*, *commodatum*, deposit, agency, and mortgage.
- Public Instruments that contain the creation or legal act of a commercial entity, such as commercial companies and corporations, commercial commissions, shareholder's meetings, modifications to bylaws, and shared purchase/sale contracts.
- Certification of any type of document.
- Powers of Attorneys, both general and specific.
- Interpellations or legal diligences that include the recognition of facts or legal acts in the presence of the *notario*.
- Arbitrators, mediators, and certification authority roles.
- Intervention in judicial proceedings.

## ANNEX C

"Article 101: Establishment of the Free Trade Area

The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area.

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

(b) promote conditions of fair competition in the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

[413] Amongst others.

(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Article 105: Extent of Obligations

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

"Article 301: National Treatment

1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.
2. The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.
3. Paragraphs 1 and 2 do not apply to the measures set out in Annex C01.3".[414]

**CHAPTER 12**

"Article 1201: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party, including measures respecting: (a) the production, distribution, marketing, sale and delivery of a service; (b)the purchase or use of, or payment for, a service; (c) the access to and use of distribution and transportation systems in connection with the provision of a service; (d) the presence in its territory of a service provider of

[414] *Ibid.*

another Party; and (e) the provision of a bond or other form of financial security as a condition for the provision of a service.

2. This Chapter does not apply to: (a) financial services, as defined in Chapter Fourteen (Financial Services); (b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and (ii) specialty air services; (c) procurement by a Party or a state enterprise; or (d) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.
3. Nothing in this Chapter shall be construed to: (a) impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access or employment; or (b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1202: National Treatment

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.
2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

Article 1203: Most-Favored-Nation Treatment

Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.

Article 1204: Standard of Treatment

Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 1202 and 1203.

Article 1205: Local Presence

No Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service.

Article 1206: Reservations

1. Articles 1202, 1203 and 1205 do not apply to: (a)any existing non-conforming measure that is maintained by (i) a Party at the federal level, as set out in its Schedule to Annex I, (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or (iii)a local government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1202, 1203 and 1205.
2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.
3. Articles 1202, 1203 and 1205 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

Article 1207: Quantitative Restrictions

1. Each Party shall set out in its Schedule to Annex V any quantitative restriction that it maintains at the federal level.
2. Within one year of the date of entry into force of this Agreement, each Party shall set out in its Schedule to Annex V any quantitative restriction maintained by a state or province, not including a local government.
3. Each Party shall notify the other Parties of any quantitative restriction that it adopts, other than at the local government level, after the date of entry into force of this Agreement and shall set out the restriction in its Schedule to Annex V.
4. The Parties shall periodically, but in any event at least every two years, endeavor to negotiate the liberalization or removal of the quantitative restrictions set out in Annex V pursuant to paragraphs 1 through 3.

Article 1208: Liberalization of Non-Discriminatory Measures

Each Party shall set out in its Schedule to Annex VI its commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other non-discriminatory measures.

Article 1209: Procedures

The Commission shall establish procedures for: (a) a Party to notify and include in its relevant Schedule (i) state or provincial measures in accordance with Article 1206(2), (ii) quantitative restrictions in accordance with Article 1207(2) and (3), (iii)commitments pursuant to Article 1208, and (iv) amendments of measures referred to in Article

1206(1)(c); and (b) consultations on reservations, quantitative restrictions or commitments with a view to further liberalization".[415]

Article 1210: Licensing and Certification

1. With a view to ensuring that any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party does not constitute an unnecessary barrier to trade, each Party shall endeavor to ensure that any such measure: (a) is based on objective and transparent criteria, such as competence and the ability to provide a service; (b) is not more burdensome than necessary to ensure the quality of a service; and(c) does not constitute a disguised restriction on the cross-border provision of a service.
2. Where a Party recognizes, unilaterally or by agreement, education, experience, licenses or certifications obtained in the territory of another Party or of a non-Party: (a) nothing in Article 1203 shall be construed to require the Party to accord such recognition to education, experience, licenses or certifications obtained in the territory of another Party; and (b) the Party shall afford another Party an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in that other Party's territory should also be recognized or to conclude an agreement or arrangement of comparable effect.
3. Each Party shall, within two years of the date of entry into force of this Agreement, eliminate any citizenship or permanent residency requirement set out in its Schedule to Annex I that it maintains for the licensing or certification of professional service providers of another Party. Where a Party does not comply with this obligation with respect to a particular sector, any other Party may, in the same sector and for such period as the non-complying Party maintains its requirement, solely have recourse to maintaining an equivalent requirement set out in its Schedule to Annex I or reinstating: (a) any such requirement at the federal level that it eliminated pursuant to this Article; or (b) on notification to the non-complying Party, any such requirement at the state or provincial level existing on the date of entry into force of this Agreement.
4. The Parties shall consult periodically with a view to determining the feasibility of removing any remaining citizenship or permanent residency requirement for the licensing or certification of each other's service providers.
5. Annex 1210.5 applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers.

Article 1211: Denial of Benefits

1. A Party may deny the benefits of this Chapter to a service provider of another Party where the Party establishes that: (a) the service is being provided by an enterprise owned or controlled by nationals of a non-Party, and (i) the denying Party does not maintain diplomatic relations with the non-Party, or (ii) the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented

[415] *Ibid.*

if the benefits of this Chapter were accorded to the enterprise; or (b) the cross-border provision of a transportation service covered by this Chapter is provided using equipment not registered by any Party.

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to a service provider of another Party where the Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-Party and that has no substantial business activities in the territory of any Party".[416]

**General Exceptions (Chapter 21)**

Article 2101:General Exceptions

1. For purposes of:

   (a)Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and

   (b)Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services,

   GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in:

   (a)Part Two (Trade in Goods), to the extent that a provision of that Part applies to services,

   (b)Part Three (Technical Barriers to Trade), to the extent that a provision of that Part applies to services,

   (c)Chapter Twelve (Cross-Border Trade in Services), and

   (d)Chapter Thirteen (Telecommunications),

[416] *Ibid.*

shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.

Article 2105: Disclosure of Information

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.

## ANNEX D

### Annex 1210.5 Professional Services

### Section A - General Provisions

Processing of Applications for Licenses and Certifications

1. Each Party shall ensure that its competent authorities, within a reasonable time after the submission by a national of another Party of an application for a license or certification:

   (a)where the application is complete, make a determination on the application and inform the applicant of that determination; or

   (b)where the application is not complete, inform the applicant without undue delay of the status of the application and the additional information that is required under the Party's law.

Development of Professional Standards

2. The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission.
3. The standards and criteria referred to in paragraph 2 may be developed with regard to the following matters:

   (a)education - accreditation of schools or academic programs;

   (b)examinations - qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;

   (c)experience - length and nature of experience required for licensing;

(d)conduct and ethics - standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;

(e)professional development and re-certification - continuing education and ongoing requirements to maintain professional certification;

(f)scope of practice - extent of, or limitations on, permissible activities;

(g)local knowledge - requirements for knowledge of such matters as local laws, regulations, language, geography or climate; and

(h)consumer protection - alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers.

4. On receipt of a recommendation referred to in paragraph 2, the Commission shall review the recommendation within a reasonable time to determine whether it is consistent with this Agreement. Based on the Commission's review, each Party shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time.

Temporary Licensing

5. Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service providers of another Party.

Review

6. The Commission shall periodically, and at least once every three years, review the implementation of this Section".

**Section B - Foreign Legal Consultants**

1. Each Party shall, in implementing its obligations and commitments regarding foreign legal consultants as set out in its relevant Schedules and subject to any reservations therein, ensure that a national of another Party is permitted to practice or advise on the law of any country in which that national is authorized to practice as a lawyer.

Consultations With Professional Bodies

2. Each Party shall consult with its relevant professional bodies to obtain their recommendations on:

(a)the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants;

(b)the development of standards and criteria for the authorization of foreign legal consultants in conformity with Article 1210; and

(c)other matters relating to the provision of foreign legal consultancy services.

3. Prior to initiation of consultations under paragraph 7, each Party shall encourage its relevant professional bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations on the matters referred to in paragraph 2.

Future Liberalization

4. Each Party shall establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants.
5. Each Party shall promptly review any recommendation referred to in paragraphs 2 and 3 to ensure its consistency with this Agreement. If the recommendation is consistent with this Agreement, each Party shall encourage its competent authorities to implement the recommendation within one year.
6. Each Party shall report to the Commission within one year of the date of entry into force of this Agreement, and each year thereafter, on its progress in implementing the work program referred to in paragraph 4.
7. The Parties shall meet within one year of the date of entry into force of this Agreement with a view to:

(a) assessing the implementation of paragraphs 2 through 5;

(b) amending or removing, where appropriate, reservations on foreign legal consultancy services; and

(c) assessing further work that may be appropriate regarding foreign legal consultancy services