

The Latin Notary: the Civil Law "title insurance"

The Notary as existing in Italy belongs to the "latin (o roman) notarial system".

The "latin notary" system is largely spread around the world, adopted by approximately 71 countries, mostly belonging to the civil law system.

Although the same word "public notary" is used within the "common law" legal systems, it must be underlined very clearly from the beginning that the concept (the meaning) behind the word in the civil law system and in the common law system is completely, absolutely different.

So when the words "Latin Notary" are used it is necessary to forget every notion that links it to the anglo-american "public notary".

The "latin notary" finds his origin within the Roman culture; they were Emperor clerks who did the writing for the emperor; then there were the tabelliones, who did draft the deeds among private subjects, to give them legal form and strength. From the VIII century the notary deeds were given the same execution strength of a judicial sentence.

And from the XI century (year 1.000) the notary deed was given a privileged "public faith", a particular strength. In this period the notary was equalized to the knight and to the judge within the noble professions.

The roots of the modern latin notary system, however, are to be found in the values of humanism, of the search of justice and protection of the weakest subjects.

Through this system, by using the notaries as qualified legal professionals, the State wants to guarantee certainty in the legal trading and commercial exchanges and protection of individuals.

Nowadays, the Latin notary is present in most European Countries (2/3, 30.000 notaries), including the East Europe countries, in Africa, South America, far East (Japan and China), Some common law countries, such as Malta and Maurice Island, use the latin notary system as well.

In Europe there are approx. 30.000 notaries, in Italy 5.400, in Germany 11.000, in France 7.600.

The presence of a professional with the role of the Latin Notary within the civil law systems is based on two reasons:

- 1) the civil law system privileges the written evidence. This means of course that the reliability of what is written in a document has the utmost importance;
- 2) the civil law system stands upon a variety of public registers where almost all and all the most relevant deeds and legal situation are entered to make them "public". This means that they can be accessed to anybody and the data recorded in them are deemed too be legally true and trustworthy. Clearly the reliability of the of their records depends entirely upon the trustworthiness of the deeds entered.

Who is a Latin notary

In civil law jurisdictions, the notary:

- 1) is a lawyer;
- 2) is also a "public officer" who performs public functions;
- 3) is a specialized lawyer who draws "authentic deeds";

- 4) is a professional who is compelled to keep the original deeds in legal custody, as a public records office;
- 5) is a multi-party counselor, with a specific, traditional "anti-trial" role.

The Latin Notary as a lawyer

Latin notaries (at least in Europe) have a law degree.

They may or may not have passed the bar examination. In Italy, however, they are not allowed to practice both legal professions at the same time.

To be allowed to practice the notarial profession, they must get through a very rigorous and competitive examination and, unlike the solicitors, their number is fixed by the law.

In most civil law countries, the Latin notary is compelled to avail his services to whoever asks for them, unless special impediments excuse him, and so long as the notarial document he is asked to draw is lawful.

The notary as a "public officer"

A "public officer" is a professional who performs "public functions".

This means that he is vested by the State with public authority and faith, which allows him to draw "authentic deeds" (or "public deeds").

The "authentic deed" is the characteristic "product" of the latin notary system. Even though the notaries' discipline can show slight differences in the different countries adopting the latin system, they all draw up authentic (public) deeds with the same legal meaning.

Authenticity means legal security and reliability of legal documents: these are considered essential goals in our constitutional state, because they can very efficiently

- prevent disputes and lawsuits,
- protect commerce from forgeries and
- avoid damages to the parties involved.

This means that the notary generally performs what has been mentioned as an "anti-trial" function, which is becoming cost-saving for the society as a whole because of the increasing costs of the judicial system.

From this point of view, a notary can be defined as a public officer to whom the State delegates a specific public power, the power to assert (to affirm) the authenticity of a document.

The official State seal used by the notary bears witness of this privileged strength "Public officer", however, does not mean that he is in any way dependent from any branch of government.

It just means that he is empowered to draw "authentic deeds" (in the meaning and content which we will see) by the State itself.

It means, in other words, that he can give his own deeds a legal certainty only because the State has empowered him to this function.

For this reason, he is also subject to a strict public control.

Having been delegated the "authenticity" public function, the Latin Notary has a specific, legally binding duty to:

- check out the conformity with the law provisions of the agreements the parties ask him to notarize;
- explain to the parties the legal consequences and effects of their contracts and statements, also from a fiscal point of view, pointing out the possible risks;
- be absolutely neutral and impartial.

He is not the customers' notary, but the State's Law's notary.

The relationship between him and his customer cannot affect his professional duty to draw only perfectly lawful deeds, in the combined interest of both parties.

As a "public officer" and therefore an impartial professional, the Latin Notary has a strong "anti-trial" function.

His deeds must prevent - as much as possible - future lawsuits.

The Latin Notary "authentic deed"

As said before, an "authentic" or "public" deed is a legally reliable instrument, whose trustworthiness is guaranteed by the Latin Notary who executed it.

Where does the "need" of an "authentic deed" come from?

Only legal security in business and private relationships allow for economic development; therefore a constitutional state must guarantee legal security to its citizens.

To this goal:

- 1) lawsuits must be prevented, for as much as possible;
- 2) the citizens must have access to public registers whose records are reliable and legally trustworthy.

Clearly the reliability of the findings depends entirely upon the trustworthiness of the deeds entered.

An authentic deed, drawn by a public officer, is granted by the State the value of "public faith", which means, exactly, that they have a special legal trustworthiness, because they are drawn only if they are in accordance with all the relevant law provisions, so as to avoid a possible future annulment of the act.

To guarantee the legal reliability of an authentic deed, in executing the deed (but also when "notarizing", "authenticating" a private deed) the Latin notary must:

1. make sure of the identity of the parties;
2. make sure that they possess the legal capacity, legal powers and proper authorizations to enter that particular transaction (if there is a proxy, they must ascertain that the person giving proxy was in turn legally capable of doing it);
3. ascertain the real intentions of the parties, the effects they want to reach;
4. make sure that the results of the agreement are in accordance with every applicable law

provision;

5. explain to the parties the value and legal effects and consequences thereof;

6. make sure that the legal consequences coming from the deed are really wanted by the parties.

7. he must thoroughly check all the facts happening in front of him and the legal certainty of the documents relevant for the deed and/or annexed to it.

In other words: the latin notary guarantees - bearing full professional and economical responsibility - that every fact he reports has really happened, was performed by people whose identity and legal powers he is certain of and was thoroughly ascertained.

As a result of their its "legal certainty", the "authentic deed" is granted:

a) privileged evidentiary strength.

In the civil law trial, substantially based on written evidence, the content of an "authentic deed" must be considered legally true and trustworthy by the judge, until impeached for falsity with a special procedure.

b) privileged enforceability.

A Public deed (synonymous of authentic) enjoys the enforceability of a definitive judgement

c) almost exclusive entry into public registers.

Civil law countries juridical relationships depend upon public registers (such as the land registry, the companies registry etc.) which have a special legal reliability and certainty. This means that they guarantee - at least up to a certain extent - that their records are legally trustworthy.

Therefore, only public deeds (or private deeds "authenticated" by notaries) can be entered in them.

Public custody, certified copies, certified abstracts.

Finally, the notary has also a duty to properly preserve the original deeds in his office for future consultation or issue of certified copies.

The originals cannot leave his office unless he receives a Court order.

The second main function assigned to a latin notary is meant to guarantee the achievement of the desired results.

In fact, in the Civil Law systems this notarial function is called "Legal adjustment", but it can be described also as "specialized counseling".

As a matter of fact, as far as the content of the contract is concerned, it is a specific duty of the notary to understand exactly the results that the parties want to achieve and "translate" them into legal terms, giving the parties the safest, most effective and cheapest deed (also in fiscal terms).

By doing this, the notary draws up a contract with clear and precise legal terms, with clear contents, leaving as little room as possible to doubts and, therefore, to disputes and lawsuits.

To make this the notary first of all must make a thorough and impartial investigation (inquiry, search, analysis) of the parties' will.

This duty of the notary requires the utmost impartiality. As the judge - and differently from a

lawyer - the notary is an impartial third party who has the role to make sure of the results looked for, advise on the consequences and highlight any risk or danger for all the parties.

Impartiality is strictly imposed by law and any violation is severely sanctioned.

To summarize:

The latin notary is a public officer and a specialized counselor; his expertise must include: estate contracts, loans and mortgages, company law, family law, wills law, the relevant sections of fiscal law. He also performs other judicial duties as a judicial auxiliary/assistant.

In recent years he has also achieved an important role in the field of international private law.

(from <http://www.notariato.it/eng/home.aspx>).