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Notary Professor Dr. Reinhold GEIMER, München

The circulation of notarial acts and their effect in law

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A. Introduction

I. Overview of the Tasks of the Notary

In what follows we intend to discuss the effects of deeds and other documents of German and foreign notaries viewed from the German perspective. In doing so I shall not narrow the concept too much, and shall also be mentioning activities conducted by the German notary that are not manifested in a deed. In Germany, the notary's work comprises not only notarisation activities, but also the carrying out of a large number of other responsibilities in the area of the non-contentious administration of the justice. If we tried to bring these together in one blanket clause, we could word it roughly as follows: The notary is obliged to provide those legal services the guaranteeing and protection of which operates for legal security and the avoidance of conflicts which lies both in the interests of the private parties concerned and in the general public's interest.¹ The notary fulfills this function by providing legal assistance to private persons in the creation of private legal relations (establishment, alteration and removal of interests in chattel and real estate). An exhaustive enumeration is not possible; rather, the concept must be open in terms of its substance within the objectives stated. Notably, the drafting of contracts, which includes cases where statutory law does not mandatorily provide for the assistance by a notary, is included in the non-contentious administration of the justice. All measures for the legal realisation of legal transactions, which are termed the 'execution activities', are also included, some of which are governed by statute, but the significance of which goes far beyond this compulsory execution in practice.² The execution activity includes, in particular, notification of the purchaser about the date for payment of the purchase price in purchase contracts, the obtaining of licenses for the apportionment of land and of other authorisations under public law, e.g. under the Real Property Transactions Act and the Real Property Transactions Rules, the obtaining of registration cancellation documents, supervising the payment of the purchase price and the obtaining of personal certificates. Another very important aspect of notarial activity is the safekeeping activity (the depositing of money, securities and valuables). To this must be added the formal negotiation process in the division of an estate, and the settlement of property rights in Eastern Germany.

¹ Frenz in Eylmann/Vaasen, *Bundesnotarordnung*, 2000, section 1 at note 11.

² Section 51 Notarisation Act (BeurkG).

However, the notary's full range of activities is not restricted to the above. The notary can also serve documents, draw up exchange and cheque protests and prepare certificates showing an individual's age etc.

II. Core Area of Notarial Activity

The core area of a notary's activity, which is aimed at preventing conflict and thus alleviating the burden on the judiciary, is the notarisation of legal transactions, providing neutral advice and services to the interested parties during the preparation sessions preceding the notarisation process, and in the execution of the legal transaction that has been notarised, i.e. making the entry in the Real Estate Register or Commercial Register. In the notarisation process the notary discusses controversial points in detail and, in a dialogue with the interested parties, endeavours to reach a reasonable settlement that balances out the contradictory interests concerned. By means of his deed, the notary ensures that legal disputes are avoided.

III. Mediation, Conciliation and Arbitration Procedures

Mediation and arbitration activities also should be mentioned in this context. A notary is permitted to engage in arbitration activity without any further authorization; cf. Section 8, paragraph 4 of the German Federal Rules and Regulations for Notaries (BNotO). Notaries can also carry out voluntary conciliation procedures. As impartial intermediaries who are familiar with the law, they are particularly suited for this kind of extrajudicial dispute resolution. The function of these procedures is always to defuse and solve conflicts through the neutral advice of and discussions with the notary, as the holder of a public office (similar in character to that of judge) with a view to avoiding controversial disputes before the courts. This relieves the judiciary and, in doing so, also serves the common good and the well understood interests of the parties. This is a 'natural' area of activity for notaries who, as holders of a public office, are obliged to maintain impartiality and independence. Notaries are especially well suited to take on such court-like functions in order to relieve the judiciary. The Federal Chamber of Notaries fervently supports this endeavour. It has made available rules of conciliation and arbitration by notaries. Furthermore, it has published a model arbitration clause that notaries can integrate into their deeds at the request of the interested parties in order to let an arbitration panel decide possible disputes arising subsequently between the parties. Following the recommendation of the Federal Chamber of Notaries, where possible, the arbitrators

should be appointed as early on as at the notarisation stage. In addition to the Federal Chamber of Notaries the German Association of Notaries, with its headquarters in Berlin, took up the theme of notarial conciliation and arbitration activity. It set up an institutional arbitration court with the title 'Conciliation and Arbitration Court of German Notaries'.

IV. Tax Advice

The notary may conduct a full range of legal advice activities, which includes cases in which notarisation is not prescribed. He may also give tax advice, but is not obliged to do so. The notary is not a tax adviser. He is entitled to give tax advice, but not obliged to. Nevertheless, in his activity, tax law plays an important role for the drafting of his contracts and deeds. We can talk about an interdependence between civil and tax law, here. Drafting contracts without taking taxation issues into consideration can lead to considerable losses. Therefore, it is important for the notary to either clarify from the outset that he is assuming no liability for the fiscal effects of notarisation, and recommend that a tax adviser be called in or, if he nevertheless undertakes tax consultancy, he is also liable for negative fiscal consequences.

V. Form requirements provided for in German Law

The German Civil Code (Bürgerliches Gesetzbuch - BGB) provides for the following form requirements:

1. Written Form (Signing Requirement)

a) Lex Lata

The requirement of the written form is fulfilled if the issuing person authenticates the document personally by signing it or by using a mark, which had previously been certified by a notary. The parties must sign a contract on the same document. If several separate documents are being used in order to form a contract, it is sufficient that each party signs the document intended for the other party. Section 126 paragraph 2 of the German Civil Code (BGB).

b) De Lege Ferenda: Downgrading to Simple Text Form

It is clear that the requirement of signing personally represents an obstacle to electronic commerce. Therefore, the legislator intends to loosen the requirement of the written form

to simple “text form” in many cases. The latter form requirement, which is easier to meet than the writing requirement, demands nothing more than a declaration set down in legible characters. It is not necessary that the issuing party sign the document personally. This form requirement that does not involve a signature should make legal transactions easier. The text form should supersede the stricter writing requirement in areas involving binding declarations without any evidentiary significance having only minor legal consequences or involving declarations that are easily reversible. In these cases no warning function, which is inherent in the writing requirement of signing, is required for the parties making the relevant declarations. Hence, the writing requirement remains in effect when it comes to declarations of high personal and/or economic importance, such as the promise of a life annuity pursuant to section 761 of the Civil Code, of a suretyship (section 766 of the Civil Code), abstract promises of payment (section 780 of the Civil Code) and abstract recognitions of debts (section 781 of the Civil Code). Here, the written form serves principally a warning function. The debtor shall be protected from the consequences of precipitation. Since the declaring party’s signature is not present – text form is not tied to a piece of paper in the same way as the written form; an electronic document is also suitable for this purpose.

c) De Lege Ferenda: Electronic Signatures as an Alternative to Personal Signatures

A new, electronic form requirement is being introduced as an alternative to the written form. The electronic signature takes the place of the personal signature. If the written form prescribed by statute is replaced by the electronic form, the party issuing the declaration must affix his name to it and provide the electronic document with a specified electronic signature in accordance with the Signature Act. In the case of a contract, the parties must each sign a document with the same wording electronically in the manner just described. This is provided for in the draft of a new section 126a of the Civil Code. The electronic signing accordingly takes the place of the personal signature and can thus replace the written form.

d) Declarations in the Real Estate Register and in Registration Procedures

However, declarations for which the relevant procedural law stipulates a written application will remain in paper form initially, as is still the case at present with the Real Estate Register and Registration Procedure. However, in the future the technical and legal pre-

conditions for the electronic maintaining of the real estate register files and registration documents are to be created, with the result that electronic transmission of legal documents will be possible with the Real Estate Registry and Registry Court, too.

2. Official Attestation of Signatures

If a statute prescribes official attestation for a declaration, the declaration must be drafted in writing and the declaring party's signature must be attested by a notary, section 129 of the Civil Code. If the declaration is signed by the declarant by using a mark by hand, the attestation of the hand mark by a notary is already prescribed for and sufficient by the requirement of written form of section 126 paragraph 1 of the Civil Code.

3. Notarisation

The notarisation procedure is governed by the Notarisation Act (BeurkG). A hearing takes place before the notary during which the interested parties submit the legally binding declarations (usually offer and acceptance) that are to be notarised. Section 8 of the Notarisation Act. Unlike in the case of the written form (section 126, paragraph 2 of the Civil Code), in the notarisation of a contract, offer and acceptance can be notarised separately, i.e. by different notaries, as well (in different places), section 128 of the Civil Code.³ Notarisation is the 'strongest' kind of form requirement. It replaces both the writing requirement and the official attestation, section 126, paragraph 3 and section 128, paragraph 2 of the Civil Code.

VI. Electronic Deeds

A written record must be drawn up covering the contents of the notarisation hearing before the notary according to sections 8 et seq. of the German Notarisation Act (BeurkG). This must be signed by the notary with the addition of his seal, and in the notarisation of declarations of intent, the written record must be read out to the interested parties, and also signed by them after they have approved the text that has been read out to them. The deeds of German notaries are still tied to paper, even now. An alternative electronic processing is not yet permitted. It is not yet possible to say how things will develop in the future. At the present time as has already been stated work is being done on an act for the

³ Example: The person selling land in Hamburg who lives in Berlin accepts, before a Berlin notary, the offer made to him in a deed of a notary in Munich from the purchaser, who lives there.

adaptation of the form rules of private law to modern legal transactions. However, this excludes notarisation.

VII. Notarisation of Facts

In addition to the notarisation of legally binding declarations (such as offer and acceptance to conclude a contract), the notarisation of facts is one of the tasks of the notary. He can only notarise facts, i.e. instances of the operation of the outside world, which he himself has perceived. Legal conclusions and appraisals cannot be the subject of a testimony deed. For example, here, we have in mind the notarisation of resolutions passed by meetings according to sections 36 et seq. of the Notarisation Act, supplemented by section 130 of the German Corporation Act (AktG) for the notarising of general meetings of public limited companies (*Aktiengesellschaften*) and of partnerships limited by shares (*Kommanditgesellschaften auf Aktien*).

VIII. Official Language

In Germany, the official language is German. Therefore, in principle, deeds are drafted in German. However, the notary can also draw up the deed in another language in accordance with section 5, paragraph 2 of the Notarisation Act (BeurkG), if he has sufficient knowledge of it.

IX. Consequences of Non-Observance of Form Requirements

If the relevant statutory form requirement is not respected, this leads to the nullity of the legal transaction.⁴ This also applies if, in an actual case, the parties have stipulated a particular form, section 125 of the Civil Code.

X. Inherent Purpose of Form Requirements

Statutory form requirements aim at protecting the declaring party from being legally bound over-hastily in risky legal transactions (the warning function).⁵ The form require-

⁴ Nevertheless, in certain scenarios, the law provides in its turn for a remedy by way of stipulating performance as a form requirement substitute as, for example, in section 313, sentence 2 of the Civil Code: The non-adherence of the form requirement is remedied by performance, i.e. the entry of the particular transfer of ownership in the Real Estate Register.

⁵ In this matter, a detailed statement is given by Bernhard in 'Beck'sches Notarhandbuch', 3rd Edition, 2000, F at note 10 et seq.

ment should arouse awareness, necessitate careful reflection and foster an idea of the seriousness of the resolution of intentions commensurate with the significance of the decision. Wherever German law intends to ensure that the declaring party is familiar with the text of the legally binding declaration, it prescribes either the personal form of signature or notarisation. In the notarisation procedure, because the deed is read out, protection is institutionally safeguarded against haste. Besides that, the notarisation procedure ensures that legal advice be provided about the implications of the transaction, which serves particularly the interests of financially weaker parties. In addition, the idea of the preservation of evidence is borne in mind. Above all, this operates in the interests of the parties in order to draw a clear line between merely preliminary negotiations on the one hand and the binding conclusion of a contract on the other hand, and in order to establish the content of the contract or the legal transaction reliably, and thus also make them comprehensible to third parties. The preservation of evidence also serves the public interest, e.g. with a view to making the keeping of registers easier by means of proof of the signatory's identity through official attestation. For large transactions of real property law, inheritance law and corporate law, the German legislator requires notarisation. Further, it is primarily in cases involving consumers that notarisation is prescribed, particularly in large, legally complicated operations when, beyond the mere warning and evidence function, specialist advice from an independent and impartial law administration agency is required. In the notarisation procedure, the notary is obliged to find out the intentions of the interested parties, clarify the facts and set down the result established in a written form that is legally effective. The legislator prescribes formal requirements as a means for ensuring that equal weight is given to all contracting parties – and only then contractual freedom is legitimate from the point of view of legal philosophy. Thus, the strongest and most stable means to prevent an imbalance attributable to differing levels of knowledge of the law and differing financial strength, is the notarisation by an impartial notary who is familiar with the law. In the notarisation hearing the notary fulfils a social function as an intermediary who can ensure that the substance of the legal transaction is constructed in a just and equitable fashion.⁶ Because of this, optimal consumer protection is achieved, mainly in such a way that the notary gives advice as prescribed by section 17 of the German Notarisation Act (BeurkG). In this process the notary has the task of ensuring that inexperienced and uninformed interested parties are not placed at a disadvantage.

⁶ Bernhard in 'Beck'sches Notarhandbuch', 3rd Edition, 2000, F at note 20.

B. Effects of Notarial Deeds

I. The Archimedes Principle: The Effects of a Notarial Deed in the context of a particular Legal System

1. From the Viewpoint of German Law

In the same way as a court judgment, a notarial deed does not have any effect per se and of itself; rather, it needs to be embedded in a particular legal system. Thus, each question as to the effects of a notarial deed can only be posed and answered from the viewpoint of a particular legal system.

2. From the Viewpoint of Foreign Legal Systems

In what follows the effects of notarial deeds shall be dealt with principally from the perspective of German law, but it must be emphasised that the deeds of German notaries can also be relevant from the viewpoint of foreign legal systems, i.e. when it is not German but foreign law that governs the operation, pursuant to rules of private international law or when, in another country, the question is examined whether the deed drawn up by a German notary should be ‘recognised’, i.e. whether it is accepted as being equivalent, from the point of view of the relevant foreign law.

II. The Evidence Effect

A notarial deed is official documentary evidence within the meaning of section 415 et seq. of the German Code of Civil Procedure (ZPO). Pursuant to section 415 of the Code of Civil Procedure (ZPO), it gives full evidence of the operation that has been notarised by the notary. This limits the free appraisal of evidence by the judge⁷. Only evidence that goes to show that the operation has been notarised incorrectly is admissible. The deed drawn up by the notary in the form prescribed by the Notarisation Act substantiates all the evidence of the declaration that has been notarised (*Willenserklärung*)⁸ or of the actual operation that has been notarised.⁹ This also applies to foreign deeds, if they fulfil the requirements set for domestic deeds.¹⁰ The whole operation notarised by the notary is included in the internal evidence of the deed. Thus, it is not only the content of the declaration, which is self authenticating but also the statements in the notarial deed about the

⁷ Section 286, Code of Civil Procedure.

⁸ Section 415, Code of Civil Procedure.

⁹ Section 418, Code of Civil Procedure.

¹⁰ Winkler, Beurkundungsgesetz (‘The Notarisation Act’), 14th Edition, 1999, section 1 at note 12.

identity of the person making the declaration, the declarant's age (relevant for contractual capacity), the notary's belief about the declarant's contractual/testamentary capacity, the place, time and other circumstances of the declaration etc. What has evidentiary force is not only notarial deeds, i.e. written instruments prepared by a notary, but also declarations attested by the notary. If the notary attests the authenticity of a signature on a handwritten declaration, the authenticity of the signature is established.¹¹ Here, the statutory evidence rule of section 416 of the Code of Civil Procedure (ZPO) comes into play. If the signature is genuine, the declaration is deemed to have actually been made. This evidence cannot be repudiated whereas, in the notarial written record in section 415, paragraph 2 of the Code of Civil Procedure (ZPO), the counter-evidence to the effect that the operation described in the written record has been notarised incorrectly is admissible. Thus the evidentiary force of the signature attestation is even 'stronger' than that of the notarial written record.¹² The attestation of signatures on a blank document¹³ has the same evidential value in principle. However, the Real Estate Registry Judge or Real Estate Registry Legal Administrator, just as the Registry Judge, need not accept the declaration if there is justifiable doubt about the blank having been completed by informal agreement.¹⁴ Full evidentiary force is also given to a German translation of a deed in a foreign language that a notary has produced according to section 50 of the Notarisation Act (BeurkG).¹⁵ Pursuant to section 437, paragraph 1 of the Code of Civil Procedure, deeds that have been drafted by German notaries, are presumed to be authentic per se. Where doubt exists about authenticity, the court can ask the person who is supposed to have made the declaration for a confirmation pursuant to section 437, paragraph 2 of the Code of Civil Procedure. This rule does not apply to deeds from foreign notaries. *Sedes materiae* for this is, rather, section 438 of the Code of Civil Procedure, which provides:

(1) The court must assess, according to the circumstances of the case, whether or not a deed that holds itself out as having been drawn up by a foreign authority or a person vested with public faith by the foreign country, is to be regarded as authentic without more detailed proof.

¹¹ Section 418, Code of Civil Procedure.

¹² Winkler, *Beurkundungsgesetz* ('The Notarisation Act'), 14th Edition, 1999, section 1 at note 18.

¹³ Section 40, paragraph 5 of the Notarisation Act.

¹⁴ Winkler, section 1 at note 20.

¹⁵ Winkler, section 1 at note 22.

(2) Authentication by a consul or embassy minister of the Federal Government is sufficient for evidence of the authenticity of such a deed. The authentication testifies to the authenticity of the signature and the official capacity of the person notarising and, if applicable, the authenticity of their seal,¹⁶ but not the observance of the form requirements of the state in which the deed was drafted, unless on the basis of section 13, paragraph 4 of the Consular Act, what is termed ‘extended authentication’ has been undertaken.¹⁷

The formalities of consular authentication, which are also very onerous (section 438 of the Code of Civil Procedure) have been mitigated somewhat in their effect by the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5th October, 1961¹⁸. In the scope of application of this Convention, official authentication without a consular certificate of the originating state is sufficient. By this means, the clumsiness of the consular authentication process necessitating whole chains of certifications and over-certifications is avoided. To this must be added the fact that, on the basis of bi- and multilateral agreements, foreign deeds are freed from any formalities, even if they have been included in the Hague Convention.¹⁹ Thus, for example, Article 1 of the Franco-German Agreement on Abolishing of the Requirement of Consular Authentication for Public Deeds of 13th September, 1971²⁰ provides:

„In order to be used in the other state, public deeds [...] do not require any consular authentication, official authentication without consular certificate, certification or similar formality.“

Article 11, paragraph 2 expressly lays down that this agreement takes precedence over the Hague Convention. In this context, it is worth mentioning Article 49 of the Brussels and Lugano Conventions and, latterly, Article 56 of the Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement

¹⁶ Section 13, paragraph 2 of the Consular Act. In this context, Spellenberg in *Münchener Kommentar zum BGB*, 3rd Edition, Art. 11 EGBGB, at note 95.

¹⁷ Cf. Bindseil in Hecker/Müller-Chorus, ‘*Handbuch der konsularischen Praxis*’, 2nd Edition, 1998, section 4 C at note 6 et seq. and Spellenberg, in *Münchener Kommentar zum BGB*, 3rd Edition, Art. 11 EGBGB at note 97.

¹⁸ *Bundesgesetzblatt* 1965 II 875, also available at <http://www.hcch.net/e/conventions/index.html>.

¹⁹ List, e.g. in Spellenberg, in the ‘*Münchener Kommentar zum BGB*’, 3rd Edition, Art. 11 EGBGB at note 98.

²⁰ *Bundesgesetzblatt* 1974 II 1075.

of Judgments in Civil and Commercial Matters²¹, which will become effective on 1st March, 2002, replacing the Brussels Jurisdiction and Enforcement Convention. Accordingly, the deeds to be submitted in the exequatur procedure require ‘neither consular authentication nor a similar formality’. The same is determined by Art. 35 of Regulation (EC) no. 1347/2000 of 29th May, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for children of Both Spouses (‘Brussels II’)²², Article 19, paragraph 2, sentence 2 of Regulation (EC) no. 1347/2000, of 29th May, 2000 on Insolvency Proceedings²³ and Article 4, paragraph 4 of Regulation (EC) no. 1348/2000, of 29th May, 2000, on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters²⁴.

III. No Res Judicata Effect

A notarial deed does not have legal authority in the sense of res judicata effect; in this regard, it is to be contrasted with a court judgment.²⁵ If an interested party intends to have his right established with binding effect res judicata, he must bring an action seeking either performance or a declaratory judgment. Then, in the court proceedings, the above-mentioned evidentiary effect of the notarial deed comes into play again.

IV. Notarial Deeds as a Basis for a Legal Transaction and the Creation of a Right or Establishment of a Right

1. Immovable Property Law

a) Section 313 of the German Civil Code

The notary’s activity assumes central importance in immovable property law as a whole. Sedes materiae is section 313 of the German Civil Code: According to this provision, a contract whereby one party undertakes to transfer or acquire ownership of a plot of land, requires notarisation. Attestation of the signature by a notary is not enough. Rather, what is needed is a written record from a notary which must be read out to the interested parties, approved by them and signed by them and the notary. Nevertheless, the full content of a contract concluded without observance of this form requirement is valid if the conveyance and entry in the Real Estate Registry take place, as provided in section 313,

²¹ Official Journal of the European Communities, no. L 12, of 16th January, 2001, page. 1.

²² Official Journal of the European Communities, no. L 160, of 30th June, 2000, page 19.

²³ Official Journal of the European Communities, no. L 160, of 30th June, 2000, page 1.

²⁴ Official Journal of the European Communities, no. L 160, of 30th June, 2000, page 37.

²⁵ Geimer German Notaries’ Journal [DNotZ] 1975, 461, 482, with further references.

sentence 2 of the Civil Code. In the transferring of legal title to plots of land and other equivalent rights to land (e.g. of an inheritable building right [*Erbbaurecht*]) and in the creation of rights to plots of land and full legal title to land, the notary is involved out of absolute necessity, but the notarial deed does not effect, of itself, the transfer of ownership or the establishment of the right. Rather, the entry in the Real Estate Register is still necessary. Thus German law does not adhere to the pure consensual principle originating in Civil Law. In contrast to the situation still prevailing in many Civil Law countries, entry in the Real Estate Register or other registers (e.g. Register of Ships) is constitutive under German law, and not simply declaratory. For the conveyance, and for the establishment of rights to land, sections 873 and 925 of the Civil Code require a two prong test, i.e. agreement before the notary and entry in the Real Estate Register.

b) Section 29 of the German Real Estate Act

Section 313 of the Civil Code is supplemented by section 29 of the Real Estate Registry Act (GBO). Pursuant to this statute, an entry may only be made in the Real Estate Register if the consent for the entry and the other declarations required for the entry are proven by official or officially attested deeds. Insofar as they are not apparent in the Real Estate Registry, some other preconditions of the entry require proof by official or officially attested deeds. The aim of this rule is to ensure the accuracy of the Real Estate Register, i.e. that the Real Estate Register corresponds with the material legal situation. It forms the basis for the best possible warranty of the accuracy of the Real Estate Register. This is precisely why the German Real Estate Register system stresses bona fide rights protection to such a large degree and the (bona fide) acquisition by those who have no entitlement leads to the loss of ownership or title for the true owner (who is not noted in the Land Register) or the person with title, great demands must be made as to the standard of proof of the registration documents. This elevated standard can only be guaranteed by the notary.

2. Corporate Law and the Law concerning Legal Entities

a) Incorporation of Companies and Legal Entities

It is not only in the area of real estate law that the notary plays a central role, but also in the sector of corporate law and the law concerning legal entities and, additionally, in legal services concerning other commercial transactions. The incorporation of private li-

mitted companies²⁶ and public limited companies²⁷ requires notarisation, just as increases in capital and the alteration of the articles of incorporation do.²⁸ Here, the creation of the company is not, in fact, effected at the notarisation stage; it is not until it is registered in the Commercial Register that the company has its origin as a legal entity with a liability limitation etc.²⁹ Thus it is possible, here, too, to detect a two prong test, again, i.e. the foundation document before the notary and the entry in the Commercial Register. This principle is widespread throughout the world; at any event it is valid law in most member states of the European Union. Thus, *de legibus latis*, the entry in the Commercial Register is constitutive, for example, for incorporation and increases in capital, but also for the moving of registered offices, other alterations of the articles of incorporation, mergers and splitting of companies etc. However, we should take issue with this hitherto irrefutable dogma in the law of corporations, of the constitutive significance of the entry in the Commercial Register or other registers. If we complain that the registration process takes too long, a call for a central register at a national or European level would not help much, either.³⁰ Rather, we should consider whether it is necessary to retain the constitutive effect of the entry in the Commercial Register. Indeed, we cannot entirely eliminate the legal supervision of incorporations, increases in capital and reorganisations all together, or reduce it to the primitive table A-procedure of English law, because commerce, and especially consumers, must be protected from unreliable incorporations and incorrect registration entries. We should, however, transfer certain supervision tasks from the registry court judge to the notary: The company should not only begin its life as a legal entity with its liability being limited to the company assets until it is entered into the Commercial Register, but rather as early on as the notary's certification is issued to the effect that the company has been incorporated in accordance with the law. The same arrangement could be made for increases in capital and reorganizations. Such a relocation of competence would be the most simple, most efficient and also the cheapest measure that could end complaints about the long registration periods. It would demonstrably relieve the registration authorities because, following the 'release' issued by the notary the (then only declaratory) entry in the register would have to be undertaken without further che-

²⁶ Section 2 of the German Act on Private Limited Companies (GmbHG).

²⁷ Section 23 of the German Companies Act (AktG).

²⁸ Sections 130, 179 et seq. AktG; sections 53 et seq. GmbHG.

²⁹ Section 41 AktG, section 11 GmbHG.

³⁰ This is because yet more bureaucracy would be thrown up. Here, only improved organisation in real terms or in terms of staff of the registry courts would be a remedy. This would not necessarily be successful.

cking on the part of the Registry Court.³¹ This suggestion should not oust the authority of the registry court judge; for, on the one hand, the competence of the notary comes into play only in addition to the competence of the registry court judge, and not in his place and, secondly, the introduction of a competing competence of this nature on the part of notaries is at the discretion of the individual states. The latter will only avail themselves of this option if their judiciaries are hopelessly overburdened and all attempts in the area of personnel policy to shorten registration periods have failed. This is being taken into account seriously, and is already being practised to a certain extent in Italy.

b) Transfer of Capital Shares in Private Limited Companies

Section 15 of the Act on Limited Liability Companies (GmbHG) prescribes notarisation for the transfer of a capital share in a private limited company. The transferring of the capital shares to a private limited company is not entered in the Commercial Register. Thus, here, we have no dual situation. Instead, the assignment of the capital share becomes effective with notarisation.³²

c) Applications for Registration in the Commercial Register

Even though notarisation is not prescribed, applications for registration in the Commercial Register must be attested by the notary. Calling upon the notary in the light of section 12 of the German Commercial Code (HGB) has the effect of safeguarding the register. To this must be added the fact that most applications for registration in the Commercial Register, although it is not prescribed, are formulated by the notary. This, too, promotes the precision and accuracy of the entries in the Commercial Register.

d) Formation of Partnerships

Even in areas in which notarisation is not required, e.g. for the formation of a partnership (general partnerships, limited partnerships, if no obligation to contribute real estate or ca-

³¹ The fact that it is only in countries with Latin Notariat that there are notaries, is no reason for dismissing this suggestion at the outset. For it would also be possible for it to come about in the Common Law states and in the Northern countries, because these states could transfer the supervisory function to other offices.

³² If necessary, as soon as all the authorisations and consents required by statute and by the memorandum and articles of association have been obtained.

pital shares in a private limited company is involved³³), in practical legal life, the notary is involved in the matter because he must attest the application on the basis of sections 12, 106 and 162 of the German Commercial Code (HGB). Therefore, in many cases the notary is also instructed with the drafting of the application and sometimes with the preparation of the partnership agreement, as well.

e) Filtering Function of the Notary

For this reason, in practice, it is not only an evidential function that is attributed to the notarial attestation of signatures but, additionally, a very considerable filtering function in dealings with the state registers, because the latter are spared inappropriate and incorrect applications. To this must be added the protection of those not experienced in business. Therefore, the Federal Chamber of Notaries has proposed amending and supplementing section 40 of the German Notarisation Act (BeurkG). This rule governs the attestation of signatures by notaries. The legislative objective amounts, *de lege lata*, to nothing more than mere preservation of evidence of the identity of the signatory. However, for this reason the effects associated with the calling in of the notary are only being utilised inadequately. In reality, in the attestation of signatures, the notary is also concerned, in many cases, with the legal content of the signed declaration. Both the party making the declaration and the recipient of it benefit from this. Above all, the Registry Court is spared a large number of erroneous, not to mention nonsensical applications in this way.³⁴ It would not be an exaggeration to state that, without the notaries' contribution in the drafting and checking of registration declarations, a proper registration procedure would be virtually impossible. The notary prevents applications made nonsensically, unreliably and erroneously or with misunderstanding content. Instead, he transposes the

³³ If plots of land, full legal title to land or capital shares in a private limited company are brought in, the notarisation obligation is required by section 313, sentence 1 of the Civil Code or sentence 15 GmbHG.

³⁴ The following are recipients: both the Local Court (Amtsgericht) as Real Estate Registry (section 1, paragraph 1, sentence 1 of the Land Registry Act [GBO]) and the other Registry Courts (section 8 of the Commercial Code [HGB], section 10, paragraph 2 of the Co-operative Associations Act, section 160b of the German Ex Parte Jurisdiction Act [FGG], sections 21, 55 and 1588 of the Civil Code, section 1 of the Ship Register Regulations) and also other offices, e.g. the Federal Aviation Authority (section 78 of the Law on Rights in respect of Aircraft [LuftfzRG]). Declarations that must be attested and submitted to the court are mainly consents (section 19 Land Registry Act, section 29 SchRegO), assents in procedure law as subordinate to the consents (sections 22, paragraph 2, 27 Land Registry Act) and applications for registration in the registers (section 12 of the Commercial Code, section 5, paragraph 2 of the Partnership Companies Act [PartGG], section 157 I Co-operative Associations Act, sections 77, 150, sentence 2 of the Civil Code).

wishes and requests of those participating into juristic formulations that are familiar to the judges maintaining the registers and to the judicial officers, and thus contributes in a major way to rapid processing. Without the filtering function of the notary, the Registry Courts³⁵ would have to conduct far more unproductive work. Defects concerning the form requirements in the declarations submitted by the interested parties lead to time-consuming queries and official legal decisions, which challenge the erroneous declarations. According to the proposal from the Federal Chamber of Notaries, these positive effects of notarial activity occasioned by the attestation of signatures should not, as hitherto, be seen as mere 'reflex' effects but they should, rather, find their way into the wording of statute law, as well.

3. Matters of Inheritance Law

a) Co-operation of the Notary with the Probate Court

In addition to co-operation between the notary and the Real Estate Registry, on the one hand, and the Registry Court, on the other, his co-operation with the Probate Court must also be emphasised. In Germany, - as is now only the case in a few other countries - we have the legal institution of the inheritance certificate. This is a certificate showing who is the heir. It certifies the inheritance entitlement to third parties acting in good faith, even if it is factually incorrect, sections 2365 and 2366, Civil Code. The same is true for the executorship certificate, section 2368, Civil Code. Entries in the Real Estate Register concerning succession upon death can only be made, pursuant to section 35 of the German Real Estate Registry Act (GBO), if the succession is proven by a succession certificate. However, an exception is made for notarial wills and inheritance contracts. If succession is based on a disposition *mortis causa* that is contained in a notarial deed, it is sufficient if, in place of the inheritance certificate, the notarial deed containing the disposition *mortis causa*, and the written record concerning the opening of the disposition are submitted. From this we can tell what great significance the German legal system attaches to the notary's activity, and what great confidence it has in it.

The Probate Court issues the actual inheritance certificate *de lege lata*. The same applies to the executorship certificate. Competence generally lies with the Local Court of the district in which the deceased's most recent place of residence is situated.³⁶ It is necessa-

³⁵ In the Real Estate Register Entry Procedure, the Real Estate Register Officials as well.

³⁶ If the deceased is of German nationality and if he was neither living nor staying in Germany when the succession event took place, the Schöneberg Local Court in Berlin-Schöneberg is competent. The latter can submit the case to another court for material reasons, section 73, paragraph 2 of the

ry for the applicant to affirm his statements concerning the succession in lieu of an oath. In competition with the Probate Court – the notary is competent to accept such affirmations in lieu of an oath. In practice, therefore, a large number of inheritance certificates are prepared and executed by notaries. In this connection, the notary must clarify all the legal and factual circumstances concerning the issue of succession and bear them in mind in formulating the inheritance certificate application. Here, too, the notary acts as a filter. The burden on the courts is alleviated, as they are not occupied with confused and out of place applications, because the notary endeavours to achieve the submission of applications that are as correctly effected as possible, and the presentation of effective procedural declarations.

b) De Lege Ferenda: Issuing of Inheritance Certificates by Notaries

In order to relieve the courts, the Federal Chamber of Notaries has proposed that the competence for issuing inheritance certificates should be transferred to notaries. Inheritance law is already central to the notary's activity. De lege lata alone, notaries, as neutral intermediaries in matters of inheritance law, undertake important tasks in the inheritance certificate procedure. The positive experiences with this would suggest that the issuing of inheritance certificates should also be transferred to notaries. If this were done, in Germany, a practice would be followed, that has existed in Austria for a long time. There, the settlement of the '*Verlassenschaftsverfahren*', 'probate procedure', is almost completely in the hands of the notary in his capacity as 'judicial commissioner'.

c) De Lege Ferenda: Competence of Notaries for Special Official Custody of Wills, and for the Opening of Dispositions Mortis Causa in the Notary's Custody

A further proposal goes as far as suggesting the initiation of a competence for notaries for the special official custody of wills³⁷, and for the opening of the dispositions mortis causa being stored by the notary.

³⁷ German Ex Parte Jurisdiction Act [FGG]. If the deceased was a foreigner and was neither living nor staying in Germany when the succession event took place, the Local Court of the district in which the objects of the inheritance are situated is competent with regard to all the objects of the inheritance situated in Germany, section 73, paragraph 3, of the German Ex Parte Jurisdiction Act [FGG]. De lege lata the notary must place all the wills he has notarised into special official storage at the competent Local Court, sections 2258a et seq., Civil Code. It is only inheritance contracts that can – if this is the preference of the interested parties – remain in the notary's collection of deeds, section 2300 Civil Code, section 34, paragraph 3 BeurkG.

d) Central Wills Database Maintained Electronically

The Federal Chamber of Notaries would also like to set up a central wills database maintained by them electronically, as is already the case with the organisations of notaries in other European countries. A network extending across borders is also planned as part of this. In future, this could make easier to investigate whether and with what content a particular person has set up dispositions mortis causa (wills and/or inheritance contracts). The current system is outmoded and, in the light of the large proportion of foreigners in the population, no longer of adequate probative strength. At present there is no central register in Germany, but only a decentralised system for informing the individual registries of birth. The latter are notified by the registry notarising the deceased's death about the occurrence of the succession event and, by post, they inform the competent Probate Court. However, this presupposes that the death is registered by a German registry office.

V. Notarial Deeds as Enforceable Instruments

The enforcement effect of notarial deeds has great significance in legal reality. The enforceable deed is an excellent instrument for quick and efficient legal enforcement and, at the same time, alleviating the burden on the state courts.

It is also a method that is easy for citizens to use for establishing enforcement instruments.³⁸ Under section 794, paragraph 1, no. 5 of the German Code of Civil Procedure (ZPO), execution takes place on the basis of deeds that have been received by a German notary within the limits of his official competences in the form prescribed, and in which, on account of the claim that must be stated, the debtor has submitted to immediate execution. The following are excepted: Claims

- that are not open to a settlement by compromise,
- that aim at submitting a legally binding declaration (*Willenserklärung*) or
- that are relating to the existence of a lease for a residence.

³⁸ It is estimated that, in Germany, around 95 % of all real estate transaction contracts contain a clause by which the debtor has submitted to immediate execution. To this must be added almost all loans from banks and other credit institutions, as well as those extended by private persons. Obviously, the subjection to execution can be and is used far more frequently in the practice of German notaries, e.g. in abstract recognitions of debt and in divorce settlements. Because of the revised text of section 794, paragraph 1, no. 5 of the German Code of Civil Procedure, the statistics for enforceable notarial deeds in Germany will improve still further.

With the enforceable deed drawn up before the notary, an enforcement instrument is available which, as to its enforceability, has the same value as a court judgment. However, the former does not come about – unlike a court judgment – in the pathological situation of the dispute between the parties but, rather, it is set up on the basis of the debtor's voluntary submission to execution, in a situation that does not involve a dispute.³⁹ The enforceable deed is very common in Germany. Thus, for example, in the bank and savings bank sector, almost all loans are secured by the parties submitting to execution. Pursuant to section 800 of the Code of Civil Procedure, the subjection to immediate execution can also take place in such a way that the execution shall take effect vis à vis the relevant owner of the land. However, this requires an entry in the Real Estate Register. Yet, it is not only loans that are made enforceable under section 794, paragraph 1, no. 5 of the Code of Civil Procedure, but also purchase price obligations and other payment obligations. The merits of this legal institution have been recognised by the legislator and, therefore, he has extended the scope of this legal institution considerably. Since 1st January, 1999, the subjection to execution is no longer restricted to pecuniary claims but, in principle, has been allowed for all types of claim, i.e. claims relating to an activity or desisting from an activity can also be made enforceable. Thus, for example, the obligation to erect a house in the developer's contract, or the obligation to clear a lot of land can be subject of a notarial execution clause, with the result that the obligee need not call upon a court but may restrict himself to instructing the bailiff or the enforcement court with the execution.

VI. Declaration of Enforceability by Notaries instead of the State Courts

1. Enforceability Declaration of Attorneys' Settlement

In order to relieve the judiciary still further, the German legislator has introduced the enforceable attorneys' settlement.⁴⁰ A compromise agreement concluded by attorneys on behalf and on the authority of the parties they represent is declared to be enforceable at the request of one of the parties, if the debtor has submitted to immediate execution in this agreement, and if the settlement has been deposited, stating the date of its origin, with the Local Court at which one of the parties could be sued according to rules of general jurisdiction at the time when the settlement is concluded. However, with the consent of the parties the settlement can also be placed in custody of a notary who has his seat in the district of a court that has jurisdiction on the basis of section 796a, paragraph 1 of the

³⁹ Cf. also, in the international context, the quotation cited by von Bar, below, under footnote 90.

⁴⁰ Sections 796a et seq., Code of Civil Procedure.

Code of Civil Procedure, and declared to be enforceable by him, section 796c, Code of Civil Procedure. Thus, a task is transferred to the notary that is genuinely a judge's one, which must clearly be separated from his competence under the notaries' regulations, especially for notarisations⁴¹. Even if there is a concurring application from the parties for an enforceability declaration, the notary must reject this as being unjustified, if it becomes clear from the circumstances that the parties have not had the objective or subjective settlement authority, or that the settlement infringes upon statutory regulations that must be respected *ex officio*. Thus, the notary finds himself in the same position as the judge. The positive decision of the notary bestows enforceability on the attorneys' settlement and establishes absolutely the effectiveness of the attorneys' settlement and the continued existence of the claim that has been declared enforceable.

2. Enforceability Declaration of Arbitration Awards

a) De Lege Lata

Because of the reform of arbitration procedure law that came into force on 1st January, 1998, the issuing of the declaration of enforceability was transferred to notaries as another competing competence, i.e. an declaration of enforceability of arbitration awards with agreed wording (which are issued in the arbitration procedure on the basis of a settlement). Section 1053, paragraph 4, Code of Civil Procedure, represents a consistent continuation of the creation, begun by section 796c of the Code of Civil Procedure, of alternative competences for the notary with a view to relieving the courts. Accordingly, a notary who has his seat in the district of the court that has jurisdiction for the enforceability declaration as provided for in section 1062 of the Code of Civil Procedure can declare an arbitration award with agreed wording enforceable with the consent of the parties. The declaration of enforceability by the notary gives the arbitration award enforceability to the same extent as the *exequatur* of the state court. Its rejection by the notary is binding on the parties (*res judicata* effect) under the same preconditions as the parallel decisions of the state courts.

⁴¹ Section 20, notaries' regulations.

b) De Lege Ferenda

The Federal Chamber of Notaries has proposed that, in the future, the enforceability declaration of all other types of arbitration awards also be transferred to notaries, i.e. including such as have been issued in a contentious arbitration procedure.

VII. Attempt at Extrajudicial Resolution of Conflicts by the Notary as a Precondition for Access to the Courts

One more phase on the road to the promotion of alternative dispute resolution is initiated by the law of 15th December, 1999⁴². Pursuant to section 15a of the Introductory Act to the Code of Civil Procedure (EGZPO), a state (*Land*) law can determine that the filing of the action in minor cases is not permissible before an attempt has been made by a conciliator set up or recognised by the *Land* administration of justice, to resolve the dispute by mutual agreement.⁴³ Before an attempt at conciliation, the path to the courts is blocked. The claimant must submit with the claim a certificate issued by the conciliator confirming an unsuccessful attempt at reaching an agreement.⁴⁴ In quite a few *Land* statutes, the notary has been declared to be a conciliator, e.g. the Bavarian Conciliation Act of 25th April, 2000 provides so.⁴⁵ With compulsory conciliation, the German legislator is picking up on a development that is being discussed in the Anglo-American countries under the catch word 'alternative dispute resolution'. With compulsory conciliation, a new sphere of co-operation is opening up between the notary and the civil courts. This is a very interesting development conceptually, which has been heralded already by section 104 of the Property Law Validating Statute (*Sachenrechtsbereinigungsgesetz*)⁴⁶. Here, it is a

⁴² Bundesgesetzblatt 1999 I 2400.

⁴³ This applies to
 - disputes concerning property or pecuniary rights before the Local Court concerning claims, the subject of which, in money and monetary value, does not exceed a total of DM 1,500.00,
 - disputes concerning claims arising out of neighbour law according to sections 910, 911 and 923 of the Civil Code, and according to section 906 of the Civil Code, and according to the statutory regulations of Land law as understood in Article 124 of the Introductory Act to the Civil Code, unless it is a matter of the operation of a commercial concern,
 - disputes concerning claims about instances of defamation which have not been committed in the press or radio.

⁴⁴ This certificate must also be issued to him upon request if, within a period of three months, the conciliation procedure he has applied for has not been carried out.

⁴⁵ Bayerisches Gesetz- und Verordnungsblatt 2000, 268.

⁴⁶ In this matter see, for example, Vossius, 'Sachenrechtsbereinigungsgesetz', 1995, at note 1 et seq. before section 87.

matter of problems in connection with the reorganisation of ownership relationships in the former German Democratic Republic (the Accession Area).

VIII. Other means whereby Notaries Alleviate the Burden on the Judiciary

1. Granting of Inspections of the Real Estate Register

In order to relieve the judiciary, the Federal Chamber of Notaries has proposed that notaries grant the general public access to inspect the Real Estate Register since, they argue, the electronic Real Estate Register is soon to be introduced all over Germany and, therefore, it will be possible to retrieve the content of the Real Estate Register in notaries' offices online. This would make access to Real Estate Register data easier for the citizen. Up to now, it has been each of the Local Courts at which each Real Estate Register is maintained that have given out information about the Real Estate Registers, in a decentralised manner.

2. Electronic Commerce with District Real Estate Registries and Registry Courts.

Moreover, German notaries are striving towards electronic commerce with the registers that are maintained publicly, especially with the real estate registries and Registry Courts. By this means the procedure could be constructed on both sides in a more cost- and time-efficient way. With a view to creating the necessary infrastructure, the Federal Chamber of Notaries is preparing a particularly secure electronic notary intranet. This could then be connected to the relevant networks in other member states of the European Union, as well.

IX. Cost-Reducing Effect of the Notary's Activity

1. Cost of Real Estate Transactions

We cannot fail to mention the effect of the notary's work in reducing costs. For example, the cost of land transactions in Germany are the lowest in the whole of Europe and, what is more, worldwide. In particular, they are quite a lot less than those in countries outside the Civil Law notaries' area. Thus, the transaction costs in the Common Law area are appreciably greater.

2. Cost Saving on account of the Avoidance of Conflict

Here, we can include the savings in costs on account of the avoidance of legal disputes. It is only about one thousandth of all notarial deeds that are the subject of court disputes.⁴⁷

C. The Notary in the Life of the Individual

Following this overview of the various functions German law has given the notary, I shall now change the vantage point and pose the question, ‘Who typically has to use the services of a notary, and when?’.

I. Recognition of Paternity and Maternity and other Legal Transactions of Parent and Child Law, notably Adoption

As early on as when a person is born the notary can come into the picture, in connection with the recognition of paternity or maternity or in adoption situations. The fact that the European Court of Human Rights⁴⁸ and the Federal Constitutional Court⁴⁹ have, by compulsion, placed births outside the marriage on an equal footing with those within the marriage, has led to a fundamental reform of German parent and child law. By this means the legitimacy declaration of the child born outside marriage (legitimation) has been abolished.

II. Matrimonial Property Agreements and other Agreements on the part of Engaged Couples and between Spouses

There is a whole series of operations in marriage and family law that I do not need to state individually here, because they are bound to centre around the same themes in all countries, even if the solutions differ from country to country in terms of technical aspects of the law. I would merely like to stress the notary’s central role in the drawing up of matrimonial property agreements. German law does not prohibit matrimonial property agreements following marriage; nor does it make them harder to conclude. However, in the light of the nowadays high divorce rate in Germany it has become common practice to settle contractually all areas that are relevant to the marriage before it takes place. These prenuptial contracts relate not only to the system of marital property, but al-

⁴⁷ In greater detail, Schwachtgen, DNotZ 1999, 269, 270.

⁴⁸ EGMR FamRZ 1995, 1106.

⁴⁹ Federal Constitutional Court [BVerfGE] 1992, 158, BVerfG FamRZ 1995, 789.

so to questions of what is termed 'statutory pensions equalisation and maintenance' (*Ver-sorgungsausgleich*) following divorce. Agreements concerning the spouses' statutory minimum share of the decedent's estate also come into the frame, here. If the marriage fails the notary, in his turn, endeavours to achieve a divorce consequences settlement if the spouses both want to divorce, i.e. want to avoid an antagonistic dispute.⁵⁰ In such cases the land and buildings owned jointly are generally transferred to one of the spouses and it is set down that the latter assumes the mortgages secured on the land and buildings, and the liabilities to banks secured by it as the sole future debtor, and the spouse who is leaving is released from further liability for these debts, or at least is to be freed of them in the future.

III. Wills, Inheritance Contracts and other Legal Transactions of Inheritance Law

1. Mandatory Notarisation of Inheritance Contracts

If the marriage goes well or, at any rate, without a divorce, it ends with death. For this situation, too, many people seek the advice of the notary. This is not mandatorily prescribed, however, given that a will or a common will can also be drawn up in handwriting. It is only for inheritance contracts that notarisation is necessary. By means of the inheritance contract, the contracting parties are bound, i.e. they cannot change their dispositions *mortis causa* unilaterally. It is well known that inheritance contracts and other contracts relating to the estate of a testator who is still living were prohibited by the revolutionary law of the French *Code civil*; the legal systems of most of the Civil Law states are influenced by this to this day.

2. Significance of Tax Law in the Drafting of Dispositions Mortis Causa

The construction of the dispositions of the testator is often influenced decisively by inheritance tax law, which has repeatedly been the subject of attempted legal reform.

⁵⁰ For mutually agreed divorce that is now permissible, the introduction of written, informal proceedings is planned. Thus, the compulsory oral hearing before the family court is to be dropped. This procedure, that will save time and costs, should then be initiated when the parties submit a notarised agreement governing all relevant consequences of the divorce.

3. Significance of Private International Law (Conflict of Laws) in the Drafting of Dispositions Mortis Causa

The notary's advice is also important, however, in view of the globalisation of people's life circumstances. It is not a rarity nowadays for a German man living in Berlin or Munich to own land and buildings abroad, e.g. in Italy, Florida or Sweden. Therefore, the notary must ascertain which law is applicable, and if necessary, advise the interested parties to draw up a disposition mortis causa pursuant to the law of Florida or Italy or Sweden, as well. In this context, the prohibition of inheritance contracts also plays an important role; if applicable, the notary will advise the interested parties to draw up unilateral dispositions with the same content, to avoid the risk of the German inheritance contract's not being recognised in the state where the objects of the succession are situated.

IV. Division of an Estate

These few examples clearly show that the notary accompanies the individual from the cradle to the grave. After an individual's death, he is called in again for the division of the estate, i.e. the apportionment of the estate amongst several co-heirs, if land or capital shares in a private limited company are included in the estate.

V. Fulfilment of Bequests

The same applies to the fulfilment of bequests with regard to land and buildings, and capital shares in private limited companies. According to German law, bequests do not confer a right in rem. Instead, the bequest only has effect in personam, i.e. under the law of obligations.⁵¹ This is to say that the whole estate, including the objects of the bequest, is transferred to the heir(s). Nevertheless, he/they are obliged to transfer ownership of the object of the bequest or assign it to the legatee.⁵² Here is an example: The testator names

⁵¹ Civil law legacy is also being discussed.

⁵² Section 2174 of the German Civil Code provides: 'By the bequest, the right is justified, for the beneficiary, to demand from the aggrieved party the rendering of the object of the bequest.' Even if, pursuant to German private international law (Article 25 EGBGB), foreign inheritance law is applied that provides for a claimable legacy, the property effect with regard to those estate objects that are located in Germany is not recognised, with the justification that the question of property law inheritance does not fall within the scope of application of the decedent's nationality criterion, but rather is a question of property law, accordingly the *lex rei sitae* conflicts of law rule of Art. 40 EGBGB is applicable. Thus, the claimable legacy (determined by the authoritative foreign law), in Germany, is 'subordinated' to the civil law legacy, Federal Supreme Court (BGH) NJW 1995, 59; Bavarian Higher Regional Court (BayObLG), BayObLGZ 1995, 376; Palandt/Heldrich, BGB, 60th Edition, 2001, Art. 25 EGBGB, at note 11.

his wife as the sole heir, and bequeaths his private limited company to his nephew. In the event of death, the widow becomes the sole heir. This means that she will become the owner of all the capital shares in the private limited company on the basis of universal succession. However, she is obliged, on the basis of the disposition *mortis causa*, to transfer the capital shares in the private limited company, in a notarial deed, to the legatee.

VI. Renunciations of Inheritance

German inheritance law does not have any *hereditatis iacens*.⁵³ With the death of the testator, the estate goes to his heirs. The latter need not accept the inheritance but, rather, they can simply disclaim it. Even in the renunciation of the inheritance, the notary must be called upon in many instances, because the renunciation declaration requires notarial attestation if it is not done for the written record of the Probate Court.⁵⁴

VII. Contracts concerning the Estate of a Third Party who is still Living

1. Basic Principle

In conclusion, in German law also there exist contracts, unlike some foreign legal systems, concerning the estate of a third party who is still living. Indeed, contracts of this nature are null and void in principle according to section 312 of the German Civil Code. The same applies to a contract concerning a statutory minimum share of a decedent's estate and to a contract concerning a bequest arising out of the estate of a third party who is still living.

2. Exception

These rules do not apply, however, to a contract that is concluded between future statutory heirs concerning the legal portion or someone's statutory minimum share of a decedent's estate.

⁵³ Section 1922, paragraph 1 of the German Civil Code provides lapidarily: 'With the death of a person (decedent), her assets (inheritance) go, as a single unit, to one or more other persons (heirs).'

⁵⁴ Section 1945, paragraph 1 of the German Civil Code.

VIII. Contracts for the Relinquishment of Inheritance, the Statutory Minimum Share of a Decedent's Estate and Gifts

Contracts concerning the relinquishment of inheritance, statutory shares and gifts require notariation pursuant to section 2348 of the Civil Code. These are contracts with which relatives or the spouse of the ceased relinquish their statutory right to an inheritance or a minimum share. The same applies to what is termed 'relinquishing gifts' in accordance with section 2352 of the Civil Code.⁵⁵

IX. Total Inheritance Purchase Contracts and Similar Disposal Contracts

A contract by which the heir sells the inheritance that has accrued to him requires notariation under section 2371 of the Civil Code. This rule is also applied under section 2385 of the Civil Code, to similar contracts, such as the sale of an inheritance acquired by the vendor by contract, and to other contracts that are intended for the transfer of an inheritance that has accrued to the transferor or been acquired by him by another means.

X. Assignment of Inheritance Portions

Such contracts are rare in practice, if the heir is only one person, because the sole heir does not generally sell the inheritance in toto, but only individual items from the estate. However, they often occur in joint inheritances. Here, one co-heir sells his (joint) portion of the inheritance to another co-heir or a third party. Here, the real transfer of the inheritance portion also requires notariation according to section 2033, paragraph 1, sentence 2 of the Civil Code.

XI. Anticipated Succession

In the practice of notaries what is termed 'anticipated succession' plays an important role. In this variant, the testator transfers during his lifetime the main portions of his assets to his children or those he deems suitable to continue the management of his assets and, if possible, to increase them. For his lifetime the transferor often reserves for himself the usufruct or, at least, a right of residence over the land and buildings that have been transferred. For the anticipated heritable succession that is not governed in greater detail by statute, a comprehensive contractual practice has evolved which includes, notably, the

⁵⁵ The following scenario is at issue: The person relinquishing was appointed as an heir by a binding, joint will or by an inheritance contract with a third party, or made a beneficiary of a bequest.

situation in which the younger generation dies before the parents' generation. In such a situation, a recovery reservation is included in the deed. Anticipated succession has been common from time immemorial amongst farmers, but is also used by businessmen if, for example, a father who wants to retire hands his business down to his children.

Lately, it has come into fashion more and more amongst private individuals, mainly motivated by inheritance tax considerations, particularly in situations in which the legislator is intending to increase inheritance tax.

XII. Acquisition of Ownership of Land for the Family Home

The notary is also important for the average citizen when he acquires land and buildings, whether he is acquiring a plot to build on or a residence by ownership of an apartment. In many cases, he acquires a house that has yet to be built or a residence that has yet to be built, i.e. at the time of notarisation only a plan for the building that is still to be built exists. Here, we are dealing with what is termed a 'developer's contract'. In these situations, it must be ensured, in particular, that the acquirer is protected if the vendor or builder (developer) does not complete the building project.

XIII. Non-Marital Partnerships

1. Legal Relationship between (Semi-)Permanent Partners

The number of couples who live together without a marriage certificate (what is termed, 'life partners') is constantly on the increase. There exists between partners at least the same, if not an even greater need for settlement than between spouses, especially if we consider that, in principle, no mutual maintenance obligation exists, and that the surviving partner does not become the statutory heir of the one who dies first.⁵⁶

2. Legal Relationship with Children

By this we mean mainly paternity recognitions and maintenance contracts in non-marital partnerships, as well as the conferring of the family name on stepchildren, and agreements concerning custody by parents and the right of access.

⁵⁶ In this regard, in detail, cf. Grziwotz in 'Beck'sches Notarhandbuch', 3rd Edition, 2000, B III.

XIV. Registered Same-Sex Partnerships

On 1st August, 2001, the Act concerning the Ending of Discrimination against Same-Sex Partnerships came into force⁵⁷. This introduces the lifelong partnership, brought about by a declaration before the competent authority, of two persons of the same sex. In this declaration, the life-partners must provide for the division of their assets. The usual property status is that of a balanced restitution community (*Ausgleichsgemeinschaft*)– which corresponds to the statutory marital property regime of spouses' property increments restitution community (*Zugewinnngemeinschaft*). However, they may also settle the division of their assets by a notarised life-partnership contract, in a way that differs from the statutory arrangement. Here, a new area of work will be opening up for notaries.

Registered life-partners, like spouses, have a statutory right to intestate succession and a statutory right to a minimum share in the decedent's estate. They may draw up joint wills, which has only been possible by law hitherto for spouses. Moreover, they may conclude contracts for the relinquishment of inheritance and statutory shares before the notary.

D. The Notary as a Point of Contact for Businessmen and Commercial Concerns

Let us now turn our attention away from the perspectives of the average citizen, and focus on the businessman and commercial concerns. Here, too, in the German legal system, important tasks have been transferred to the notary, which we shall merely sketch with bold strokes in what follows, leaving detail aside.

I. Incorporation, Increases in Capital and Alteration of Articles of Incorporation for Corporations

As has already been mentioned, the incorporation of corporations (private limited companies, public limited companies etc.) requires notarisation. The same is true for increases in capital and reductions in capital, and for resolutions amending the articles of incorporation. For large public limited companies, every general meeting must be notarised.

⁵⁷ Bundesgesetzblatt 2001 I 266.

II. Reorganisations

The same applies to the law of reorganisation. Since 1st January, 1995, Germany has a modern Reorganisation Act. It brings together the merger and consolidation options that were spread amongst a large number of individual statutes in the past into a unified law, and expands these options enormously.⁵⁸ To the already well-known legal institutions, merger and consolidation, the statute now adds the splitting of companies, which hitherto has only been available for trust companies. The categories of companies capable of being involved in a reorganisation (legal entities) have been expanded a great deal. Many new opportunities are also emerging for restructuring by means of universal succession.⁵⁹ According to the current legal status quo, only legal entities that have their registered office within the country can be involved in a reorganisation.⁶⁰ A reorganisation that crosses borders is not provided for by statute. However, it may be that, on the basis of the case law of the European Court of Justice, some changes will emerge in the European Community in this regard. What is termed the ‘Centros judgment’ of the Court of Justice of the European Community⁶¹ is already a sign of this. The new Reorganisation Act also extends the notary’s competence to cases in which a the involvement of a notary was not required, e.g. members’ meetings of co-operative societies and merger contracts between co-operative societies. In consequence of the internationalisation of economic relationships, in Germany, as elsewhere in the European Union and, moreover, in the European Economic Area and in the transatlantic context, a great wave of mergers is currently ta-

⁵⁸ This is dealt with in detail by Heckschen in ‘Beck’sches Notarhandbuch’, 3rd Edition, 2000, D IV.

⁵⁹ In a broad overview, four different groups of reorganisation can be highlighted:

1. Merger by
 - Absorption
 - New foundation
2. Splitting, with the following subgroups:
 - a) Splitting off
 - for the purpose of new foundation
 - for the purpose of absorption
 - b) Separation
 - for the purpose of new foundation
 - for the purpose of absorption
3. Assignment of assets
 - Full assignment and partial assignment
4. Change of form.

⁶⁰ Section 1, paragraph 1 of the Reorganisation Act (UmwG); Zimmermann in ‘The Beck’sches Notarhandbuch’, 3rd Edition, 2000, G at note 189.

⁶¹ Court of Justice of the European Community [EuGH], judgement of 9th March, 1999, Case C-212/97 Slg. 1999, I-1484 = IPRax 1999, 360 (Behrens 323). For reactions of national courts to this judgement, see Behrens, IPRax 2000, 384.

king place. In this connection, tasks are falling to the notary that are of great significance for the overall economic macro-structure of Germany and Europe.

III. Direct Control and Profit Transfer Agreements and other Inter-Company Agreements

Indeed, inter-company agreements between public limited companies and those between private limited companies, as well as those between a private limited company and a public limited company, need not be notarised; written form is sufficient. However, inter-company agreements require the consent of the general meeting of shareholders or general meeting of the entity being controlled, and that of the controlling entity. Furthermore, the conclusion of such agreements must be notified to the Commercial Register and, therefore, the notary deals with this. Primarily, direct control and profit transfer agreements must be considered here. These are mostly concluded for tax reasons. With this agreement, a commercial company (the entity being controlled) subordinates its management to another company (the controlling entity). It undertakes to transfer all its profits to the controlling entity which, at the same time, is obliged to take on losses. In this way, in what is termed the ‘corporate group by contract’, immediate settlement of accounts is possible, which could have tax reducing results. Unlike in a direct control agreement, a profit and loss transfer agreement can even be concluded with retroactive effect to the beginning of the financial year since, here, in contrast to the situation with the direct control agreement, there is the risk that acts that were originally legal might become illegal later.⁶²

IV. Contracts for the Purchase of Commercial Entities

The notary plays an important role in the contract for the purchase of a commercial entity, both in what is termed a ‘share deal’ (the transfer of the holding under company law), and also in the ‘asset deal’ (transferring individual items of the assets of the concern) in the light of the notarisation requirement in section 313 of the Civil Code, and section 15 of the Law on Limited Liability Companies.

⁶² In addition to the direct control and profit transfer agreement governed by section 291 of the Companies Act [AktG], the Companies Act also contains provisions about what is termed ‘the profit pool group’, in section 292, paragraph 1, no. 1, the Companies Act, partial profit transfer agreements, section 292, paragraph 1, no. 2, Companies Act, and company lease agreements and leases of operating concerns, section 292, paragraph 1 no. 3, Companies Act.

E. Questions of International Law

I. Ascertaining the Foreign Law

The notary need not be familiar with foreign law. However, he must be well-informed about German private international law and find out, in accordance with its rules, whether foreign law will be applied from a German perspective. He must draw the interested parties' attention to this, cf. section 17, paragraph 3, sentence 2 of the Notarisation Act (BeurkG). Concerning the content of foreign law, the notary can, for example, obtain an expert opinion from the German Institute of Notaries in Würzburg. This is an establishment of the Federal Chamber of Notaries that operates very effectively, and which has at its disposal a very good library and excellent staff.

II. The Notarisation Power of Notaries

The authority to draw up public deeds has been derived from the power of the state. As the holder of a public office, the notary may only act within the territorial limits of his state. If, for example, a German notary were to travel to Mexico in order to notarise a purchase contract or a will there, this would violate the territorial sovereignty of Mexico.⁶³ Germany would be liable in public international law for having violated Mexico's sovereignty. The deed would be ineffective nationally as a public deed. What must be differentiated from this is the case of the notarisation, in his own country, of factual operations, which the German notary has witnessed while being abroad. If, for example, the German notary goes to Zurich to a general meeting of a German public limited company, and he draws up a deed concerning the course the meeting took, after he has returned to his registered office in Germany, the deed is effective – because it has been drawn up in Germany. Nevertheless, the notary has violated international law. Switzerland could protest to the Federal Foreign Office in Berlin or to the German Ambassador in Bern. In any event, disciplinary proceedings will be initiated against the notary.

⁶³ Cf., e.g. Federal Supreme Court [BGH], DNotZ 1999, 346.

III. International Competence

1. No Limiting of the Notary's Sphere of Activity on account of International Aspects of the Subject-Matter of his Notarisation

If the German notary is working within Germany, his sphere of activity is not limited on account of the international connections of the subject-matter of his notarisation.⁶⁴ The following are thus not important, i.e. the fact that

- foreign law is applied
- the persons involved in the transaction are foreigners or have their domicile or registered office abroad
- the objects of the legal transaction are situated abroad.

2. Exclusive International Competences for German Notaries

a) Transfers of Ownership of German Land (Conveyances)

Nevertheless, Germany claims a whole series of internationally exclusive competences. Thus, the transfer of ownership of a German plot of land (conveyance) or of a full legal title to land, pursuant to section 925 of the Civil Code, can only be declared before a German Notary.

b) Issuing of Partial Mortgages and Partial Land Charge Certificates

The same applies to the issuing of partial mortgages and partial land debt certificates according to section 20, paragraph 2 of the notaries' regulations.

c) Auctioning of real estate

The same is true of the auctioning of real estate pursuant to section 20, paragraph 3 of the notaries' regulations.

⁶⁴ The following has already been dealt with in detail in the German Country Report by Wirner and Ott at the XXth Congress of the International Union of Civil Law Notaries in Cartagena (Columbia).

d) Partnership agreements, articles of incorporation, alteration of articles of incorporation, reorganisations and transferring of the assets of German corporations

(i) Strict Doctrine

What is disputed is the question as to whether and to what extent foreign notaries are allowed to work in the area of company law. According to one view represented in scholarly literature, Germany claims an internationally exclusive competence. This means partnership agreements, articles of incorporation, resolutions concerning alterations to the latter, reorganisations and the transfer of the assets of German corporations may only be notarised by German notaries, because the aim and object of calling upon the notary is his knowledge of the law. Precise knowledge of German company law could not be expected of a foreign notary. Such a notary would, therefore, not be suitable to give the appropriate advice and information.⁶⁵

(ii) Liberal Case Law

The German courts take a relatively critical view of this approach.⁶⁶ In any event, when the foreign notary is on an equal footing with the German notary in terms of his training and function, and foreign notarisation procedure law is similar to the German equivalent, the foreign notarial deed is equated with the German one. For this substitution, German case law does not require the same procedure as under the German Notarisation Act, but only equivalence.⁶⁷ Here, we must take as our starting point the purpose of the German form requirement, and investigate whether the foreign notarisation procedure realises this function in the same way as the procedure the German notary has to adhere to. It is not enough for the authenticator to have the title, 'notary'. Rather, he or she must be comparable to a German notary in terms of training and legal status, and undertake comparable procedures in terms of a German notarisation procedure.⁶⁸

⁶⁵ Cf. Zimmermann in 'Beck'sches Notarhandbuch', 3rd Edition, 2000, G at note 190 et seq.

⁶⁶ Cf. Spellenberg in Münchener Kommentar zum BGB, 3rd Edition, Art. 11 EGBGB, at note 92.

⁶⁷ Federal Supreme Court [BGH], NJW 1981, 1160. A critical view of this can be found in Geimer, DNotZ 1981, 406.

⁶⁸ For a more detailed treatment, see Wolfsteiner, DNotZ 1978, 532; Brambring NJW 1975, 1255.

IV. Authenticity of Foreign Deeds

One thing that must be separated, for logic's sake, from the question of substitution is the evidence of the authenticity of the foreign notarial deed. This is to say: The recipient state in which the foreign deed is to be used requires from the state whose notary has established the deed a written confirmation that the deed is authentic, i.e. that it comes from the relevant authenticator and that, according to the law of the state where the deed is established, this person is competent and authorised to carry out the notarisation in question. This 'legalisation' relates to the proving of the authenticity of the deed and not the substantive law question of the fulfilment of the notarial form by an authenticator (who is the equivalent of the German one). Reference has already been made to section 438 of the Code of Civil Procedure, which does not prescribe legalisation as compulsory, and liberalisation effected by the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, of 5th October, 1961,⁶⁹ by the introduction of authentication without a consular certificate. Within the scope of application of this convention, the authentication without consular certificate issued by the originating state is sufficient, unless another international law agreement with the originating state has dispensed with the need for any proof.

V. Effects of Foreign Deeds

Accordingly, if the deed from the foreign notary or another authenticator is deemed authentic in Germany, its evidentiary force fundamentally corresponds to that of a German notary (sections 415, 417 and 418 of the Code of Civil Procedure), provided the foreign authenticator and the foreign notarisation procedure are comparable to the appropriate German counterpart.⁷⁰ Thus, for example, the 'deed' of a US American notary public can never be classified as a 'deed' as understood in section 128 of the Civil Code, and sections 8 et seq. of the Notarisation Act, even if the notary public testifies that he has read out the written record, and that it has been approved by the interested parties and signed by them personally.

⁶⁹ Federal Law Gazette 1965 II 875. Also available at <http://www.hcch.net/e/conventions/index.html>.

⁷⁰ Spellenberg in Münchener Kommentar zum BGB, 3rd Edition, Art. 11 EGBGB, at note 97b.

VI. Locus Regit Formam Actus (Auctor Regit Actum): Local Law as an Alternative to the Form Prescribed by the Transaction Jurisdiction

1. Article 9 of the European Contract Law Convention and Article 11 of the Introductory Act to the German Civil Code (EGBGB)

The principle of ‘locus regit formam actus’ is laid down in Article 9 of the European Contract Law Convention of 19th June, 1990 and (in an extended sphere of application) in Article 11 of the Introductory Act to the Civil Code. Accordingly, as an alternative, either the law of the transaction (*lex causae*) or local law govern the form requirements of the transaction.

2. Implications of a Choice of Law for the Question of Form

The contracting parties can choose the law governing the legal transaction expressly or by implication. In Germany, the relevant rules of the Rome Contract Law Convention have been transformed into Articles 27 et seq. of the Introductory Act to the Civil Code (EGBGB). A choice of law clause has the effect of subjecting the whole legal transaction in all its legal aspects to the legal system selected. If the parties choose, for example, German law for the purchase contract relating to a Spanish plot of land, from the German viewpoint, the form requirement in section 313 of the Civil Code is also applied; this is to say that the purchase contract must be notarised.⁷¹ Nevertheless, an opportunity for a cure exists in section 313, sentence 2 of the Civil Code. If the passing of title is effective according to the law of the place where the object is situated, the non-adherence of the notarisation form (section 313 sentence 1 of the Civil Code) is rectified, even if as in the example above this law (Spanish law in this case) knows of neither conveyance (= property conveyance contract, detached from the purchase contract, concerning the passing of title to the plot of land) nor (constitutive) entering into the Real Estate Register.⁷²

3. Scope of Application

a) Property Law Transfer or Order Deed

The ‘locus regit actum’ rule does not apply without restrictions. According to Article 9, paragraph 6 of the Rome Contract Law Convention, and according to Article 11, pa-

⁷¹ BGHZ [Federal Supreme Court Gazette] 52, 239; BGHZ 53, 194; BGHZ 57, 337; BGHZ 73, 391. Differentiating as to whether an express or implicit choice was made, Spellenberg in Münchener Kommentar zum BGB, 3rd Edition, Art. 11 EGBGB, at note 34.

⁷² The details are disputed, cf. Palandt/Heldrich, BGB, 60th Edition, 2001, Art. 11 EGBGB, at note 6.

paragraphs 4 and 5 of the Introductory Act to the Civil Code, it does not apply to immovable property, i.e. the property law transfer or order deed. However, this exception to the rule does not apply to the *obligation contract being the bases of the contract relating to the immovable property*. For this, adherence of the form requirements of the place of the transaction is sufficient, i.e. even when a legal system is applicable to the contract under the law of obligations that does not make any distinction, such as in German law, between an obligation transaction and a immovable property transaction, i.e., for example, causing title to pass with the conclusion of the purchase contract. Nevertheless, apparently, on the basis of Article 11, paragraph 4 of the Introductory Act to the Civil Code, which is based on Article 9, paragraph 6 of the Rome Contract Law Convention, in its turn this does not apply when, according to the law of the state where the object is situated, the compulsory formal requirements which must be applied without considering the place where the contract is concluded or the law to which it is subject.’

b) Legal Transactions and Legal Operations relating to the Organisation of German Companies and Legal Entities

German case law as has already been mentioned is very sceptical about any exclusion of the local form by the analogous application of Article 11, paragraph 5 of the Introductory Act to the Civil Code to legal transactions and legal operations relating to the organisation of German companies and juristic persons, even when the transactions or operations in question have to be entered in the German Register.⁷³

c) Establishment of Wills and Inheritance Contracts

Adhering to local form requirements is sufficient for the establishment of wills according to the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 5th October, 1961, to which Germany is a party. Nationally, the relevant rule is to be found in Article 26 of the Introductory Act to the Civil Code (EGBGB). This provision also governs inheritance contracts which the Hague has left out for the time being, because it is primarily the Latin law tradition that does not give effect to inheritance contracts.

⁷³ Cf. Spellenberg in Münchener Kommentar zum BGB, 3rd Edition, Art. 11 EGBGB at note 1 et seq.; Spellenberg in the Schütze Anniversary Publication, 1999, 887, 898 et seq.

VII. *Lex Fori* – Basic Principle

In procedural law, all over the world, the ‘*lex fori*’ principle applies.⁷⁴ Even if in the case (‘on the merits’) foreign law must be applied, for example to the contractual capacity of a foreigner or to the obligation contract (e.g. because the parties to the legal transaction have entered into a choice of law agreement and thus have agreed to a foreign legal system), for the procedure before German courts and authorities, German procedural law applies which, in its turn, interacts with notarisational procedure law. The requirement for proof of the registration basis by official or officially attested deeds serves to protect the national registry courts and, at the same time, to protect the interested parties. The entries should be based on safe and correct documents that have evidentiary force and, in this way, should prevent the occurrence of disputes or legal uncertainties as far as possible. The assumption of the correctness of the German Real Estate Register (section 891, Civil Code) and loss of a right or the exclusion of a party who might have true entitlement by acquisition in good faith (section 892, Civil Code) as has already been mentioned above can only be justified in terms of legal ethics by the combination of safe notarisational and safe registration.⁷⁵ In this connection reference must be made to Article 16 of the Brussels and Lugano Convention and Article 22 of the Regulation (EC) of 22nd December, 2000, no. 44/2001. According to Article 16, no. 1 and Article 22, no. 1, for actions in rem only the courts of the state in which the object is situated have jurisdiction, i.e. the courts of the state in which the land and buildings or full legal title to land are situated. Pursuant to Article 16, no. 2 of the Brussels and Lugano Convention, and Article 22, no. 2 of Regulation (EC) no. 44/2001, for actions, in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat have exclusive jurisdiction. In order to determine that seat, the court shall apply its rules of private international law; the courts of the state in the sovereign territory of which the company or juristic person has its registered office have international jurisdiction exclusively. Indeed, these rules are only applied if it is a matter of a two-party procedure that is structured in an adversary way, in keeping with the pattern of traditional

⁷⁴ Geimer, ‘Internationales Zivilprozessrecht [‘International Civil Procedure Law’], 4th Edition, 2001, at note 319.

⁷⁵ As has already been made very clear in the Country Report by Wirner and Ott.

civil proceedings.⁷⁶ However, the evaluation on which they are based should also be applied to the area of non-contentious proceedings and, additionally, to the notarisation procedure in particular.

F. International Execution of Enforceable Deeds

I. Basic Principle: Necessity of the Enforceability Declaration

1. No Recognition of Foreign Enforceability by Extension of Effect

Despite all the globalisation and international interconnections, even today the enforcement effect⁷⁷ of a notarial deed⁷⁸ attributed to it in its state of origin does not automatically extend to foreign states,⁷⁹ especially not those in which the enforcement should take place. Thus, in this strict sense, there is *no recognition of enforceable deeds*. Rather, in the enforcement arising out of notarial deeds that extends across borders, just as in the enforcement of affirmative relief judgments of the state courts and of decisions of arbitration tribunals, the necessity exists of an *exequatur*, i.e. of an enforceability declaration, in the state where enforcement is sought. Enforceability according to the law of the first state includes the instruction to the domestic enforcement organs to execute the claim that has been established, upon request, if necessary by compulsory enforcement. An instruction to enforcement organs of another state is ruled out, for reasons of international law. This is because the sovereignty of foreign states must be respected. The legal provisions of the first state that confer enforcement effect upon a notarial deed are, therefore, insignificant for the enforcement organs of other states per se. In these states, which we shall call ‘second states’, below, the first state enforcement effect is only respected if and insofar as the second state’s legal system prescribes this. Now, the second state legislator could decide that the first state enforcement effect of foreign enforceable deeds

⁷⁶ For more detail, see Geimer in Festschrift Schippel, 1996, 869 and 883; Geimer/Schütze, ‘Europäisches Zivilverfahrensrecht’ [European Civil Procedure Law], 1997, Art. 2 at note 57 and Art. 16 at note 152.

⁷⁷ An introduction from the German viewpoint, Wolfsteiner, ‘Die vollstreckbare Urkunde’, ‘The Enforceable Deed’, 1978; from the Austrian viewpoint, Rechberger/Oberhammer/Bogensberger, ‘Der vollstreckbare Notariatsakt’, ‘The Enforceable Notarial Deed’, 1994, and Wagner/Knechtel, ‘Notariatsordnung’, ‘Rules and Regulations for the Notarial Profession’, 5th Edition, 2000, Explanatory Notes for section 3, ‘Rules and Regulations for the Notarial Profession’, at note 1 et seq.

⁷⁸ Geimer, ‘Vollstreckbare Urkunden ausländischer Notare’, ‘Enforceable Deeds of Foreign Notaries’, DNotZ 1975, 461.

⁷⁹ Not applicable, therefore, section 328 of the German Code of Civil Procedure or Article 26 Brussels / Lugano Convention and, now, Article 33 of Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

be extended to its sovereignty area. The scope of the enforceability would, on account of this extension of effect, also have to be assessed in the second state on the basis of the law of the first state. German law does not adopt this course of action, as will be seen if we look at sections 722 and 723 of the German Code of Civil Procedure (ZPO). In other ways, too, no legal system provides for such an authentic recognition in the sense of a real extension of effect for enforceability. The recognition is, rather, limited grosso modo to the *res judicata* (claim preclusion), collateral estoppel (issue preclusion), and the *in rem* effect.⁸⁰ The enforceable deed does not give rise to effects of this nature. The same also applies in the scope of application of the International Convention and agreements of secondary legislation of the European Community. Here, we only need to mention Article 31 *se seq.* of the Brussels and Lugano Convention⁸¹, as well as Article 38 *et seq.* of Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters that will come into force on 1st March, 2002, and which replaces the Brussels Jurisdiction and Enforcement Convention.

2. The Declaration of Enforceability as an Act Establishing or Altering Legal Relationships

As already stated as far as is known all legal systems refuse to extend the enforcement effect in the sense of granting authentic recognition within their country. The aim is to avoid the appearance of German enforcement organs' having obeyed the orders of the organs of foreign judiciaries. Furthermore, the recognition of foreign enforceability would run up against some very considerable practical difficulties. By recognition, foreign enforceability would, in fact, be extended within the country, with the result that the scope of the enforcement, including the question of when this is to be applied, would have to be assessed according to the enforcement law of the first state. However, knowledge of foreign enforcement law cannot be demanded of an enforcement organ, especially not a

⁸⁰ Concerning the judgement effects that are capable of recognition, see Geimer, 'Internationales Zivilprozessrecht', 'International Civil Procedure Law', 4th Edition, 2001, at note 2799 *et seq.*

⁸¹ Leutner rightly stresses, in 'Die vollstreckbare Urkunde im europäischen Rechtsverkehr', 'The Enforceable Deed in European Legal Transactions,' 1997, 36, that – unlike with the judgments of foreign courts – a recognition in the sense of an extension of effect from the first state to the second state does not come into consideration, because the enforceable deed does not give rise to any effects that are capable of recognition. The enforceability according to the law of its state of origin, which is inherent in it (page 203 *et seq.*) is not extended to the enforcement state but, instead, the latter confers on it enforceability in accordance with its own law, and thus makes it equivalent to enforceable deeds within the country (page 31).

bailiff.⁸² National enforceability must, therefore, be conferred upon a foreign enforcement instrument from the outset⁸³, regardless of whether an enforceable notarial deed or a court judgment is involved. Hence, the second-state exequatur, which brings about this effect, is thus not a declaratory administrative ruling establishing the extension of foreign enforceability to its own territory. On the contrary, it is a judgment establishing or altering a legal relationship.⁸⁴

3. Effects of the Enforceability Declaration

Enforceability that is conferred upon the foreign instrument by the second-state exequatur is assessed only by virtue of the law of the second state and corresponds, in terms of its substance, with the enforceability of second-state instruments.⁸⁵ Even after enforceability in the first state has been eliminated, there remains the enforceability in the second state, which has been conferred upon the foreign instrument by the exequatur. However, it can be removed by an action to oppose enforcement (also called an ‘interpleader challenging execution’).⁸⁶ Thus it is guaranteed that it is in the litigious procedure, and not in the execution proceedings, that the question of whether enforceability has been cancelled is examined.

II. Declaring Foreign Deeds Enforceable under German National Law

1. Section 794, paragraph 1, no. 5 of the German Code of Civil Procedure

Section 794, Paragraph 1, no. 5 of the German Code of Civil Procedure does not offer any legal basis for the enforceability declaration of foreign enforceable deeds. This rule only relates to execution ‘arising out of deeds that have been received by a German court or German notary within the limits of his official competences in the form prescribed’. The scope of application of section 794, paragraph 1, no. 5 of the Code of Civil Procedure is thus strictly limited to the deeds of German notaries. This rule gives no basis for enforcement arising out of instruments that have been drawn up before *foreign* notaries.⁸⁷

⁸² Geimer/Schütze, ‘Internationale Urteilsanerkennung’, ‘The International Recognition of Judgments’ I/2, 1984, 1413.

⁸³ BGH, FamRZ 1986, 45 = EWiR 1985, 207 (Geimer) = RIW 1986, 554 = NJW 1986, 1440 = IPRax 1986, 294 (Dopffel 277).

⁸⁴ Stein/Jonas/Münzberg, Zivilprozeßordnung, 21st Edition, section 722 at note 3; Wieczorek/Schütze, Zivilprozeßordnung, 3rd Edition, section 722 at note 24.

⁸⁵ Geimer, Internationales Zivilprozeßrecht, 4th Edition, 2001, at note 3101.

⁸⁶ For more details, see VIII, below.

⁸⁷ Stein/Jonas/Münzberg, Zivilprozeßordnung, 21st Edition, 1995, section 794 at note 24, 99.

2. Proposal: Analogous Application of sections 722 and 723 of the German Code of Civil Procedure

As a legal basis, however, sections 722 and 723 of the Code of Civil Procedure must be considered.⁸⁸ In terms of their wording, these rules relate only to the enforceability declaration of foreign judgments, i.e. of court decisions. Indeed, prevailing opinion interprets the term ‘judgment’ very broadly, but refuses to include enforceable notarial deeds in the concept, as well.⁸⁹ This viewpoint is too narrow: If German law is willing to admit the decisions of foreign courts for execution within Germany, on certain preconditions, this should apply all the more to foreign enforceable deeds. The main reservation about the enforcement of foreign court decisions is based on a certain scepticism about the administration of justice in other countries. The intention is to prevent the documents of foreign state authorities from being executed compulsorily, without inquiry, within the country. These misgivings are not present, however, when it comes to enforceable deeds of foreign notaries, since the interested parties have submitted their declarations before the foreign notary voluntarily and without any compulsion from the state authorities. What was written in the 19th century by *Ludwig von Bar*, who enjoyed an excellent international reputation, still ‘hits the nail on the head’ today:⁹⁰

„In any event, the least doubts are entertained about the admission of execution based on foreign deeds of non-contentious proceedings. If we also mistrust a foreign judge’s decision it does not mean, however, that falsification or gross misunderstanding should be attributed to the deeds of non-contentious proceedings accepted in a civilised state without further ado, especially since the parties can generally choose the appropriate organs, themselves, but deceptions whereby persons who have not actually appeared are shown as having acted, are fortunately only rare.“

⁸⁸ Geimer, DNotZ 1975, 461, 464; Geimer, Ferid Anniversary Publication, 1988, 89 et seq.; Geimer, ‘Internationales Zivilprozeßrecht’, 4th Edition, 2001, at note 3106; Geimer/Schütze, ‘Internationale Urteilsanerkennung’ I/2, 1984, 1620; Zöller/Geimer, Zivilprozeßordnung, 22nd Edition, 2001, section 722 at note 8. Concurring with this, Schütze, DNotZ 1992, 66, 81; Wieczorek/Schütze, Zivilprozeßordnung, 3rd Edition, section 723 at note 2.

⁸⁹ Baumann in Bülow/Böckstiegel/Geimer/Schütze, ‘Internationaler Rechtsverkehr in Zivil- und Handelssachen’, ‘International Legal Transactions in Civil and Commercial Matters’, 3rd Edition (As of: October, 2000) 795. 170 at footnote no. 4; Stein/Jonas/Münzberg, Zivilprozeßordnung, 21st Edition, 1995, section 722 at note 10 and section 794 at note 24, 99; Spellenberg in ‘Münchener Kommentar zum BGB’, 3rd Edition, 1998, Art. 11 at note 45.

⁹⁰ von Bar, ‘Theorie und Praxis des internationalen Privatrechts’, ‘Theory and Practice of Private International Law’ II, 2nd Edition, 1889, 542.

3. A Digression: The Liberal Viewpoint of Other Legal Systems on the Question of Declaring Foreign Enforceable Deeds Enforceable

What has been concluded here for German law with meticulous arguments, because the German legislator has overlooked the problem of foreign deeds, is *expressis verbis* on the statute book in Austria. According to section 79 of the Austrian Execution Act, enforcement can also take place on the basis of 'deeds' that have been established abroad and are enforceable there. Other states, too, have a legal provision of this nature such as, for example, France in Article 509 of the *Nouveau code de procédure civile*, Greece, in Article 905, letter f of the Civil Procedure Act,⁹¹ Italy in Article 68 of the Private International Law Act of 31st May, 1995, Spain in Article 600 of the *Ley de Enjuiciamiento Civil*,⁹² Slovakia and the Czech Republic in Article 63 of the International Private Law Act of 4th December, 1963.⁹³

4. Summary

According to the prevailing opinion in Germany, apart from the scope of application of international agreements, the enforcement of foreign notarial deeds is out of the question at present. Thus, the practical significance of national law is greatly reduced. In fact, national law does not have a significant role in legal reality. Treaty law is what is important, especially the Brussels and Lugano Conventions and, in future, Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which will come into force on 1st March, 2002, and will replace the Brussels Jurisdiction and Enforcement Convention.

⁹¹ Article 906 III, ZPG [Civil Procedure Act], as *argumentum e contrario*.

⁹² Concerning this, see Fernandez Rozas/Sanchez Lorenzo, *Curso de derecho internacional privado*, 1991, 592.

⁹³ Not, however, Switzerland, since the enforceable deed does not exist there, although Article 31 of the International Private Law Act declares the rules concerning recognition and enforcement applicable analogously for the recognition and enforcement of a deed of non-contentious proceedings, Jametti Greiner, 'Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht', 'The Concept of the Decision in Swiss International Civil Procedure Law', 1998, 208. An enforcement obligation exists, however, according to Article 50 of the Lugano Convention, also on this point, Jametti Greiner, 'Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht', 1998, 353.

III. Completely Free Movement of Enforceable Deeds through the Abolition of the Exequatur Requirement?

The requirement of the enforceability declaration of the first-state enforcement instrument in the other member states according to Article 31 et seq. of the Brussels / Lugano Convention and, now, Article 38 et seq. of Regulation (EC) no. 44/2001 of 22nd December, 2000, consumes time and money. It also bears the risk that a malicious debtor is able to transfer his assets into another state before the creditor has reached the stage of the enforceability declaration. Therefore, in the discussion of reforms, amongst other things, people have been calling for the acceleration of enforcement opportunities and, in the interests of their efficiency, the full abolition of the exequatur requirement.⁹⁴ However, these proposals have yet to be realized. The new Regulation (EC) no. 44/2001 of 22nd December, 2000, strictly affirms the necessity of the enforceability declaration. Article 41 of the EC Regulation must be understood as the pitiful remains of the demand for a 'European enforcement instrument' that crosses borders. This provision stipulates that:

The ⁹⁵ judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35 ⁹⁶. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

This new legal provision is to be contrasted with Article 34 of the Brussels / Lugano Convention. Admittedly, the Brussels and Lugano Conventions also determine an *ex parte* procedure for the first instance, in which the debtor does not participate. However, Article 34, Paragraph 2 provides that the exequatur judge determine whether the reasons for refusal provided for in the convention are present.⁹⁷ This examination now has been abolished with a view to accelerating the procedure. Only in the second instance does it take place, in the context with the debtor's right to appeal.⁹⁸

⁹⁴ Cf., for example, the proposals for reform from the Commission in the Official Journal of the European Communities of 31st January, 1998, no. C 33/22.

⁹⁵ Cf., for example, the proposals for reform from the Commission in the Official Journal of the European Communities of 31st January, 1998, no. C 33/22.

⁹⁶ Former Articles 27 and 28 of the Brussels Convention.

⁹⁷ For the restrictive examination *ex officio* in the *ex parte* procedure, *de conventiono lata* already, Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 34 et seq.

⁹⁸ Art. 45 of Regulation (EC) no. 44/2000.

IV. Brussels and Lugano Convention and Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

Bilateral agreements have become far less important in the heart of Europe, i.e. in relation to the member states of the Brussels and Lugano Conventions, to which Poland has also acceded on 1st February, 2000.⁹⁹

1. Enforceability Declaration (exequatur order) in accordance with Article 50 of the European Jurisdiction and Enforcement Convention / Lugano Convention or Article 57 of Regulation (EC) no. 44/2001 of 22nd December, 2000

In the scope of application of these conventions, i.e. in civil and commercial matters, with the exception of the special subject-matters enumerated in Article 1, paragraph 2 of the convention in question, Article 50 is applicable. On 1st March, 2002, with virtually identical wording, Article 57 of Regulation (EC) no. 44/2001 will take its place. The latter specifies:

- (1) A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.
- (2) Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.
- (3) The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.
- (4) Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

⁹⁹ Bundesgesetzblatt 2000 II 1246. Cf. Martiny/Ernst IPRax 2001, 29; Sawzuk in Liber amicorum Schütze, 1999, 733; Wagner WIRO 2000, 47.

2. Concept of the Authentic Instrument as understood in Article 50 of the European Jurisdiction and Enforcement Convention / Lugano Convention and Article 57 of Regulation (EC) no. 44/2001

Even though, when the Brussels Convention was concluded on 27th September, 1968, in the area of the six founder-member states of the European Economic Community (EEC), notarial deeds were almost exclusively considered as enforceable deeds, Article 50 of the European Jurisdiction and Enforcement Convention does not talk about notarial deeds but about „authentic instruments“. The concept is, therefore, broader. *Jenard* and *Möller* use three criteria in their report concerning the textually identical Article 50 of the Lugano Convention¹⁰⁰:

- (1) The instrument must have been received by a public authority. Enforceable deeds made by private parties are ruled out. The Court of Justice of the European Community, in its judgment in the *Unibank* case¹⁰¹ clearly concluded that an authentic deed as understood in Article 50 European Jurisdiction and Enforcement Convention must be notarised by an authority or another office empowered by the state of origin for the establishment of enforceable deeds. Therefore, even German attorneys' settlements do not come under Article 50 European Jurisdiction and Enforcement Convention /Lugano Convention. The latter are, as such, deeds made by private parties. They become enforceable instruments according to section 794, Paragraph 1, no. 4b of the Code of Civil Procedure, if they have been declared enforceable either by the state court (section 796b, Code of Civil Procedure) or by the notary (section 796c, Code of Civil Procedure).¹⁰²
- (2) The notarisation must relate to the enforceable claim; mere attestations of signatures are not enough.

¹⁰⁰ Official Journal of the European Communities, 1990 C 189, 80.

¹⁰¹ ECJ, 17th June, 1999 Case no. C 260/97 (*Unibank*) EWS 1999, 268 = DNotZ 1999, 919 (*Fleischhauer* 925) = IPRax 2000, 409 (Geimer 366); in this context Jayme/Kohler IPRax 1999, 401, 409. In concreto, the case was about Danish promissory notes (*Gaeldsbrev*) on the basis of which, in accordance with section 478, Paragraph 1, no. 5, *Retsplejolv*, an enforcement can be sought immediately.

¹⁰² Disagreeing: Schütze, DZWir 1993, 133 and 135; Wieczorek/Schütze, Code of Civil Procedure, 3rd Edition, section 796b at note 11.

(3) The deed must be enforceable on its own in the state where it is established. It is not sufficient for the deed to be capable of being legally enforced by execution in an *Ur-kundsprozess* (trial where evidence can only be produced by documents) or in a similar procedure.¹⁰³

Another important element is the co-operation of the debtor in the establishment of the enforcement instrument; that of the creditor is not necessary. The unilateral submission of the debtor (or his representative) to immediate execution is sufficient.¹⁰⁴ The enforceable cheque protests according to French law, which the *huissier* draws up without the co-operation of the debtor, must be excluded according to this.¹⁰⁵

3. Unconditional Enforcement Obligation

The enforcement obligation exists under the convention and will exist in future under Regulation (EC) no. 44/2001 of 22nd December, 2000, even when the type of ‘enforceable deed’ is unknown in the state where recognition is sought. Moreover, appeal cannot be based on public policy as a reason for the rejection of the enforceability declaration.¹⁰⁶ In states that do not have this legal institution (United Kingdom, Norway and Switzerland), sooner or later a discussion will arise about the enforceable deed which might bring about a third groundswell in the direction of acceptance of Civil Law¹⁰⁷ and the conquests of Napoleon¹⁰⁸. Such a development would also lead to more rapid legal execution in these countries and, at the same time, to a more effective alleviating of the burden on the judiciary, apart from the demonstrable reduction in costs for those seeking redress from the legal system.

¹⁰³ Leutner, ‘Die vollstreckbare Urkunde im europäischen Rechtsverkehr’, ‘The Enforceable Deed in European Legal Transactions’, 1997, 45 et seq.

¹⁰⁴ Leutner 44, 134, 200 et seq. Recently, Gerhard Wagner, *Prozeßverträge*, 1998, 778 et seq. has been advocating without plausible reasons a classification as a procedural contract rather than as a unilateral procedural act. This is left open in Rosenberg/Gaul/Schilken, ‘Zwangsvollstreckungsrecht’, ‘Execution Law’, 11th Edition, 1997, 184 (section 13 IV footnote 178).

¹⁰⁵ Leutner, ‘Die vollstreckbare Urkunde im Europäischen Rechtsverkehr’, 1997, 44, 202.

¹⁰⁶ Geimer/Schütze, ‘Europäisches Zivilverfahrensrecht’, 1997, Article 50 at note 4.

¹⁰⁷ Cf. Leutner, ‘Die vollstreckbare Urkunde im Europäischen Rechtsverkehr’, 1997, 287.

¹⁰⁸ The Notarisation Act’ of 25th vëntose de l’an XI (16th March, 1803).

V. Details of the Enforceability Declaration

1. Preconditions for the Enforceability Declaration

a) Authenticity of the Foreign Notarial Deed and its Enforceability according to the Law of the State of Origin

The claimant must submit an enforceable official copy, which is issued according to the law of the state of origin. Through this, both authenticity and enforceability under the law of the state of origin are proven. No consular authentication is required.¹⁰⁹ If the enforcement debtor objects on the ground that according to the law of the state of origin there exists no effective instrument, the judge of the state of enforcement must examine this objection. If the notarial deed, in fact, does not have any effect under the law of the state of origin, its enforceability lapses as well. Enforceability under the law of the state of origin is, however, a precondition for the enforceability declaration in the state of enforcement.

b) Notarisation Power of the Foreign Notary

The foreign notary must have had notarisation power for the establishment of the enforceable deed. This precondition is not expressly stipulated either in the national law or in the agreements. However, it necessarily follows from the principles of general customary international law. Public notarisation activity represents per se the exercise of powers of national sovereignty,¹¹⁰ especially the establishment of enforceable instruments. The notary will work as an official organ of sovereign power. As such, he may not – as already stated above under E I – interfere with the sovereignty of other states. If he nevertheless carries out notarisation on foreign territory, he violates international law. All states, i.e. not just those that are directly affected, must refuse the enforceability declaration for the instrument that has come about in contravention of international law, otherwise they would be participating in the violation of international law.¹¹¹

¹⁰⁹ Each agreement contains detailed rules concerning the formalities, cf. Article 50 (3), 47 no. 1 European Jurisdiction and Enforcement Convention / Lugano Convention.

¹¹⁰ In order to exercise public power by notaries as understood in Article 45 EC Treaty Stumpf/Gabler notar 2000, 11 with further references.

¹¹¹ Geimer, 'Internationales Zivilverfahrensrecht', 4th Edition, 2001, at note 533 et seq.

2. No Examination of the International Jurisdiction of the State of Origin

a) National German Law

The recognition of *court decisions* usually requires the international jurisdiction of the state of origin.¹¹² Even for the enforceability declaration of foreign enforceable deeds, the question arises as to whether and, if so, according to what criteria, the international jurisdiction of the state of origin must be examined. Here, criteria would have to be developed as to when the international jurisdiction for the establishment of enforceable deeds must be approved according to the mirror-image principle¹¹³. The norms concerning the place of jurisdiction, however, are not easily applied to the activity of the notary. This is because there is no defendant and, unlike a court, the notary does not act against the debtor, and certainly not without his consent and in his absence. In contrast to the court – the notary does *not exercise any power of compel the parties*. From the procedural law relationship based on the bringing of an action, an obligation to enter an appearance emerges for the defendant in the sense of a procedural burden. If the defendant does not appear a judgment by default can be rendered against him. On the other hand, the situation is different in the notarisation procedure: Notarisation is only undertaken, and thus an enforcement instrument created, if the debtor co-operates.¹¹⁴

¹¹² E.g. section 328, paragraph 1, no. 1, Code of Civil Procedure, section 16a no. 1, German Ex Parte Jurisdiction Act [FGG]; Article 102 II, no. 1 of the Introductory Act to the Insolvency Act (EGInsO).

¹¹³ Concerning the mirror-image principle, see Geimer, 'Anerkennung ausländischer Entscheidungen in Deutschland', 'Recognition of Foreign Decisions in Germany', 1995, 6, 114.

¹¹⁴ Thus, we can talk about a 'subjection' or 'unconditional assent' or waiver in terms of jurisdictional law. Cf. Martiny, in 'Handbuch des internationalen Zivilverfahrensrechts', 'Handbook of Civil Procedure Law' published by the Max Planck-Institut für ausländisches und internationales Privatrecht, the Max Planck Institute for Foreign and Private International Law, III/1, 1984, Chapter I, section 4 at note 544 (sentence 252): 'Insofar as an examination of jurisdiction is considered necessary at all, subjection to the jurisdiction of the court should be present.' In the same vein, concerning the 'Compromise agreement', Heini/Keller/Siehr/Vischer/Volken, Kommentar zum IPRG 1993, Article 30 at note 10: 'With a jurisdiction objection, the enforcement defendant will rarely be heard. By making conciliatory gesture with a view to an amicable dispute resolution before the foreign judgment court, he will have assented to its jurisdiction (Article 6, Article 26 letter c IPRG), with the result that this jurisdiction must be recognised in Switzerland.'

b) Brussels and Lugano Convention and Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

(i) Court Decisions

The Brussels and Lugano Conventions just as Regulation (EC) no. 44/2001¹¹⁵ in principle provide for no examination of the international jurisdiction of the first state during the stage of the recognition and enforceability declaration for court decisions pursuant to Article 28 paragraph 3 of the Brussels Convention or Art. 28 paragraph 4 of the Lugano Convention.¹¹⁶ However, some exceptions apply to insurance and consumer matters, and in the sphere of exclusive competences of Article 16 Brussels / Lugano Convention.

(ii) Enforceable Deeds

Moreover, according to Article 50 Brussels / Lugano Convention and Article 57 of Regulation (EC) no. 44/2001, no examination at all of the international jurisdiction of the state of origin takes place.¹¹⁷ Authentic instruments must, therefore, be declared enforceable in the scope of application of the Brussels / Lugano Convention and, now, Regulation (EC) no. 44/2001, even when they have come about in the context of a violation of national jurisdiction rules, provided that this violation does not cause the deed, and thus the enforcement instrument, to be ineffective according to the law of the state of origin. A violation of the competence rules of the Brussels and Lugano Conventions is ruled out from the outset, because the jurisdiction regulations of the convention in question do not apply to the establishment of notarial deeds.¹¹⁸

3. The Compatibility of the Instrument with Public Policy in the State in which Enforcement is sought

If sections 722 and 723 of the German Code of Civil Procedure are applied by analogy to enforceable deeds - as has been advocated here -, section 328, Paragraph 1, no. 4, in

¹¹⁵ Even according to Art. 16 of Regulation (EC) no. 1347/2000 of 29th May, 2000, on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and in Proceedings relating to Parental Responsibility for the Children of both Spouses' ('Brussels II') and according to Articles 16 and Art. 25 of Regulation (EC) no. 1346/2000 of 29th May, 2000 on Insolvency Proceedings, the international jurisdiction of the state of origin is not examined in the exequatur stage.

¹¹⁶ Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 28 at note 1 et seq.

¹¹⁷ Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 50 at note 13.

¹¹⁸ Geimer DNotZ 1999, 764, 766.

conjunction with section 723 paragraph 2 of the German Code of Civil Procedure are relevant for the area of German national law. Additionally, the international treaties in each case, notably Article 50 Brussels / Lugano Convention and, now, Article 57 of Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters each provide for a public policy test.¹¹⁹ In this process, we must investigate whether

- a) the claim to be enforced is contrary to the state of enforcement's public policy. Since foreign enforceable notarial deeds are generally about the payment of money or the handing over of other fungibles, this should not normally be the case;
- b) the legal relationship from which the claim that is to be enforced stems clashes with public policy.
- c) the foreign notarisation process is against public policy. Cases in which a violation of this nature must be approved should at least in the area where Civil Law notaries operate only be textbook examples.

VI. List of Exceptions to Article 1, Paragraph 2, no. 1 of the Brussels and Lugano Convention, and Regulation (EC) no. 44/2001 of 22nd December, 2000

Article 1, paragraph 2, no. 1 Brussels / Lugano Convention / Regulation (EC) no. 44/2001 leaves out particular civil law subject-matters as not falling within the scope of the Convention or Regulation. Contrary to the prevailing opinion, which adheres to the text,¹²⁰ one should not apply this exception rule to enforceable deeds as well.¹²¹ For example, this is important with agreements between spouses on the occasion of a divorce, when a lump-sum for the settlement of the maintenance following the divorce (which falls within the scope of application of the Convention or the Regulation) and the matrimonial property rights claims (which must be subsumed under the exception rule of no. 1) is stipulated as being enforceable.

¹¹⁹ In this regard, Leutner, 'Die vollstreckbare Urkunde im europäischen Rechtsverkehr', 1997, 31. 'As against the exequatur for foreign court decisions Article 50 Brussels / Lugano Convention favours enforceable deeds because, in them, the reasons for rejection....are reduced to the public policy proviso.' Here, Leutner 39 sees a special evidence of trust, particularly with respect to notaries. See in this context, discussion by Geimer in DNotZ 1999, 764.

¹²⁰ Jenard, Report on Article 50.

¹²¹ Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 1 at note 57 and Article 50 at note 9.

VII. No Enforceability Declaration of Instruments under Public Law

Sections 722 and 723 of the German Code of Civil Procedure relate only to instruments that have been drawn up concerning civil law claims, but not enforceable instruments concerning claims under public law.

The same applies to contract law. All intergovernmental agreements and contracts only deal with the enforceability declaration of instruments in civil and commercial cases, just as Regulation (EC) no. 44/2001 of 22nd December, 2000.

VIII. Enforceability Declaration Procedure

Within the scope of application of the Brussels and the Lugano Convention, the enforceability declaration procedure has been standardised across Europe to a large extent.¹²² The same applies to Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The motion to declare a foreign enforcement instrument enforceable according to Article 31 of the Brussels / Lugano Convention or Article 38 of Regulation (EC) no. 44/2001, must be made to the presiding judge of a civil court of the Regional Court in Germany, according to Article 32 Brussels / Lugano Convention or Art. 39 of Regulation (EC) no. 44/2001.¹²³ The Local Court has no jurisdiction. No objection is lodged against the decision of the presiding judge (in the same instance); rather, complaints may be submitted to the Higher Regional Court. The legal complaint against the decision of the Higher Regional Court is admissible before the Federal Supreme Court.

¹²² In the area of international agreements, the national implementation laws must be respected, unless the agreement in question governs the enforceability declaration, itself.

¹²³ Local jurisdiction is determined, in each case, by the place of domicile or registered office of the debtor. If the latter has no domicile in the area of sovereignty of the enforcement state, the court of the district in which the execution is to be executed has jurisdiction (Article 32 (2) Brussels / Lugano Convention).

The jurisdiction over the subject-matter and territorial jurisdiction of the German Regional Court, according to Article 32 Brussels / Lugano Convention and Article 39 of Regulation (EC) no. 44/2001 of 22nd December, 2000 are, according to section 3 of the German Law on the Implementation of Inter-State Agreements and the Execution of Regulations of the European Community in the Area of the Recognition and Enforcement in Civil and Commercial Matters (Recognition and Enforcement Implementation Law – AVAG – Bundesgesetzblatt I 2001 I 288), exclusive jurisdictions. The details of the enforceability declaration procedure are – by way of a supplement and to fill the gaps – governed under Article 31 et seq. Brussels / Lugano Convention and under Article 38 of Regulation (EC) no. 44/2001 - in sections 4 et seq. AVAG.

IX. Defences of the Debtor

The debtor's procedural rights are not reduced by the enforceable notarial deed. Even if he has submitted to the immediate execution, he is at liberty to put forward his affirmative defences, e.g. payment, set-off, extension for payment etc. by way of the opposition counter-suit or action to oppose enforcement (*Vollstreckungsgegenklage*). The burden of assertion and the burden of proof are the same as in the case of an action for satisfaction on the part of the creditor.

1. Defences to the Admissibility of the Court Enforceability Certificate

Objections to the admissibility of the certificate of a German enforceable deed can be presented pursuant to sections 795, 732, 726 and 768 of the German Code of Civil Procedure in certain proceedings. However, these proceedings do not take place if a foreign execution submission is to be declared enforceable. In this case, the objections must be raised in the enforceability declaration procedure.

2. Defences to the Substantive Claim

a) Declaratory Action

An enforceable notarial deed does not have any res judicata effect.¹²⁴ The debtor can, therefore, in accordance with sections 797 paragraph 4, 767 paragraph 2 of the German Code of Civil Procedure (ZPO) additionally appeal on grounds which he could already have asserted at the time when the deed was established: He is not personally barred from doing so. If the creditor intends to have his right established with binding effect res judicata, he must file an action for the establishing of the claim. In reverse, the debtor can also assert a negative declaratory action. Thus, however, the enforceability of the instrument is not eliminated. The action for negative declaration on the part of the debtor is, therefore, very rare in Germany.

¹²⁴ Cf. B III above.

b) Action to Oppose Enforcement (section 767 ZPO) and Comparable Opposition Actions

The debtor's objections to the claim are, on the contrary, asserted by means of an action to oppose enforcement according to section 767 of the German Code of Civil Procedure or by means of a comparable foreign legal institution. This can happen in two ways:

(i) In the State of Origin

The debtor can raise his defences to the substantive claim in the state of origin, initially, with the opposition claim or action to oppose enforcement or the other legal remedies known to the law in the state of origin. By this means enforceability according to the law of the state of origin is removed. Through this the instrument also ceases to be enforceable in the second state; the debtor must, however, appeal for this in the procedure of declaration of enforceability in the state in which enforceability is sought. If enforceability according to the law of the state of origin lapses only *after the conclusion of this procedure*, the debtor can thus present the reversal or alteration of the -state of origin enforceability in the second state in a special procedure pursuant to section 29 of the German Law on the Implementation of Inter-State Agreements and the Execution of Regulations of the European Community in the Area of Recognition and Enforcement in Civil and Commercial Matters (Recognition and Enforcement Implementation Law AVAG)¹²⁵.

(ii) In the State in which Enforceability is sought

The debtor can, however, also dispense with the opposition claim or action to oppose enforcement in the state of origin (doubtless because he has no assets there) and proceed against the enforceability declaration in the second state, only. He must then, however, present his objections in accordance with sections 12, 14 AVAG in the enforceability declaration procedure. If the enforceability declaration becomes incontestable, the debtor can no longer be heard on defences that have arisen before the elapsing of the appeal period or if he has appealed after the end of the appellate proceedings.¹²⁶ If such objections have not arisen, however, until after the enforceability declaration proceedings have been completed, he has the action to oppose enforcement at his disposal according to section

¹²⁵ Bundesgesetzblatt 2001 I 288.

¹²⁶ Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 36 at note 28. Critical of the solution of the German legislator in section 14 (previously: section 15) AVAG Leutner, 'Die vollstreckbare Urkunde im europäischen Rechtsverkehr', 1997, 265 et seq.

14 AVAG. Example: The debtor pays, after the instrument has been declared enforceable in Germany and this declaration has been incontestable. In this situation, the debtor can assert an action to oppose enforcement against the German enforceability declaration pursuant to section 767 of the German Code of Civil Procedure.

X. Compensation for Unjustified Enforcement

For claims for compensation for unjustified enforcement, in the conflict of laws, the law of the place of enforcement is authoritative. The debtor with a foreign enforceable deed is better protected in Germany than the debtor with a German enforceable deed. The reason is that strict liability exists under section 717, paragraph 2 of the German Code of Civil Procedure in a situation of enforcement arising out of judgments, but not in enforcement arising out of deeds according to section 794, paragraph 1, no. 5 of the Code of Civil Procedure.¹²⁷ For enforcement arising out of foreign deeds, on the other hand, section 28 of the German Law on the Implementation of Inter-State Agreements and the Execution of Regulations of the European Community in the Area of Recognition and Enforcement in Civil and Commercial Matters (Recognition and Enforcement Execution Law AVAG)¹²⁸ contains a ruling that is copied from section 717, paragraph 2 of the German Code of Civil Procedure, and provides a basis for strict liability.

XI. Consequences of a Refusal to Issue the Exequatur

If the enforceability declaration is rejected (e.g. because the foreign notarisation procedure has violated public policy), the creditor must bring a new action in order to obtain an instrument that is enforceable in the enforcement state. For this purpose he must apply to the courts of the state which has international jurisdiction for this claim. In the scope of application of the Brussels and Lugano Conventions or Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Article 2 et seq. must be followed. If, accordingly, it is only the state in which the enforceable deed was established and which still has enforceability, that has international jurisdiction, complications can arise if, according to local law, a new action for satisfaction is inadmissible, e.g. because the view is held, there, that the creditor lacks interest in bringing proceedings because of another enforcement instrument, in the form of a judgment granting satisfaction. Such a viewpoint

¹²⁷ Zöller/Stöber, ZPO, 22nd Edition, 2001, section 717 at note 5.

¹²⁸ Bundesgesetzblatt 2001 I 288.

seems to contradict the convention. Nevertheless, the creditor should not go without protection. In such a situation, therefore even in the scope of application of the Brussels and the Lugano Convention or Regulation (EC) no. 44/2001 of 22nd December, 2000 from the point of view of international emergency jurisdiction, an action will have to be admitted before a German court if an adequate connection exists within the country.¹²⁹

XII. Hague Conference on Private International Law Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

At present, under the auspices of the Hague Conference on International Law, discussions are being held about a worldwide jurisdiction and enforcement convention, which would take the Brussels Convention as a raw model. From the point of view of the Civil Law notary, it is very important that the provision of Article 50 of the Brussels Convention also be adopted into the new convention because, in the light of the globalisation, enforceable notarial deeds should not be allowed to get caught up on national border fences.¹³⁰ Also, we must prevent an imbalance from appearing at the outset between the countries with a Civil Law notarial profession and the Common Law countries. The latter have come a little short on the 'blessings' the Romans have spread around the world. Little Roman law has reached there, unless we count the preference of Common Lawyers for latin terminology. Even the development of Roman law in the Middle Ages, especially in Northern Italy, was not received or only with reservations on the British Isles. Thus it becomes clear that, in the common law countries, the progressive institution of the enforceable deed is unfortunately not known. Many matters that are settled by enforceable notarial deeds in the area of the Civil Law notarial profession are settled in a functionally comparable manner, but in a conceptually more old-fashioned way, in summary proceedings, by judgment by consent, or by confession. These judgments fall within the scope of application of the planned worldwide convention and, therefore, will have to be recognised and enforced in all contracting states. In reverse, on the other hand, there is no opportunity for the international execution of notarial enforcement instruments if the arrangement in Article 50 of the Brussels Convention is not also adopted into the new convention. Article 34 of the provisional draft merely provides for the enforceability declaration of enforceable deeds on the basis of mutuality. This development

¹²⁹ On the issue of emergency jurisdiction (not provided for in the text of the Convention), Geimer/Schütze, 'Europäisches Zivilverfahrensrecht', 1997, Article 31 at note 64.

¹³⁰ For a detailed treatment of this, see Fleischhauer in IPRax 1999, 216.

would be very regrettable. This is because enforceable deeds are - and this has to be stressed again - in the area of the Civil Law notarial profession, an efficient alternative to court proceedings, and they alleviate the burden on the judiciary enormously. There is also no objective reason why the enforceable deed must only be promoted internationally on the basis of mutuality in execution, while this restriction in the enforceability declaration of judgments by consent or by confession is absent. The notary has the same status as the judge in civil proceedings. He is an independent and impartial holder of a public office, who is responsible for the legal content of the deeds he establishes. If you like, he is a procedural *professio iuris*.¹³¹ This is also the *tertium comparationis* to the judgments by consent or by confession in Anglo-American law. It is only on this point that the Common Law is more archaic or, - to express it in a less pithy way - at least less well-developed than the civil law in the countries of the Civil Law notarial profession. But it seems archaic that, in the United States of America, a confession of judgment deed has to be presented to a court so that the latter can then issue a judgment by confession or by consent. There, it would be a lot more elegant if the debtor (or his representative) were to appear before the notary, admit his debt before him and immediately make himself subject to immediate execution. Although both institutions are based on the same fundamental concept, i.e. the establishment of an enforcement instrument in a rapid and cost-saving non-litigious procedure, and although judgments by confession or by consent fulfil the same function, in terms of the legal situation, as the enforceable notarial deeds in the countries with a Civil Law notarial profession, according to the stage the discussion has reached so far, they are apparently being dealt with differently in the Hague. Only the quasi-judgments of the common law are apparently falling within the scope of application of the new worldwide Convention, whereas the enforceable deeds of the Civil Law notaries are apparently being kept outside. Thus, on an international level, the national efforts aimed at efficient execution and alleviating the burden on the courts are being expended *ad absurdum*. In this connection, it is also worth looking at arbitration. Here, since the time of Ptolemy, it has been recognised that, instead of choosing the route to the state courts, parties can choose to avail themselves of arbitration panels. Arbitration awards enjoy worldwide mobility, precisely because the view has been well received that the parties are dispensing with the judicial relief afforded by the state courts, and can settle their disputes in other ways. What is true for arbitration awards must all the more be true for notarial deeds.

¹³¹ Fleischhauer IPRax 1999, 216, 219.

G. Territorial Limits of the Declaration of Enforceability: L'exequatur sur l'exequatur ne vaut

If an enforcement instrument from state A is declared enforceable in state B, this declaration of enforceability forms the basis for execution, there. This can, however, not be declared enforceable in Germany (but only the enforcement instrument arising out of state A). The principle, *l'exequatur sur l'exequatur ne vaut*, is recognised generally¹³². Thus, for example, an exequatur judgment through which a foreign judgment is declared enforceable in a third party state, cannot be declared enforceable. Inherent in the exequatur is also the territorial limitation to the state in which the enforceability declaration has taken place. An example: Pursuant to section 1053, paragraph 4 of the German Code of Civil Procedure (ZPO), a German notary declares a New York arbitration award enforceable. Now, the arbitration award is to be enforced in Greece. The basis for the enforceability declaration procedure, there, cannot be the German (notarial) exequatur, but only the original enforcement instrument, i.e. the New York arbitration award.

H. Theses

1. For important transactions of property law, inheritance law and company law, notariation is required. Above all, for the consumer, notarisation is and will remain necessary, because it is only in this way that the specialist advice and services of an independent, impartial organ of the administration of the law can be guaranteed.
2. The incorporation of private limited companies and public limited companies requires notarisation, as do increases in capital and alterations to articles of incorporation. The dogma, hitherto unalterable in the law of corporations, of the constitutive importance of the entry in the register is no longer adequate nowadays. If people complain that the registration process takes too long, it would not really help to call

¹³² References in Geimer, 'Zur Prüfung der Gerichtsbarkeit und der internationalen Zuständigkeit', 1966, 26, footnote 7; Geimer, 'Anerkennung ausländischer Entscheidungen in Deutschland', 1995, 87, 171; Geimer in Geimer/Schütze, 'Internationale Urteilsanerkennung' I/2, 1984, 1174; Kegel in Müller-Freienfels Anniversary Publication, 1986, 392; Kropholler 'Berichte der Deutschen Gesellschaft für Völkerrecht' 28 (1988), 115; Linke, 'Internationales Zivilprozeßrecht', 2nd Edition, 1995, Rz. 355; Martiny in 'Handbuch des Internationalen Zivilverfahrensrechts', Vol. III 1, 1984, Chapter I Rz. 381; Baumann, 'Die Anerkennung und Vollstreckung ausländischer gerichtlicher Entscheidungen in Unterhaltssachen', 1989, 17; Jametti Greiner, 'Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht', 1998, 100; Stojan, 'Die Anerkennung und Vollstreckung ausländischer Zivilurteile', 1986, 171; Schack, 'Internationales Zivilverfahrensrecht', 2nd Edition, 1996, Rz. 812, 936. Opposing view: Schütze ZZP 77 (1984), 287.

for a central register on a national or European level. Rather, we should transfer some supervision procedures of the registration authorities to the notary, in advance: The company's legal personality with limited liability does not attach when it is entered in the register, but as early on as when the notary issues the certificate to the effect that the company has been incorporated in accordance with the law. The same should apply to increases in capital and reorganisations, and also to the moving of registered offices, other alterations to articles of incorporation, mergers, splits etc.

3. In their special meeting on the creation of an area for freedom, security and the law in Tampere in Finland on 15th and 16th October, 1999, the heads of state and government of the European Union demanded a „genuine European area of law“, in which individuals and commercial enterprises can assert their rights across borders, unhindered by „the incompatibility or complexity of the legal systems“. In this context, the call for a „European enforcement instrument“ was rightly brought up, on the basis of which, in all states of the European Union, execution can be pursued without the prior issuing of a declaration of enforceability.

The enforceable notarial deed is particularly suitable for this. Here without having to burden the courts, which are generally overloaded an enforcement instrument is being created in a simple and, what is more, inexpensive fashion, that can be classified very high on the legal-ethical scale. This is because the debtor has participated out of his own volition and has submitted voluntarily to immediate execution, or agreed with it. His procedural rights are not infringed by this and, indeed, in a certain respect, they are even enhanced because objections are not precluded - which is different from the case in court judgments granting performance.

4. Article 57, paragraph 4 of Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will replace Article 50 of the Brussels Convention on 1st March, 2002, stipulates:

“The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.“

This standard form requires, amongst other things, information about who the creditor and debtor are, and the „text of the enforceable obligation as annexed to this certificate.“ The expression, text, of the enforceable obligation should be eliminated be-

cause, in a „quibbling“ interpretation of this formulation, we have grounds to fear bureaucratic obstacles to the international enforceability of notarial deeds. It should be sufficient for it to be made clear, in a reference to the notarial deed, what enforcement instrument is involved.

Competence for the issuing of the certificate mentioned should be given to the chambers of notaries or professional associations of notaries. In this way it would be guaranteed that an expert and highly-specialised office is involved, that is especially familiar with the details of enforceable deeds.

5. The European Parliament had proposed that notaries should be competent to declare foreign enforceable deeds enforceable. Regrettably, however, the relevant wordings were not included by the Council in Council Regulation (EC) no. 44/2001, of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This proposal should, however, be pursued further, and the regulation amended accordingly.
6. In Germany, already *de lege lata*, notaries can declare enforceable attorneys' settlements and arbitration awards with an agreed wording (arbitration awards that incorporate in them a compromise of the parties) according to sections 796 c, paragraph 1, and 1053, paragraph 4 of the German Code of Civil Procedure (ZPO), if both parties request this. These competences exist alongside those of the state courts. Such competences ought to be introduced in order to alleviate the burden on the judiciary, for all arbitration claims, as well, and for the enforceability declaration of foreign notarial deeds.
7. Unfortunately, the Common Law countries have not implemented the progressive institution of the enforceable deed in their legal systems. A large number of matters that are settled by enforceable notarial deeds in the area of the Civil Law notarial profession are settled in a functionally comparable manner, but in a conceptually more old-fashioned way, in summary proceedings, by judgment by consent or by confession. These judgments fall within the scope of application of the Worldwide Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters that is being negotiated under the auspices of the Hague Conference on International Law and, therefore, will have to be recognised and enforced in all contracting states. In contrast, on the other hand, there is no opportunity for the international execution of notarial enforcement instruments if the arrangement in Article 50 of the Brussels

Convention or Article 57 of Council Regulation (EC) no. 44/2001, of 22nd December, 2000 is not also adopted into the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

Article 34 of the provisional draft, which merely provides for the enforceability declaration of enforceable deeds on the basis of mutuality, is inadequate. This is because, in the area of the Civil Law notarial profession, enforceable deeds are an efficient alternative to court proceedings, and they alleviate the burden on the judiciary enormously. There is also no objective reason why the enforceable deed must only be promoted internationally on the basis of mutuality in execution, while this restriction is absent with regard to the enforceability declaration of judgments by consent or by confession. Arbitration awards enjoy world-wide mobility, precisely because the view has been well received that the parties are dispensing with the judicial relief afforded by the state courts, and can settle their disputes in other ways. What applies to arbitration awards must apply all the more to enforceable notarial deeds.