

TOPIC I

**THE IMPARTIALITY OF THE NOTARY:
A GUARANTEE IN CONTRACT LAW**

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DR ROLF GAUPP
LAWYER AND NOTARY
UHLANDSTRASSE 21
D-74072 HEILBRONN

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INTRODUCTION

The IIIrd topic of the XVIth International Congress of the Latin Notarial Profession in Lima/Peru 1982 was stated as 'the social task of impartially drawing up contracts'. FESSLER drew up the German report. The XXIVth Congress in 2004 in Mexico again deals with the notary's impartiality when drawing up contracts. The international reporter rightly traces the prerequisite of presenting new developments both inside and outside the notarial profession from this topic in particular.

Many new developments have arisen in the meantime. Internationalisation and globalisation are not just slogans; they are a reality. They have essential effects on the notary's profession and give rise to pressing current questions.

Significant changes in the legal advisory professions have taken place at European level and in Germany. Regardless of these, the notary's impartiality (Part A) continues to be the most important institutional professional foundation. Continuing liberalisation initiated in European and constitutional law as well, especially the German lawyer-notary's possibilities for association, has led to a large number of new legal and professional law rules with the aim of ensuring impartiality, even with changed relationships and increased economic pressure (Part B). The contractual fairness aspect, especially for consumer protection, has been strengthened decisively in European contract law; incisive legislative changes, which pursue 'contractual fairness' are evident and supported by judicial inspections of content for contracts (Part C). In contrast, the legal concept of achieving the 'right contract' through the advisory cooperation of the impartial notary in the form of notarial certification remains current and has a future (Part D).

A.

The impartiality of the notary as an essential status determining professional basis

Starting definitions; essential legal basis; ensuing fundamental professional demarcation

I. Starting points

1. ‘The notary must exercise his office faithfully to his oath. He is not the representative of one party, but an independent and impartial guide for the parties concerned.’ This is stipulated by § 14 Paragraph 1 of the Federal notarial regulations (BNotO).¹ The German notary accordingly takes an oath to ‘fulfil a notary’s duties conscientiously and impartially ...’; § 13 Paragraph 1 BNotO after the issue of the appointment deed.

This fundamental official duty is decisive for the entire exercise of the notary’s function and is the main essential and differentiating characteristic of the notarial function.² The practical and theoretical importance of the notary’s impartiality in German notarial law is absolutely dominant. The legal duty to ensure uncompromising impartiality is a decisive essential characteristic of the notary’s office.³

2. ‘Impartiality’ corresponds to the term ‘neutrality’.⁴ Neutrality may count here as the ‘modern’ current social and communicative understanding of the common concept, which related disciplines, such as psychology above all, expound more effectively. For example, the ‘absence of an internal attitude oriented towards disadvantage or preference’ is viewed as a decisive criterion.⁵

The parties’ trust in the notary’s neutrality is an imperative basis for the notarial activity. Professional supervision of the notary and the supporting activity of the chambers of notaries do nothing more than ensure this position of trust held by the notary.⁶

¹ Federal notarial regulations (BNotO) in the version of 19.12.1998; BGBl. I, 3836.

² SEYBOLD/SCHIPPEL, Kommentar zur Bundesnotarordnung, 7th edition., 2000, Rd.-No. 35 on § 14; BERNHARD, in Beck’sches Notar-Handbuch, 3rd edition., 2000, F, Rd.-No. 45.

³ BOHRER, Das Berufsrecht der Notariat, 1991, Rd.-No. 95.

⁴ ‘Neutrality means impartial action’; WALZ, et al, Verhandlungstechnik für Notare, 2003, 157 m. footnote 85 under reference to DUDEN, dictionary of foreign terms.

⁵ ROSSAK, The notary’s independence and neutrality, dissertation, Augsburg 1986, 334 ff.; cited in WALZ, loc. cit., footnote 88, and passim.

⁶ WALZ-SORGE, loc. cit., 38.

II. Legal basis for impartiality: legal and professional law provisions

1. The notary is the independent holder of a public office; § 1 BNotO. The notary's official oath and general official duties explicitly contain the requirement for impartiality as a central feature; § 13 Paragraph 1, § 14 Paragraph 1 BNotO. The notary must safeguard independence and impartiality during the exercise of his function first of all through suitable measures; § 28 BNotO.

A range of legal provisions that prevent the danger of violating the duty of neutrality also exist. Provisions protect the notary's 'inner' neutrality; the notary must 'demand of himself that he remain neutral and have a pretension to be neutral'. 'External' neutrality is also protected; this relates to the view held by parties and third parties.⁷ These legal provisions, which ensure the notary's impartiality in general and in particular configurations, are discussed in the following section.

2. Legal provisions are supplemented and clarified by provisions from notarial professional law.

On 29.1.1999, in accordance with § 78 Paragraph 1 BNotO, the Federal German Chamber of Notaries adopted guideline-recommendations for professional law guidelines, which the councils of notaries were to decide on for statutory purposes in accordance with § 67 Paragraph 2 BNotO. The guideline-recommendations were adopted unanimously at the assembly of representatives of the Federal chamber of notaries. The statutes of the chambers of notaries essentially comply with the recommendations of the Federal Council of Notaries as well as with each other.⁸

Figure. I, 1.1 of the guideline-recommendations stipulates the safeguarding of notarial independence and impartiality from the outset: 'The notary is an impartial legal advisor and a guide for all the parties involved.'⁹

The regional chambers of notaries' guidelines have all taken over this sentence literally.¹⁰ Incidentally the principle of impartiality runs through the entire guideline text like a 'guiding thread', in keeping with this fundamental sentence.

⁷ On the difference between inner and outer neutrality WALZ-SORGE, loc. cit., 36.

⁸ SEYBOLD/SCHIPPEL, BNotO, Part 3, preamble Rd.-Nrn. 1 ff.

⁹ The Federal Council of Notaries' guideline-recommendations (RLE/BNotK) are published in the German Notarial Journal (DNotZ) 1999, 258 ff.; more in SEYBOLD/SCHIPPEL, BNotO, Part 3, with commentary references on the individual provisions in each case; amendment decision by the Federal Council of Notaries of 04.04.2003, DNotZ, 2003, 393; comprehensive overview – just published – by WEINGÄRTNER/WÖSTMANN, Richtlinienempfehlungen der BNotK – Richtlinien der Notarkammern, 2004, guideline recommendations from the Federal Council of Notaries, 5 ff.

¹⁰ WEINGÄRTNER/WÖSTMANN, loc. cit., 11 (Bavaria), 18 (Berlin), 24 (Brandenburg), 32 (Braunschweig), 38 (Bremen), 43 (Celle), 49 (Frankfurt), 55 (Hamburg), 60 (Hamm), 66 (Kassel), 73 (Coblenz), 82 (Mecklenburg-Vorpommern), 89 (Oldenburg), 95 (Pfalz), 101 (Rhine council of notaries), 107 (Saarland notarial council), 115 (Sachsen), 122 (Sachsen-Anhalt), 129 (Schleswig-Holstein), 135 (Stuttgart), 141 (Thuringia).

3. International aspects are increasingly and essentially also affecting the notarial profession. This applies primarily at European level.¹¹ It is not too much to say that the fate of the future of the notarial profession in Germany, for example, is not decided in Germany itself but is determined through international trends, largely decided in Brussels.

The conference of notarial professions in the European Community¹² adopted the European Code of notarial professional conduct rules in Naples on 04.02.1995.¹³ The conference drew up a new version of this European Code in Munich on 09.11.2002 through a decision by their assembly. The amendments were ratified by the German notarial profession on 04.04.2003. In terms of content, the Code was mostly extended by provisions on the use of modern information and communication technologies by European notaries. It was primarily made explicit here that the professional conduct rules also apply in this area.¹⁴

Figure 1.2.2 Paragraph 1 of the Code (unchanged in content relative to the earlier version) stipulates the notary's duty, 'to advise and certify with complete impartiality and independence'. This duty is common property in the notarial law of all Member States.¹⁵

III. The notary's 'impartiality' and 'neutrality' as a fundamental structural principle of the notarial profession

1. The notary is the holder of a public office awarded by the state; § 1 BNotO. His integrity is ensured through legal office principles. Impartiality and independence have the highest priority here.¹⁶

On the basis of the applicable functional principle the German notarial profession is neither a 'liberal profession' nor a 'state-bound profession'; in sociological terms it is positioned

¹¹ Specifically, compare the observations supported by international experience made by HELLGE, Chairman of the International Committee of the Federal Council of Notaries, in the plenary discussion on the presentations 'Future prospects for the notarial profession – a public function and liberal profession structures' (reporters: EULE and HECKSCHEN) at the 25th Conference of German notaries in Münster 1998, Special issue of DNotZ, 340.

¹² Conférence des Notariats de l'Union Européenne (C.N.U.E.), set up in Paris on 17.05.1976 as a standing committee of presidents of notarial bodies in the European Community. The leading notarial organisations in EU Member States which are members of the International Union of Latin Notaries (U.I.N.L.) are members of the conference.

¹³ The text of the European Code has been published, including in Beck'sches Notar-Handbuch, loc. cit., Annex. 5, 1327 ff. For the remainder, fundamental, SCHIPPEL, The European Code of notarial professional conduct rules DNotZ 1995, 334, with all essential further proofs.

¹⁴ New version of the European Code of Notarial Professional Law, translation from French with illustration of the motives and terminological specifications DNotZ 2003, 721ff.

¹⁵ SEYBOLD/ SCHIPPEL, BNotO, 339.

¹⁶ On the official principles of the German notarial profession, comprehensive, BAUMANN, The German notarial profession: a public office and social function. Reports by the German delegation at the XXIst International Congress of the Latin Notarial Profession, Berlin 28.05. – 03.06.1995, 3 (21 ff.) – GAUPP, The meaning of notarial professional law for clients, colleagues and the State. Reports by the German delegation at the XXIInd International Congress of the Latin notarial profession, Buenos Aires 27.09. – 02.10.1998, 119.

between the civil service and the liberal professions.¹⁷ Despite legally institutionalised independence, the notarial profession does not count among the liberal professions; apart from the civil servant function there is no other profession in Germany that is so regulated by legal provisions as the notary's. The justification for this is found in the allocation of sovereign functions to an (otherwise independent) holder of office.¹⁸

2. There are various forms for practising the notarial profession in Germany. This diversity is a special characteristic of the German notarial constitution, and results from historical developments in a federally structured country in terms of constitutional law. Above all, the German lawyer commissioned as notary is an almost a unique feature in Europe. This notarial form is of special interest from the impartiality aspect (which fits in with the explicit question raised by the international coordinator in his exposé).

There are three types of the notarial profession in Germany.¹⁹

- a) The exclusive notarial profession exists in the larger geographical part of Germany, namely in Bavaria, Hamburg, Rheinland-Pfalz, Saarland, North-Rhine Westphalia (with historically determined exceptions here), Brandenburg, Thuringia, Saxony, Sachsen-Anhalt and Mecklenburg-Vorpommern. In this form of exercise the German notarial profession thus follows the regular form of the notarial profession within the U.I.N.L. in Continental Europe as well as in Central and South America.
- b) The lawyer commissioned as notary exists in Berlin, Bremen, Hessen, Niedersachsen, Schleswig-Holstein, parts of North-Rhine Westphalia and parts of Baden-Württemberg (Stuttgart regional higher court district). According to the legal definition in § 3 Paragraph 2 BNotO, a lawyer commissioned as notary is a lawyer who, in addition to working at this profession, is appointed simultaneously as a notary. He therefore has a double profession. A lawyer commissioned as notary is bound by both the professional law for lawyers and the (stricter) professional law for notaries.²⁰
- c) State notaries have been established in Baden-Württemberg, while lawyers commissioned as notary also practise in the Stuttgart regional higher court district.²¹

1,654 single profession notaries and 8,370 lawyers commissioned as notary (out of a total of 121,420 lawyers) were recorded in Germany in 2003. The scale of notarial business carried out by the lawyer commissioned as notary is a multiple

¹⁷ BAUMANN, loc. cit., 19 f.; cf also constitutionally here, ZUCK, The notary between an office and a liberal profession, Festschrift for Helmut SCHIPPEL, 1996, 817. 'On the increasing closeness of liberal professions to commercial activities, which is becoming alarmingly more evident', press report from the Süddeutschen Zeitung in Deutsches Anwaltsblatt, 2003, 558.

¹⁸ BAUMANN, loc. cit.

¹⁹ Overview in STARKE, Beck'sches Notar-Handbuch, K I, Rd.-Nr. 17.

²⁰ Overview in SANDKÜHLER, Beck'sches Notary-Handbuch, K II, Rd.-Nrn. 1 ff.

²¹ Considerations on reforming the notarial system in Baden-Württemberg exist – resulting in the introduction of the liberal profession notarial function; on the current status see Baden-Württemberg Official Gazette No. 48 of 08.12.2003, 3.

lower than the amount carried out by the single profession notary. The business volume accounted for by pure notaries is therefore more significant in Germany.

According to the prevailing view, there are no notarial professional differences between single profession notaries and lawyers commissioned as notary in principle.²² The competence, procedural stipulations, institutional principles and professional requirements are identical for single profession and lawyer-notaries in principle. They perform the same function. Special situations can arise concerning the lawyer commissioned as notary, as he may simultaneously exercise the profession of lawyer and possibly other self-employed professions (§ 8 Paragraph 2, Sentence 2 BNotO: patent lawyer, tax consultant, auditor, chartered accountant). Professional law takes account of this through special regulations. These special regulations above all serve to protect independence and impartiality. Part B of this report deals with the details.

3. Impartiality as an essential outstanding status forming standard for the notarial profession has a fundamental demarcation function vis-à-vis other legal and business advisory professions.
 - a) The notary's impartiality is an essential differentiating and demarcating principle, especially compared with the lawyer. The lawyer exercises a liberal profession, which in principle excludes state control; § 2 Paragraph 1 of the Federal lawyers' regulations (BRAO). The lawyer is an appointed independent advisor and representative in all-legal affairs; § 3 Paragraph 1 BRAO. His core task is to safeguard partisan interests; § 43 a) Paragraph 4 BRAO contains the basic instruction that the lawyer must not represent conflicting interests.

Regardless of this, the rights and duties of the lawyer in Germany (as well as in the Roman legal sphere) are institutionally based in professional law; in contrast, this component is absent or only weakly emphasised in the Anglo-American sphere. According to § 1 of the German BRAO, the lawyer is an 'independent body of the administration of justice' with the clearly defined duty to abide by professional ethics principles, especially the principle of independence. To what extent this legal postulate actually reflects reality in a period of international business firms is the subject of debate in professional law and in the German legal profession's understanding of itself.²³

²² On the professional image see EYLMANN/VAASEN-SCHMITZ-VALCKENBERG, commentary on BNotO and BeurkG, 2000, Rd.-Nrn. 4 ff. on § 3 BNotO. STARKE, loc. cit., Rd.-No. 18; SANDKÜHLER, loc. cit., Rd.-Nr. 3.

²³ Comprehensive and representative, DE LOUSANOFF (HENGELER MUELLER WEITZEL WIRTZ firm, Frankfurt/Main office), The European lawyer between administration of justice and service, presentation at the conference by the association of civil proceedings academics in Zurich on 21.03.2002, ZZP 2002, 357. Reference (Fn. 2) there to the annual conference of the International Bar Association, November 2001 in Mexico: 'The future of the law firm'. – Also see Renate JAEGER, a judge in the Federal Constitutional Court, The development of notarial professional law, Annual working conference of the German notarial profession on 18 – 20.09.2003 in Würzburg, 20.09.2003, published presentation, 10 ff.: Lawyers 'in their duties as independent organs of administration of justice and as appointed advisers and representatives of parties seeking justice are not so far removed from the notary's function, as has often been found in the pure notarial profession.' (10).

- b) Tax consultancy is an independent, markedly client-related profession. The tax advisor's task is to provide help in tax matters in the broadest sense to the principal; § 3 Tax advisor law.
- c) A look at the auditor is particularly interesting. In the case of the auditor, the professional maxim of independence and impartiality has been placed under the spotlight of interest and criticism through spectacular events in the USA (the 'rise and fall' of the international, globally operating audit firm Arthur Andersen was much debated in the global media).

Just like the lawyer and tax consultant, the auditor exercises a liberal profession; § 1 Paragraph 2 Sentence 1 of the German Auditor's Regulations (WPO). The auditor is bound to be impartial when drawing up audit reports and expert opinions: § 17 Paragraph 1 WPO stipulates this explicitly as a professional guiding principle, similarly to the case of the notary. This professional principle for the auditor is currently the subject of much debate, particularly as the auditor is assigned a central role in 'corporate governance' (principles for a suitable corporate management that is compliant with ethical standards) according to the German legislator. For auditors, this currently entails exclusion criteria, reinforcement of the profession's independence, a concern for reputation and personal justification of existence as an 'exclusive' liberal profession. Parallels with the notary's 'catalogue of concerns' are unmistakable.²⁴

4. A mitigated picture emerges for the judge and notary.²⁵ Comparison and demarcation are not relevant in their contended jurisdictions; while their differing structures are evident, points of contact may arise in the notary's involvement in settling disputes. These are matters of precautionary, conflict-avoiding administration of justice. This is the notary's profession. These are affairs, which are called 'voluntary jurisdiction' in Germany. The notary is, so to speak, a 'judge in the preliminary stage'.

In addition to his certification and assistance tasks, the German notary performs a range of what were originally a judge's functions.

This primarily entails the authority (extended significantly since 01.01.1999) to create a state execution title through an executory deed; § 794 Paragraph 1 No. 5 of the Civil proceedings regulations (ZPO). These also include the taking of affidavit assurances and the acceptance of oaths in certain cases (§ 22 BNotO), the certification of certificate of heirship applications (§ 2356 of the German Civil Code [BGB]), mediation of asset disputes in the inheritance procedure

²⁴ 'Auditors looking for trust', Frankfurter Allgemeine Zeitung of 20.10.2003, No. 243, 21, report on the German Auditors' Congress in Hamburg, held by the German Institute of Auditors (IDW). For the remainder, see BAUMBACH/HOPT/MERKT, HGB, 31st edition., 2003, introduction Rd.-No. 3 on Auditors regulations (Annex 2 c)], with reference to relevant decisions by the German Conference of Jurists 2002, Business law section; Managemagazin December 2003, 28: 'Auditors in a lasting slump'; a reference to the American Sarbanes-Oxley-Act, Prohibition on simultaneous auditing and consulting; BACKHAUS, The auditor's self image and external image – empirical findings on the positioning of the auditor in public. Die Wirtschaftsprüfung 2003, 625.

²⁵ ODERSKY, then President of the German Federal Court of Justice, 28 'Courts and the notarial profession', address on the occasion of the opening of the German notarial institute in Würzburg on 13.10.1993, DNotZ 1994, 7. Also see STÜRNER, The judge's independence from a scientific viewpoint; Reports by the Federal council of lawyers, 5/2003 v. 15.10.2003, 214 ff.

based on state law provisions (§ 20 Paragraph 5 BNotO, 86 FGG), the declaration of the executability of arbitration decision as well as lawyers' settlements (§§ 1053 Paragraph 4, 796 c] ZPO).²⁶

The judge and notary are both bound to be independent and impartial to an equal degree; they are impartial organs of the justice administration system in the same sense.²⁷ For the remainder, the same legal studies and the same practical legal preparatory service with the closing examination certification of 'qualification for the judge's office' (which incidentally equally applies to the German lawyer) are required of both professions.

Transferring further judicial functions to German notaries is the subject of current legal policy debate in Germany, e.g. the certificate of inheritance procedure, the safeguarding of wills, and similar items. This 'disburdening the administration of justice through notarial activity'²⁸ is currently being discussed more actively. The conference of German Ministers of Justice very recently decided that 'the Federal Minister of Justice, together with the states, wishes to test which civil court tasks in the voluntary jurisdiction area can be transferred to notaries with the goal of making the procedure effective and relieving the justice system'; the German Federal Ministry of Justice is expected to chair this committee.²⁹ The German professional notarial organisations, with the Federal Chamber of Notaries at the summit, support these efforts. They are based decisively on the German notary's most important 'asset', his independence and impartiality.

²⁶ For the remainder see the synthesis in STARKE, Beck'sches Notar-Handbuch, K I, Rd.-No. 7.

²⁷ ODERSKY, loc. cit., 8.

²⁸ Opening presentation at the 25th German notarial conference in Münster, 10-13.06.1998; report by WAGNER, special issue of the German Notarial Journal (DnotZ) for the 25th German notarial conference, 34 ff.; JERSCHKE, Podium discussion on this report, loc. cit., 147. On relief of administration of justice, see for the remainder, the proposals by the Federal Council of Notaries in their 1997 Report on Activities 1997, DNotZ, 1998, 514 ff., 525 f., 530 f.

²⁹ TOP C. II.4 decision, Autumn conference of justice ministers on 6 November 2002 in Berlin, published in NJW-Dokumentation, issue 48 of 24.11.2003, XXXV.

B.

Safeguards:

Standards at various legal stages ensure the notary's impartiality

I. Personality-related and behaviour-guiding standards

1. Legal stipulations in German notarial law justify and concretise the notary's duty to be impartial. Particularly outstanding examples will be cited below, without any claim to completeness.

- a) 'Only such applicants are to be appointed as notaries, who are suited to the office of notary by virtue of their personality and performance.' § 1 Paragraph 1 Sentence BNotO stipulates this as a standard in principle³⁰ which is more topical than ever today: safeguarding his independence and impartiality places special demands on the notary's personality at present. This is examined more closely later.
- b) § 17 Paragraph 1 Sentence 1 BNotO and § 140 Sentence 2 which set defining cost regulations (KostO) for German notarial fees: the notary is bound to charge the legally specified charges for his work.

The official obligation on all notaries to charge the legally specified costs equally and without exception, for their entire official activity is an essential basis for the notary's independent, impartial and free performance of his office and for general trust in such performance of his office; the free choice of the notary should be solely guided by the parties' trust and not by consideration for a 'cheap price'.³¹ Competitive elements that are alien to the notarial function are excluded through this regulation.³² Agreements on notarial costs are thus invalid, regardless of whether the agreement relates to the apportionment of charges as such, the fee rate or the value of the transaction or whether higher or lower costs are agreed.³³

- c) § 16 BNotO, §§ 3 ff. of the certification law (BeurkG) ensure the notary's independence and impartiality in the certification procedure. The law subjects the notary to restrictions on his activity. These are based on the corresponding regulations for judges in civil and criminal proceedings regulations.³⁴

§§ 6, 7 BeurkG contain absolute grounds for exclusion. The certification of private acts is invalid if the notary himself, his spouse or a person who

³⁰ SEYBOLD/SCHIPPEL, loc. cit., Rd.-Nrn. 4 ff. on § 6 BNotO.

³¹ SEYBOLD/SCHIPPEL/VETTER, loc. cit., Rd.-Nr. 5 on § 17 BNotO.

³² SEYBOLD/SCHIPPEL/VETTER, loc. cit..

³³ SEYBOLD/SCHIPPEL/VETTER, loc. cit..

³⁴ In detail:

KEITEL/WINKLER, BeurkG, loc. cit., Rd.-Nr. 5 zu § 3.

is related to him in a direct line is immediately involved on a formal basis in the certification.

This regulation is supplemented by prohibitions on involvement in § 3 Paragraph 1 BeurkG. According to these, a notary is not to become involved in a certification when it deals with his own affairs, his spouse's affairs or the affairs of someone related to the notary in a direct line; this also includes the affairs of a company in which the notary holds a stake of more than five percent. The provision contains a 'should' stipulation, which although it has no influence on the effectiveness of the certification, nonetheless justifies an unconditional official duty by the notary.³⁵

- d) § 16 Paragraph 2 BNotO justifies the notary's right and duty to abstain from exercising his function due to bias. The reason for such a 'self-rejection' can for example arise from personal or economic links to the parties or other reservations which the notary has relating to his independence.³⁶
- e) § 14 Paragraph 3 Sentence 2 BNotO; the notary must avoid all behaviour that creates the appearance of a violation of obligations legally imposed on him, especially the appearance of dependency or partiality.
- f) § 14 Paragraph 4, Paragraph 5 BNotO prohibits the notary from doing his 'own business' under the mantle of his notarial office. Apart from other items, there is an explicit mention of a prohibition on engaging in real estate transactions or taking stakes in companies that are incompatible with the office. The law primarily assumes these to be companies that undertake building activities (§ 34 c] of the German trade regulations).³⁷
- g) § 8 BNotO prohibits the notary from exercising other professions alongside his notarial function, or makes such ancillary jobs dependent on approval from the supervisory authorities.

Regular civil service relationships of all types are excluded. Honorary offices as well as fulfilling a (political) mandate in the federal parliament, state assembly, district assembly or borough council are allowed. Extensive casuistry exists in this regard.³⁸ These questions are of the greatest current importance for the German notarial profession. The Federal Court of Justice, the highest German court in civil cases, and the Federal Constitutional Court recently had to decide whether a notary's membership in the supervisory board of a bank whose statutory object also includes real estate business can be approved. The Federal Court of Justice rejected approval; the Federal Constitutional Court referred the case back, requiring the Federal Court of Justice to take into account further aspects, especially whether a 'milder device' (such as a prohibition on acting as a notary in the relevant bank's affairs) may be sufficient. Ultimately this relates to the endangering of trust in the notary's independence and impartiality and the possible 'bad impression'

³⁵ KEITEL/WINKLER, loc. cit., Rd.-Nr. 10 on § 3.

³⁶ KEITEL/WINKLER, loc. cit., Rd.-Nr. 9 on § 3.

³⁷ SEYBOLD/SCHIPPEL, loc. cit., Rd.-Nr. 68 on § 14.

³⁸ STARKE, in Beck'sches Notar-Handbuch, K I, Rd.-Nrn. 24 ff.

created, i.e. the central aspects of the notarial profession of interest here. The decision³⁹ has been assessed in varying ways and the uncertain legal situation created as a result has also been criticised.⁴⁰

- h) § 29 Paragraph 1 BNotO standardises the prohibition on advertising that is incompatible with a public office. The prohibition on advertising also raises questions and problems, occasionally of a fundamental nature.⁴¹ Such questions range from challenging the prohibition in principle⁴² up to many individual questions which often arise in connection with notarial advertising behaviour in practice, e.g. is stating focuses of activity or interest permissible? Are notices without a particular triggering occasion permissible?⁴³, and much more. For the lawyer commissioned as notary there is the further problem of the contrast between the liberalised lawyer's right to advertise and the prohibition in principle on notaries advertising; more will be said about this later.

2. Professional-law rules supplement the legal provisions.

- a) Guideline-recommendations from the Federal Council of Notaries.⁴⁴ Some examples from these:

Figure I 1.2. The notary must safeguard his impartiality against a one-sided application when drawing up drafts and expert opinions. The same applies to the legally permissible representation of an involved party in procedures of whatsoever nature, especially in land registry and commercial registry affairs as well as certificate of heirship procedures.

Figure I 2. Further professional activities by the notary as well as ancillary jobs may not endanger his independence and impartiality.

Figure VI 1.2, 2. practical implementation; measures to prevent breaches of prohibitions on involvement.

Figure VI 3.1, 3.2. Further provisions on the obligation to charge a fee and the prohibition on waiving fees.

Figure VII, passim, especially 1.2. Advertising is forbidden to the notary insofar as it leads to doubt as regards independence or impartiality or for other reasons is incompatible with his position in precautionary administration of justice as the holder of a public office.

³⁹ BVerfG of 23.09.2002, DNotZ 2003, 65.

⁴⁰ Compare (specifically) JAEGER, loc. cit., 19 f.; BNotKIntern, issue 5/2003, 5 f.

⁴¹ Overview in STARKE, in Beck'sches Notar-Handbuch, K I, Rd.-Nrn. 129 ff.

⁴² KLEINE-COSACK, 'Advertising freedom for notaries – from an official myth to a basic law', Anwaltsblatt, News for Members of the Deutscher AnwaltVerein e.V., 2003, 601. The notarial profession is the 'most unfree self-employed legal advisory profession' in Germany; informative advertising needs to be allowed on a broad scale that conflicts with principles accepted up to now; only then can the German notarial profession exist in 'increased competition in a services market without national borders' (loc. cit., 601, 606).

⁴³ STARKE, loc. cit., Rd.-Nrn. 134, 140.

⁴⁴ Proofs above in footnote. 8 f.

- b) The guidelines of the regional German notarial chambers supplement and clarify these further. Safeguarding the notary's independence and impartiality is also the guideline here.⁴⁵
- c) The European Code of Notarial Statute Law⁴⁶ extends the national state professional regulations internationally.

Figure 1.2.5 prohibits 'individual' advertising and refers to the 'collective' advertising by the notarial professional organisations, which offer 'consumers and companies an easily accessible source of information'.

Figure 2 of the Code contains an interesting regulation, namely the conditions and modalities for the notary's activities in international legal transactions. Figure 2.1 of the Code refers to the involved parties' right to request the assistance of the 'territorially competent notary'. The notary from the country of origin, who accompanies clients abroad, informs his territorially competent colleague of this and agrees the procedures for cooperation with him. The principle that only the territorially responsible notary can make a certification remains unaffected.

The German legislator has included the following (a further notable example of the influence of international regulations on national notarial law) in accordance with § 11 a) in the BNotO:⁴⁷ 'The notary is competent to support a notary appointed abroad in his official transactions and to travel abroad for this purpose ... In this instance he must take account of the obligations he bears under German law.'

A novelty can be observed here: German law now allows two notaries to be involved in the same case in cases with cross-border affairs. According to the traditional German understanding of the principle of impartiality (the notary is a neutral, solely responsible mediator for the parties), the cooperation of several notaries is otherwise excluded from the same certification for legal principle reasons.⁴⁸

The German legislator has recognised here and pragmatically decided that in 'cross-border' transactions, the involvement of several lawyers offers obvious advantages,⁴⁹ namely: greater legal security, maintenance of the client's relationship with 'his' notary, enhanced balance as regards legal professional knowledge, and is therefore permissible in this framework.

⁴⁵ Comprehensive overview in WEINGÄRTNER/WÖSTMANN, loc. cit., 11 ff.

⁴⁶ Proof above in footnote 13 f.

⁴⁷ Law of 31.08.1998, BGBl. I, 2585.

⁴⁸ Compare (specifically) BAUMANN, loc. cit., 45; an interesting European comparison is provided in DECKERS, *La Profession Notariale, sa Déontologie et ses Structures*, published by the U.I.N.L., Commission des Affaires Européennes et de la Méditerranée (C.A.E.M.), Académie Notariale, Amsterdam 2000, 73, and passim, with explicit reference to the German notarial profession as representative and exemplary in this relationship ('Never several notaries in a case'). However, also compare DECKERS/VAN VELTEN, 'Le Notariat et le Marché juridique: Monodisciplinarité ou Multidisciplinarité?', *Notarius International* 3-4/2003, 105 ff.; partially different opinion.

⁴⁹ DECKERS/VAN VELTEN, loc. cit.

3. The German notary is an independent, impartial guide for the parties involved. He is obliged to avoid even the appearance of partisanship. This professional duty can also be violated, if certification procedures which deviate from the rule are selected and therefore create given advantages for one party. It is thus worth noting the interesting legal phenomenon that notarial professional law ultimately influences the organisation of contracts being certified. In this way the notary's impartiality becomes a concrete guarantee of contract law.

The notary must arrange the certification procedure in such a way that the goals pursued by law through the certification requirement are reached, that the certification's protection and instruction function is protected in particular and an appearance of dependency or partisanship is avoided. Accordingly, the following is forbidden: systematic certification using representatives; the systematic division of contracts into offer and acceptance, where, when the division is justified for practical reasons, the offer is to emanate from the contractual party requiring instruction; the simultaneous certification of more than five records with various parties; the abusive relocation to other notarial deeds of agreements essential to the transaction.⁵⁰

In recent years provisions introduced in the certification law emphasise this principle. § 17 Paragraph 2 a) BeurkG⁵¹ stipulates that parties requiring instruction cannot be excluded from the certification. It is also explicitly demanded that the parties should be given a sufficient opportunity to deal with the topic of the certification (in advance). This duty already contained in the professional practice guidelines of the notarial councils was transferred to the certification law (BeurkG) in 2002. According to § 17 Paragraph 2 a) Figure 2 BeurkG, new version,⁵² moreover, a draft contract must be submitted two weeks prior to certification in the case of 'consumer contracts'. It is the notary's official duty to ensure compliance with this time frame. This provision relates primarily to purchase contracts in the construction business and thus has a significant effect on notarial practice. The stiff two-week deadline contained in the provision was partly heavily criticised. Ultimately, German notaries welcome a regulation of this type in any case insofar as it emphasises the notary's 'consumer protecting', impartial function in law.⁵³

II. Ensuring the notary's impartiality in special professional law configurations and other special situations

Ensuring the notary's impartiality leads to special problems if the notarial profession is simultaneously exercised with other activities. Such possible combinations are partially handed down historically and are partly the result of

⁵⁰ For example, see the guideline issued by the STUTTGART COUNCIL OF NOTARIES (responsible for the reporter) of 18.06.1999, Figure II, printed by WEINGÄRTNER/WÖSTMANN, loc. cit., 135; otherwise KEIDEL/WINKLER, loc. cit., Rd.-Nrn. 17 ff. on § 17 BeurkG.

⁵¹ Introduced into the law in the context of the professional law innovation of 31.08.1998, BGBl. I, 2585.

⁵² Contained in the 'Law on modifying lawyers' representation before regional courts of appeal' of 23.07.2002, BGBl. I, 2585.

⁵³ Opening speech by GÖTTE, President of the Federal Council of Notaries on the 26th German Conference of Notaries in Dresden 2002, Special issue of the German Notarial Journal, 2002, 8 f. – 'Evaluation' on § 17 Abs. 2 a) BeurkG: BNotKIntern 6/2003, the 14 day deadline is often met with incomprehension by the parties to the deed; in particular the 'consumer' (!) feels spoon-fed – the result of a Federal Council of Notaries survey in the report to the Federal Ministry of Justice.

new developments in the legal advisory professions. Apart from this, competitive and business pressures, which major clients try to exert, have clearly increased in these professions.

1. This essentially involves the notary's professional connections in Germany to the following summarised areas.

a) Lawyers commissioned as notary

The German lawyer commissioned as notary exercises a liberal profession as a lawyer and is the holder of a public office as a notary. This twin position leads to special professional law risks of collision, which, given the fundamental changes in the legal profession⁵⁴ in recent years, have become increasingly visible and practically relevant.⁵⁵

The lawyer commissioned as notary in Germany is the result of a tradition reaching back a long time. In the past it did not have a competitive relationship with the single profession notaries, as it was strictly geographically demarcated by the official notarial jurisdictions; 'legal advice', in the broadest sense, took place as a rule at regional level. This has changed. Changes in the external form of exercise of the notarial profession can be observed. In addition to the single profession notaries, a lawyer-notarial profession, on a significant scale, has developed in supra-local and supra-regional large firms, but also in 'medium-sized' firms, which are following the trend towards large, often also internationally oriented office units.⁵⁶ This development, linked to greater competition and internationalisation, increases the problem of safeguarding the notary's independent and impartial attitude – an essential basic principle of German and European notarial law.⁵⁷

In addition, German constitutional law jurisprudence in professional law issues for lawyers commissioned as notary is clearly showing a trend towards liberalisation, as already shown via listed examples. This aggravates the problem.

b) Professional connections

Exercise of the notarial function as such is an office transferred by the state to be exclusively exercised in person. Notaries' professional relations can therefore only relate from the outset to personal and practical factors, 'assistance' for exercise of the function.⁵⁸ The principle that the notarial profession as such is not 'suitable for association' means

⁵⁴ Compare with DE LOUSANOFF, loc. cit., passim.

⁵⁵ Comprehensive overview by KATJA MIHM, Professional law collision problems for the lawyer-notary; DeutschesAnwaltVerlag, Volume 40 of the series of publications by the Institute of Lawyer law at Cologne University, 2000, Dissertation to Law faculty; Dissertation supervisor Prof. Dr. Martin Hensler, Second assessor Prof. Dr. Barbara Grunewald; accompanying support from Dr. Tim Starke, then Chief Executive of the Federal Council of Notaries.

⁵⁶ MIHM, loc. cit., 261; EUE, The notarial profession at the crossroads: administration of justice or a legal advice market; Commemorative volume for Schippel, Munich 1996, 600 ff., 628; GAUPP, The meaning of notarial professional law, loc. cit., 123; ZUCK, The notary between his office and a liberal profession, Commemorative volume for Schippel, 818 ff., especially 832.

⁵⁷ STARKE, in Beck'sches Notar-Handbuch, K I, Rd.-Nr. 39.

⁵⁸ STARKE, loc. cit., K I, Rd.-Nr. 35.

that lawyers commissioned as notary can only establish an association for their professional practice as a lawyer; § 59 a) Paragraph 1 BRAO.

Single profession notaries can only associate with notaries appointed to the same place of office for joint practice. A maximum number of two notaries for joint professional practice in a notarial firm is determined by the German States on the basis of corresponding authorisation as a rule.⁵⁹

Lawyers commissioned as notary are allowed to associate with other lawyers commissioned as notary, lawyers, patent lawyers, tax consultants, fiscal advisers, auditors and chartered accountants for joint practice or to share joint business premises with them; § 9 Paragraph 2 BNotO. The connection between the lawyer commissioned as notary and the auditor was long contested. In its ‘auditor’ ruling of 1998⁶⁰ with the invocation of the constitutional law principles of equal treatment (Art. 3 constitutional law [GG]) and professional freedom (Art. 12 GG), the Federal Constitutional Court approved association between lawyers commissioned as notary and as auditors. The re-enactment law of the BNotO⁶¹, as a consequence, significantly extended the possibilities for professional association them to the professions of patent lawyer, auditor and chartered accountant. The lawyer commissioned as notary can carry out each of these professions and even several alongside the notarial function without a permit.⁶² Critics observe that ‘the gate has been opened wide to the multiprofessional firm’⁶³ in the area of the lawyer commissioned as notary.

Apart from this, the requirements of notarial professional law, with the imposition of impartiality at its summit, place close limits on the involvement of the lawyer commissioned as notary in professional-practice firms and corporations in practice. While lawyers commissioned as notary are permitted to participate in a limited liability law firm (GmbH) in their capacity as a lawyer, they cannot establish any employee relationship with the GmbH, e.g. as the business manager.⁶⁴ The partnership firm, which was introduced for the liberal professions with a law dated 01.07.1995, is a professional-practice firm with legal capacity intended to fill the gap between a corporation and a civil partnership. Lawyers commissioned as notary may only participate in such a partnership in their capacity as lawyers.⁶⁵

The European Economic Interest Association⁶⁶ is open to notaries (both single profession notaries and lawyers commissioned as notary). The same applies to cooperation, if they do not act externally in legal intercourse (which for example is

⁵⁹ Overview in STARKE, loc. cit., Rd.-Nr. 36 f.

⁶⁰ DNotZ 1998, 754.

⁶¹ From 31.08.1998, BGBl. I, 2585.

⁶² SEYBOLD/SCHIPPEL, Rd.-Nrn. 2, 36 on § 8 BNotO.

⁶³ SEYBOLD/SCHIPPEL, loc. cit., Rd.-Nr. 12 on § 9 BNotO.

⁶⁴ Disputed; rejecting STARKE, in Beck’sches Notar-Handbuch, K I, Rd.-Nr. 42; limited advocacy SANDKÜHLER, the same, K II, Rd.-Nr. 33.

⁶⁵ STARKE, loc. cit., K I, Rd.-Nr. 45; SANDKÜHLER, loc. cit., K II, Rd.-Nr. 34.

⁶⁶ EEC regulation 2137/85 (EC Official Journal L 201 of 31.07.1985) as well as the corresponding executory law in Germany of 14.04.1988, BGBl. I, 514.

already the case with mutual indication of cooperation partners in firms' printed matter). Further details of this need not be given.⁶⁷

2. In particular, professional configurations that endanger the notary's impartiality demand special safeguards. In this regard, there are new regulations in Germany which strictly emphasise protection of neutrality on the one hand, and on the other, there are also trends towards professional law liberalisation.

- a) In accordance with § 3 BeurkG (the provision has already been mentioned), the notary should refuse to become involved in instances where personal bias arises. The provision justifies an unconditional, non-disregardable general official duty.⁶⁸ Several legal practice restrictions were introduced in 1998 as a corollary to the significantly expanded activity and business firm possibilities open to the lawyer-notary to ensure the notary's impartiality.

In particular it is not permissible to take over a notarial transaction for a person who is linked to the notary through joint exercise of a profession or with whom he has shared business premises; § 3 Paragraph 1 Sentence 1 Figure 4 BeurkG. A link to joint professional exercise arises in all of the configurations listed above.⁶⁹ How far this prohibition on involvement extends, is best demonstrated by the fact that the partner is equated with the partner himself and his close relatives. Thus, if the notary cannot become involved because his own affairs are concerned, or those of his spouse, his children etc., he cannot become involved either if his partner is in this position.

The most important restriction is the newly included prohibition of involvement due to non-notarial activity by the notary or a partner stipulated in the law with effect from 08.09.1998 in § 3 Paragraph 1 Sentence 1 Nr. 7 BeurkG. EYLMANN, the then Chairman of the German Federal Parliamentary Legal Affairs Committee, synthesises the incisive effect plastically as follows:

‘If the lawyer himself or his associate or partner as a lawyer, patent lawyer, tax adviser, auditor, chartered accountant or in another way is or was involved in an activity which includes a private transaction, this is a taboo for him as a notary.’⁷⁰

The provision is of extraordinary importance in practice,⁷¹ particularly as § 3 Paragraph 1 Sentence 2 BeurkG obliges the notary to ask the parties if a case of ‘prior involvement’ occurred in the sense of this provision and to note the answer in the deed.

⁶⁷ Detailed presentation in STARKE, loc. cit., K I, Rd.-Nm. 46 – 50.

⁶⁸ SANDKÜHLER, in Beck'sches Notar-Handbuch, K II, Rd.-Nr. 50.

⁶⁹ In detail SANDKÜHLER, loc. cit., K II, Rd.-Nm. 54 ff; KEITEL/WINKLER, loc. cit., Rd.-Nm. 76 ff. on § 3 BeurkG.

⁷⁰ Quotation in KEITEL/WINKLER, Rd.-Nr. 96 on § 3.

⁷¹ The facts and drawn limits are very difficult to define in individual details; overviews in SANDKÜHLER, loc. cit., K II, Rd.-Nr. 76; KEITEL/WINKLER, Rd.-Nm. 95 ff. on § 3.

Violations of prohibitions on involvement do not lead to the invalidity of the certification, but are breaches of official duties, which can also have liability law consequences.

The strict legal duty of the notary to be neutral does not end with the termination of a specific mandate. It continues. A lawyer-notary, who acted as a notary in an affair, may not take over a lawyer's mandate in the same affair. This would violate both his duty to be neutral as a notary and his professional law as a lawyer; § 45 Paragraph 1 BRAO. A notarial function and a liberal professional function in the same affair exclude each other due to legal principles.

- b) The notary is bound by a prohibition on engaging in advertising that is incompatible with a public office; § 29 Paragraph 1 BNotO. The legislator hereby consciously creates a contrast with the regulations for other legal and business consultancy professions, especially for the rules applying to lawyers.

In principle this prohibition on advertising also applies to the lawyer-notary. The so-called 'Logo ruling' by the Federal Constitutional Court from 1997⁷² nonetheless revealed constitutional law limits. A 'Logo' (for advertising purposes) on the letterhead of a law firm, which includes lawyer-notaries, was considered permissible; constitutional law requires that the professional profile of a permissible association between the lawyer-notary and lawyers be taken into account. The ruling has far-reaching effects. According to it a 'restricted prohibition on advertising' applies to lawyer-notaries.⁷³ The ruling has encountered significant criticism, but represents the current legal situation.⁷⁴

Apart from this, the federal notarial regulations solve the tension between deregulated lawyers' advertising rights and the theoretical existing prohibition of notarial advertising in their new regulations by the principle that the stricter professional law takes precedence. According to § 29 Paragraph 2 BNotO, the advertising allowed to a notary (operating in several professions) in the exercise of his profession as a lawyer, tax consultant, auditor, etc. does not apply to his activity as a notary. A lawyer-notary can only use the more extensive advertising facilities available to him under other professional law, if he abstains from

⁷² Ruling of 24.07.1997, DNotZ 1998, 69 m.Anm. SCHIPPEL.

⁷³ Overviews of this 'restricted prohibition on advertising' in STARKE, in Beck'sches Notar-Handbuch, K I, Rd.-Nrn. 130 ff.; SANDKÜHLER, the same, K II, Rd.-Nrn. 120 ff., each with further proofs.

⁷⁴ Critical, for lawyers' law already, STÜRNER, Reports by the Federal Council of Lawyers, issue 5/2003 v. 15.10.2003, 214, 220: In the area of lawyers' law the Federal Constitutional Court has rendered itself in many rulings to a promoter of market and service freedom ideas, which the tradition of the understanding of the legal profession as a body of administration of justice tends to neglect'. 'The market has been opened up to European competition'... 'with the effective help of the Federal constitutional court'; 'powerful American law firm oligopolies have arrived'. For the remainder, STÜRNER vehemently criticised German notaries as regards independence and impartiality almost three decades ago: 'The Notary – an independent organ of the administration of justice?', JZ 1974, 154. The excessive criticism has yielded ground in a compensatory manner; compare with STÜRNER, 'The notarial deed in European legal transactions', revised version of a presentation given by the author at a meeting between French and German notaries in Baden-Baden on 08.10.1994, DNotZ 1995, 343.

mentioning his 'notary' function in this advertising and does not create any 'advertising content' relating to the notarial function.

3. The international coordinator of this topic highlighted the notary's impartiality vis-à-vis 'large business players' as an important problem in his presentation.

- a) There can be no doubt about the meaning of this question. It is familiar to every notary from daily practice. Cases of this type occur a multitude of times: a building contractor, a lending institution, a conglomerate frequently involved in real estate business, a public body, etc. regularly have certification arranged by a specific notary; as it were, he is their 'house notary'. This special relationship is often reinforced further by the fact that the notary does the certification in the business premises of the party concerned.

Moreover, extensive cooperation often exists with lawyers, auditors, tax advisors, business consultants, etc. They 'supply' the notary with clients, often also for the draft deeds worked out for the processes to be registered. Draft deeds create additional problems in practice. Experience shows that the proneness to error during the certification of unknown drafts is clearly higher.⁷⁵ Moreover, double fees often arise for the clients, as the German notary is not allowed to share or reduce costs in such instances in principle.

Every notary knows examples of this type, which could be expanded on. Ultimately they all relate to the same level, namely the tension relationship between material success on the one hand, and the notary's independence and impartiality on the other.⁷⁶ A lasting client relationship is unquestionably 'in itself a pleasing sign of trust in the notary', but cannot affect the notary's freedom.⁷⁷

- b) Safeguarding independence and impartiality in such cases and avoiding the mere appearance of a violation of the neutrality duty rule out precise legal evaluation and regulation in many cases.

The right recommendation in the 'house notary' case may involve notifying this circumstance if third parties are involved in the certification and instructing the other parties that they are free to choose a different notary. The right recommendation is to ensure that the notary's name is not mentioned in the documentation (particularly 'susceptible': sales brochures for investments and property). 'External certifications' in the business premises of a (permanent) client (which are particularly frequent in property transactions) are to be avoided as much as possible if third parties are involved. Figure IX, 3 of the Federal Council of Notaries

⁷⁵ On this topic, comprehensive and practically experienced, WALZ, *Verhandlungstechnik*, loc. cit., 165.

⁷⁶ Representation in SANDKÜHLER, loc. cit., K II, Rd.-Nr. 48. Comprehensive and almost aggressive for notarial independence and impartiality DECKERS, *La Profession Notariale*, 61 ff. The 'relationship between the notarial profession and money' will determine the future of the profession; 64, Figure 51; there and passim also pronouncedly against all commercial appearance forms of the profession, especially also in advertising (65 ff.). DECKERS' arguments can be transferred to German notarial law, which DECKERS repeatedly lists as exemplary in his report on the notary's independence and impartiality.

⁷⁷ SEYBOLD/SCHIPPEL, Rd.-Nr. 32 on § 14 BNotO.

guideline recommendations declares an official transaction outside the notary's premises inadmissible, if the appearance of officially non-permissible advertising, dependency or partisanship is created as a result or the protective goal of the certification requirement is endangered.⁷⁸ However, regional chambers of notaries have permitted partially deviating versions in their guidelines.⁷⁹ For the remainder, the Federal constitutional court accepted professional law restrictions of certification outside the business premises in 2000⁸⁰, but again adopted a 'liberal' attitude as regards the details.

- c) Lasting advisory relationships in the lawyer-notary's firm, as primarily typical for business lawyers, tax advisors or auditors, create a further not-easily-solved problem.

The simple circumstance that a party is represented in other affairs legally or in tax matters by the firm, is generally harmless for the adoption of a notarial official transaction. The prohibition of involvement due to the 'prior involvement' rule, which was mentioned, is exclusively related to the mandate and not related to the client. Demarcation of limits is difficult in detail. In the end, it depends on the scale and intensity of the existing consultancy relationships.⁸¹

Apart from this, permanent customer relationships and links through other constant cooperation tend to put to pressure on the notary's fees. The legal answer is clear. It is forbidden to the German notary to make any arrangement concerning the legislatively owed fees.

Finally, all configurations of this type create a special challenge for the notary which largely cannot be dealt with in legal rules: the command to be impartial 'demands a special degree of firmness, as some clients allow themselves to expect the notary they trust to give preference to their interests'.⁸²

⁷⁸ WEINGÄRTNER/WÖSTMANN, loc. cit., 9, with extensive commentary, 352 ff.

⁷⁹ WEINGÄRTNER/WÖSTMANN, loc. cit., 363 ff.

⁸⁰ Ruling of 09.08.2000, DNotZ 2000, 787 m.Anm. EYLMANN. Also see WEINGÄRTNER/WÖSTMANN, loc. cit., 357 f.

⁸¹ SANDKÜHLER, in Beck'sches Notar-Handbuch, K II, Rd.-Nr. 73 m.w.N.

⁸² SEYBOLD/SCHIPPEL, Rd.-Nr.35 a.E., zu § 14 BNotO.

C.

Contract law

The notarial activity in Germany primarily entails the use of contract law; fundamental aspects

I. Legal regulations, starting points

1. The German Civil Code (BGB)⁸³ contains a ‘general section’ on contractual doctrine which applies to all types of contracts, thus not solely to the absolutely outstanding law of obligation, but also property right, family and inheritance contracts (§§ 145 to 157). Obligation law contracts are then regulated separately in their individual types (§§ 305 ff.).⁸⁴

§§ 145 ff. BGB contain the general rules on the conclusion of a contract. The legal fundamental categories of offer, acceptance, consensus and dissent are contained there. § 305 ff. BGB contain content defining standards for obligation law contracts in general. These general provisions are supplemented, defined concretely and varied in the relevant individual passages of the BGB for all essential contract types in civil law.

2. This regulation scheme assumes certain basic categories, which are assumed as normative.

For the liberal society of the second half of the nineteenth century and the legal concept corresponding to this society, the contract (along with private property) was the deciding private legal institution. Liberal contractual thinking achieved its legitimisation ‘through the optimistic belief on the possibility of an almost automatic, ‘naturally growing’ social harmony that appears through a contractual balance: ‘*Qui dit contractionnel, dit juste.*’⁸⁵

The contractual freedom understood in this way gives only a (formally equal) competence to private social organisation; there is a fundamental abstention from an attitude to the material correctness of the result pursued by the conclusion of the contract.⁸⁶ Accordingly, liberal contractual thinking firstly legitimised by process, and so through ‘procedural rationality’, and not material ‘correctness’.⁸⁷

These principles, which are also referred to as ‘contractual freedom’ and ‘private independence’ are supporting pillars of traditional German contract law. They also continue to be so in the framework of the current legal and business order.

⁸³ New publication of the BGB which entered force in 1900 in the version in force from 01.01.2002, BGBl. I, 2002, 42.

⁸⁴ On this for the characteristic BGB ‘dissecting abstraction’ Munich commentary KRAMER, BGB, for § 145, Rd.-Nr. 1 m. footnote 1, quote of SCHMIDT, The German Abstract Approach to Law

⁸⁵ Munich commentary -KRAMER, Rd.-Nr. 2 for § 145, m. justifying quote, FOUILLÉ, La science sociale Contemporaine, 1881

⁸⁶ Munich commentary -KRAMER, loc. cit.

⁸⁷ Munich commentary -KRAMER, Rd.-Nr. 3 for § 145

The institution of the private law contract is currently even experiencing an 'extraordinary global economic situation' due to the collapse of socialism and market globalisation.⁸⁸

3. The principle of contractual freedom incorporates typical individual aspects.

It involves the 'freedom to conclude'. A party who receives an offer to conclude is not bound to accept this offer.

This also includes 'organisational freedom', also called 'freedom of content'. The contracting parties are free to organise the content of their contracts in principle. The special consequence of the organisational freedom according to German civil law is freedom to choose and set a type of contract, 'type freedom'. The contractual partners are not bound under obligation law to select the types of contracts which the law makes available (almost as a model). The contracting parties may conclude contracts with all possible content within the legal limits of contractual freedom and consequently also develop new types of contracts 'independently'.

Ultimately this covers the form freedom of contracts. The BGB includes the principle of the form freedom of legal transactions. A special form, namely the notarial form, is the exception.

II. Limits on contractual freedom

1. The 'contract' as a legal institution has undergone a change in function in Germany and Europe in the last decades. It was recognised that contractual freedom in the legal (formal) sense must be differentiated from contractual freedom in a material sense (geared towards actual assertability) and these two aspects do not always cover each other.

The inherent problem is particularly well clarified by extreme critics of contractual freedom: they argue that contractual freedom is actually 'a castle in the air, an Utopia and not a reality'; the modern task of law is to 'develop criteria and procedures for contractual fairness, whose creation is actually necessary, because contractual fairness does not exist in reality'.⁸⁹

2. German legal literature is extremely comprehensive on the relationship between contractual freedom and contractual fairness.⁹⁰ It should be noted that the reservations relative to pure formally justified contractual freedom have since

⁸⁸ Munich commentary -KRAMER, Rd.-Nr. 5, a.E., for § 145

⁸⁹ Munich Commentary -KRAMER, Rd.-Nr. 5 for § 145, m.w.N.

⁹⁰ (specifically) compare the overview in the Munich commentary - KRAMER, for § 145. Fundamental LUDWIG RAISER, Contractual freedom today, JZ 1958, 1; SCHMIDT-RIMPLER, On the contract problem, in: Functional change in private law institutions, Commemorative volume for L. Raiser, Tübingen, 1974; M. WOLF, Legal transaction freedom of decision and contractual balancing of interests, Tübingen 1970; HÖNN, Compensation for disturbed contractual parity. A contribution to the internal system of contract law. Munich 1982.

encountered a predominant consensus.⁹¹ Situations, which are summarised under the term ‘disrupted contractual parity’ are primarily of interest here.⁹²

III. Paths to solutions

Several paths can be observed in legal theory and practice at present that are henceforth to be pursued as corrections of formal contractual freedom which are perceived as necessary.

1. Private-law consumer protection, decisively initiated by European law stipulations, has now been legally established in Germany and its use has become commonplace in modern German private law practice.

The starting point⁹³ for this feature that has been evident for over 20 years was a concern to ‘protect the weaker party’ and so achieve a suitable distribution of risks. This was expressed for the first time in written-law form in the Law on general conditions of business of 1976, and was soon accompanied by a multiplicity of ancillary laws.⁹⁴ These laws have since been synthesised in the BGB via the ‘Law on the modernisation of contract law’.⁹⁵

Since 01.01.1995, the date of the entry into force of the EC directive on unfair clauses in consumer contracts,⁹⁶ ‘consumer contracts’ (§ 310 Paragraph 3 BGB) in general are subject to the so-called ‘AGB inspection’. With § 24 a) of the law on general Terms of Business (‘Allgemeine Geschäftsbedingungen, AGB’) provision, now corresponding to §§ 13, 14 and 310 Paragraph 3 BGB, a ‘clause inspection’ under §§ 307 to 309 BGB has been explicitly introduced for all contracts in which a consumer and a contractor are involved since 1996. The clause inspection ultimately leads to certain legal ‘consumer protection’ stipulations becoming compulsory and thus essential as ‘consumer protection’ measures.

Extensive written information obligations and revocation rights were also legally introduced. Thus according to the contract law stipulation of § 491 Paragraph 3 Nr. 1 BGB⁹⁷, annual interest, contract costs and preconditions for changing these two circumstances must be stated in consumer loan contracts. A violation of this provision means that the consumer is granted a right of revocation (§ 491 Paragraph 3 linked to §§ 495 Paragraph 1 and 355 BGB).

⁹¹ Synthesis in Munich Commentary-KRAMER, Rd.-Nr. 5 for § 145; Summary with special reference to the notarial profession in KRAFKA, The notary’s approach to current legal developments, DNotZ 2002, 677 ff.

⁹² Synthesis and proofs in LIMMER, Contractual correctness of notarial deeds and European consumer protection, in: Notary and legal organisation. Tradition and the future. Jubilee commemorative volume for the Rhineland notarial profession, published by the Rhineland Council of notaries, Cologne, 1998, 15, 28.

⁹³ Compare the synthesis in KRAFKA, loc. cit., 679 ff.

⁹⁴ (abbreviations) House-door revocation law (1986), Consumer credit law (1990), Instalment revocation law (1996), Telesales law (2000), etc.

⁹⁵ from 26.11.2001, BGBl. I, 3138.

⁹⁶ Council directive 93/13 EEC of 05.04.1993, EC Abl. v. 21.04.1993, Nr. L 95, 29.

⁹⁷ In the version of the ‘Law to amend lawyer representation before regional courts of appeal’ of 23.07.2002, BGBl. I, 2850.

Such legal standardisation of ‘protection of the weak’ has come up against fierce legal criticism. On the one hand, the inadequate demarcation strictness of the terms ‘contractor’ and ‘consumer’, which are decisively important, have been criticised.⁹⁸ On the other, there is criticism that consumer protection legislation is moving away sweepingly from the model of the independent, responsible citizen to the presentation of a ‘person requiring guidance’; apart from this, the economic consequences of this legislation are seldom reflected on, and consumer protection is ‘not free of charge’ from a macro-economic viewpoint.⁹⁹ Finally, there is a criticism of the task which the modern social state has assigned itself in general. This is defined as ‘precaution as a principle for a social legal order in Europe’, according to the opening presentation by RICHTER at the 26th German Conference of Notaries 2002 in Dresden.¹⁰⁰

2. In the same direction (not legally dogmatic, but with practical effect), increasing judicial inspection of content is targeting ‘burdening’ contracts.¹⁰¹ Ensuring a ‘minimum legal standard’ as a basis that must be attained for a contractual agreement has been raised as an issue by the Federal Constitutional Court since the mid 1990s.¹⁰²

This firstly concerned the legal treatment of sureties, which poor relatives of the main debtor had given in extreme situations. A large number of supreme judicial decisions have declared such sureties as legally invalid.¹⁰³ Similarly, a surety of an employee vis-à-vis a lending institution as security for a current account loan granted to his employer, out of concern for his job, was recently declared legally invalid due to violation of “ordre-public” standards.¹⁰⁴

Finally, marriage agreements have been declared invalid under extreme circumstances by the highest judicial jurisprudence up to the Federal Constitutional Court; they had moved away from the ‘normal image’ of legal regulation ‘at the expense of the abstract weaker party’.¹⁰⁵

⁹⁸ KRAFKA, loc. cit., S. 681 m.w.N.

⁹⁹ MÖSCHEL, Influences of European business regulations on German business regulations. Commemorative volume for Wolfgang ZÖLLNER, Tübingen, 1998, Volume I, 403. WAGNER, Minister of Justice of the State of Hessen, Incapacitated citizens’, Frankfurter Allgemeine Zeitung of 24.07.2003, 10: A ‘widely granted right of protection’ is emerging instead of the precedence of private independence’; the consumer ‘packed in cotton wool’ is visibly no longer the ‘responsible citizen, whose civic pride formerly bore a community’. The ‘miserable image of the uncritical, erratic and dominated consumer’ is overlapping and darkening the basis decision-making of our private law order – A development of the ‘Civil code into the petit bourgeois code’? MÖSCHEL, loc. cit.. – The change in the contractual understanding which arises from all this is unacceptable; ERNST, New contract law for German business? FAZ of 19.05.2001, 8; PICKER, Contract law reform and private independence, JZ 2003, 1035 (‘...new consideration at the expense of freedom ...’).

¹⁰⁰ Special edition of German Notarial Journal, 2002, 29 ff., specially 38 f. For the remainder see KRAFKA, loc. cit., 681.

¹⁰¹ On this matter and in the following KRAFKA, loc. cit., 681 f.

¹⁰² KRAFKA, op. cit., 681, Fn 19.

¹⁰³ Jurisprudence proofs in KRAFKA, loc. cit., Fn 20.

¹⁰⁴ Federal Court of Justice of 14.10.2003, XI ZR 121/02, Federal Court of Justice press release of 14.10.2003, published in Der Betrieb, Issue 43 of 24.10.2003, news, XV.

¹⁰⁵ Overview of the entire problem including as regards legal principles, in HOHMANN-DENNHARDT, a judge in the Federal Court of Justice, ‘Possibilities and limits for organising marriage contracts, public presentation at the annual working conference of the German notarial profession in Würzburg on 18.09.2003. For the remainder see the overview in KRAFKA, loc. cit., 682.

3. Yet there is contractual correctness through notarial certification – a further path to solution, through the use of the notary as a ‘mediator and legal integration personality’.¹⁰⁶

This ‘third way’ offers clear advantages in comparison to legal restrictions and judicial inspection of content. The notary’s impartiality as well as the certification procedure’s inspection and instruction obligations protect the parties involved. The impartiality duty primarily prohibits unilaterally preferential or imbalanced clauses, with the result of a correct contract in a public deed after prior advice with the involvement of a knowledgeable neutral party.

This report deals with these aspects in the following section.

¹⁰⁶ KRAFKA, loc. cit., 685.

D.

The notary as the guarantor of contract law – practical implementation; **The ‘added value’ of a notarial contract deed**

I. Allocation of competence to the notary

Private law stipulates which types of contracts require notarial certification. German law applies this provision particularly stringently. Failure to observe legal notarial form requirement leads to legal invalidity; § 125 BGB.

1. The safeguarding of the form goal of notarial certification determines the content and scope of official notarial duties in the certification procedure. The legal form stipulations have the following functions:¹⁰⁷

a) Assurance of consideration. Legal form provisions often serve to protect the declaring parties against overly hasty commitment in particularly risky transactions (‘warning function’). The form goal should arouse consciousness, urge level-headed consideration and demand a seriousness of decision-making that matches the importance of the decision.

b) Assurance of proof. In transactions with a major scope or comprehensive content the legal form requirement seeks to characterise the conclusion of the transaction and its entire content and to determine it clearly, unequivocally and conclusively. The assurance of proof occurs in the interest of the parties, and also in the public interest in maintaining public registers (Land register, Commercial Register).

Notarial certification has special power of proof under German law. The power of proof of a notarial deed in civil proceedings disputes relates to the fact that the people designated in the deed have given clarifications of the stated content before the notary (§ 415 of the civil proceedings regulations).

c) Assurance of instruction. The certification form is stipulated by law in particular when, in addition to the pure warning and proof function, specialist advice and instruction through the involvement of an independent, impartial justice administration body is required during important, legally complicated processes for legal policy reasons (every legal form requirement is the result of a legal/legal policy weighing-up between utility, costs and other disadvantages)¹⁰⁸.

2. German law stipulates a compulsory legal form, especially in property contracts (substantiated legislative provision: § 311 b] BGB; the provision justifies the German notarial profession’s ‘certification monopoly’ for all real estate transactions in the broadest sense); the certification requirement also applies to marital contracts, inheritance contracts, corporate contracts for legal entities,

¹⁰⁷ Overview in BERNHARD, in Beck’sches Notar-Handbuch, F, Rd.-No. 9 ff.

¹⁰⁸ KANZLEITER, Notarial certification as a way to the ‘right contract’. Special issue 2001, Centennial German Notarial Journal, 69, 80.

share transfers, changes of status of legal entities and general meeting reports for corporations as well as for related contracts which contain form-requiring components as essential contractual components – just to name the most important examples in practice.

The certification of property transactions stands to the fore in practice for the German notary. According to German law, testamentary arrangements can also be made by a personal will. Company contracts for partnerships, especially civil partnerships, trading partnerships (open trading firm, limited partnership, with the latter practice often in the legal form of GmbH & Co. KG¹⁰⁹) as well as related share transfers¹¹⁰ do not require notarial certification. Legal practice in Germany frequently uses the last possibility primarily for ‘share-deal’ company sales.¹¹¹

II. Impartial notarial contract certification acts as a guarantee of contract law

The guarantee is supported by two foundation pillars:

- the status determining basic standard of the notary’s impartiality, § 14 Paragraph 1 BNotO, as shown in detail in this report;
- the behaviour determining basic standard, which obliges the notary to undertake comprehensive examination and instruction; § 17 Paragraph 1 BeurkG.

The procedures, utility and guarantee effects of the notarial deed are of interest here on the one hand, and the limits of their effect on the other.

1. Some comments about the procedure for notarial certification.

- a) The ‘negotiation’ (§ 8 BeurkG) is the core item in certification.¹¹² The German legislator increased the substantive content of the notarial ‘negotiation’ with the law of 23.07.2002¹¹³ in a two-fold sense. As already stated, a sentence was introduced stating that in ‘consumer contracts’ the notary must work towards a situation where ‘the consumer has sufficient opportunity to deal with the object of the certification in advance’; a draft contract is to be transmitted two weeks prior to certification. Furthermore, the parties concerned themselves or a ‘trusted person’ should be present at certification.

The new provision was much debated.¹¹⁴ It has been established that legal certification is characterised by the ‘negotiation’ before the notary, with the simultaneous presence of the parties before the notary and his

¹⁰⁹ Mixed corporate law form between KG and GmbH = KG, in which a GmbH is a personally liable shareholder; in Germany this is found very frequently in medium-sized companies.

¹¹⁰ Also insofar the company has property and only its transfer is involved; h.M., cf. MÜNCHENER KOMMENTAR-ULMER, Rd.-Nrn. 26 ff., § 719 BGB.

¹¹¹ The tendency by the German (non-notarial) advisory process to avoid the notarial form or to interpret the form requirement restrictively in practice in corporate law procedures especially in share transfers can be confirmed by any German notary who deals largely with business law.

¹¹² REITHMANN, DNotZ 2003, 603.

¹¹³ So-called regional court of appeal modification of representation law, BGBl. 2002 I, 2850.

¹¹⁴ See above B I. 3., last paragraph.

consultative involvement;¹¹⁵ this is the essential substance of what is understood as notarial certification and which is unquestionably strengthened by the new regulation.

The negotiation always includes the oral reading of the text formulated in writing by the notary, § 8 BeurkG. On the one hand, this serves to create the concrete starting points for clarification and instruction obligations. On the other, it seeks to ensure exact knowledge by the parties of all the details of their statements and also personal inspection by the notary. As it were, the contract text acts as a checklist which is worked through to achieve actual agreement on all open or only seemingly clarified points.

The oral reading, as well as the closing signature by the parties, have the function of a 'settlement event'. This formalisation of the conclusion of the contract creates an atmosphere of 'now or never'.¹¹⁶ The particular importance of the contractual conclusions formalised in this way is constantly experienced by each notary.

- b) The notarial certification procedure, in the presence of the parties and the notary as a neutral advisor, is a 'mediating procedure', which is contrasted with the 'dialectic procedure' of representation of each side of the contract by its own legal advisor. Both are possible ways to the 'right contract'.¹¹⁷ If they are compared, neither of the two procedures can claim a higher 'guarantee of correctness' from a general viewpoint.

The mediating procedure is primarily used if the parties do not have any major conflict of interest practically or in legal issues; or if objective suitable solutions of contrasting interests are possible and the parties place trust in the impartial legal advisor proposing balanced solutions to them. This is the typical situation in property purchase contracts, which largely predominate in notarial practice.¹¹⁸

On the other hand, the 'dialectic' process for finding the 'right' contractual provisions is superior, or necessary, if significant financial or legal difference in interests, and thus organisational alternatives, exist. This applies to acquisition contracts for companies (an example often found in practice). A company acquisition contract is a complex contract which regulates difficult economic relationships against the background of a typically strong difference in interests between the seller and buyer. In such cases of a rather atypical, 'difficult' contractual conclusion, the representation of each party by its own legal adviser is often an imperative measure (which as a rule the parties themselves acknowledge). If a legal notarial certification duty exists in such cases, the notary has the role of 'moderator'.¹¹⁹

¹¹⁵ REITHMANN, loc. cit., 604.

¹¹⁶ WALZ, Verhandlungstechnik für Notare, loc. cit., 169 f.

¹¹⁷ KANZLEITER, loc. cit., 69, 77 ff.; REITHMANN, The 'right' construction contract, Commemorative volume for Johannes Bärmann and Hermann Weitnauer, Munich 1990, 513.

¹¹⁸ KANZLEITER, loc. cit., 78 f.

¹¹⁹ KANZLEITER, loc. cit., 79.

2. Contractual ‘disparity’ is one of the fundamental problems of modern contract law, as listed and proved in the preceding Part C. Notarial certification largely solves this problem or at least reduces it very significantly.

a) ‘Disrupted contractual parity’, ‘dominant excess weight of one side of the contract’¹²⁰ can relate to¹²¹

- practical inferiority, which the other contractual partner cannot resist despite recognising the imbalanced situation or
- ‘situational’ inferiority of a contractual side, who does not recognise the ‘dominating’ pursuit of interests by his contract partner.

The second aspect is particularly important, i.e. absence of necessary information, intellectual inferiority, inferiority in the practical negotiation situation.¹²²

b) § 17 Paragraph 1 BeurkG obliges the notary to ensure that the contract submitted for certification

- reflects the genuine desires of the parties concerned,
- is correct,
- is lawful and clearly drawn up and
- does not disadvantage inexperienced and unsophisticated parties.¹²³

Both, the notary’s impartiality without exception as well as his wide-ranging checking and instruction obligations, protect the parties to the deed from open or latent risks of the ‘disparity’ of contractual positions.

The notarial certification ‘filters’ the content of the contract on the way to the ‘right contract’.¹²⁴

This guarantees a contract that is ‘correct’ in the sense of ‘legal security’. It is the notary’s main task to determine the facts relevant to the contract and to apply the legal rules relevant to the contract, including regulations to cope with disruptions of performance and including execution of the contract in registers, particularly the Land registry and Commercial registry – an essential moment in the ‘guidance’ of the contract by the notary overall.

There is also a guarantee of a contract which as far as possible is ‘correct’ in the sense of ‘contractual fairness’. The impartiality duty categorically prohibits the notary from accepting unilaterally favourable or imbalanced contractual provisions. The preventively working notarial inspection of

¹²⁰ HÖNN, Compensation of disturbed contractual parity, loc. cit.; LIMMER, The contractual fairness of notarial deeds and European consumer protection, loc. cit.; RICHTER, The notary’s legal shaping function; in each case passim.

¹²¹ According to the summary analysis in RICHTER, loc. cit., 21.

¹²² Further differentiation in LIMMER, loc. cit., 28.

¹²³ RICHTER, loc. cit., 22; JERSCHKE, Reality as a model – the right way to a fair contract, DNotZ special issue 1989, 21 ff., 23.

¹²⁴ RICHTER, loc. cit., 23.

content thus pre-empts the purely repressively judicial inspection of content¹²⁵.

- c) Apart from the typically relevant law areas of civil law, contract law also incorporates other relevant areas of law, especially tax law. Special tax law knowledge is not expected from the notary; he can refer the parties to a tax adviser or the tax authorities; German notarial contract deeds very often contain such a reference.¹²⁶ As practice shows, general debate and general indication often trigger targeted tax reviews (the sentence ‘danger recognised, danger averted!’ does not just apply during legal studies!) – an often inestimable contribution to the ‘correct’ fiscal contract organisation.

This experience applies similarly to other special areas of law, and even frequently for financial questions, which influence or substantiate the intended contract.

3. The contract deed is the result of notarial legal implementation in contract law. Notarial legal implementation, on the basis of independence and impartiality, supplies a ‘product’, which can exclusively be ‘offered’ by the notary in the ‘Legal advice and services market’. The ‘added value’ (in the sense of the general topic of this congress) of the notarial deed arises from the:
- legal validity in all relevant legal aspects,
 - immediate executability, § 749 Paragraph 1 Nr. 5 ZPO (which nonetheless only exists through an explicit statement in the deed in German law, not per se),
 - the increased power of proof especially also as regards the time and location of certification, §§ 415, 418 ZPO.

It is foreseeable that electronic conclusion of contracts will be included in the notarial ‘repertoire’ (and is also being prepared for in Germany). The notarial procedure and the deed as its conclusion should not be altered qualitatively as a result; the special features of the notarial assistance would otherwise be lost. This will primarily involve ensuring the contractual will of the parties involved and a check by the notary whether the parties’ indications and instructions have actually been understood.¹²⁷

4. The guarantees which impartial notarial certification offers in contractual law have limits.

Limits already arise from the not unlimited scope of the notary’s inspection and instruction duty. Thus, as is acknowledged,¹²⁸ the notary’s instruction duty does not relate to the economic scope of the business transaction being certified. The notary is not the parties’ ‘guardian’ and is not their business or tax adviser.¹²⁹

The same applies to the tax scope. The fact that a frequent reference to the advisability of specialist tax advice, regardless of this, has been said.

¹²⁵ Above C. III., 2.

¹²⁶ SPIEGELBERGER, in Beck’sches Notary-Handbuch, E, Rd.-Nrn. 12 f.

¹²⁷ RICHTER, loc. cit., 31 m.w.N.

¹²⁸ Specifically BERNHARD, in Beck’sches Notar-Handbuch, F, Rd.-Nr. 55; KEITEL/WINKLER, Rd.-Nrn. 89 ff. on § 17 BeurkG.

¹²⁹ KEITEL/WINKLER, loc. cit., Rd.-Nr. 90 m.w.N.

For the remainder, generally speaking, the principle that mediation via the compulsory certification procedure is not always right or adequate, depends on the situation and case. It has been said that preference can be assigned to the ‘dialectic’ process with separate legal advisors especially in the case of complex contracts with emphatically contrasting interests.

Finally, the principle of freedom of contract which applies as a legal principle and is ultimately guaranteed by German Constitutional law¹³⁰ also establishes limits; contractual freedom is an essential component of this. For example, if the ‘inexperienced’ or ‘unsophisticated’ contractual party has recognised the situation and legal position due to notarial instruction, a further inspection and influencing by the notary is excluded even if there is one-sidedness in the contract conditions stipulated by the other party. The notary is then literally ‘at the end of his wits’; every practitioner knows this. An ‘open’ contractual situation which excludes ‘disparity’ is created.¹³¹ The fact that reservation of broad contractual-freedom limiting general clauses § 134 BGB (illegality) and § 138 BGB (violation of public order; ‘*ordre public*’) always applies is self evident.

III. The notary’s impartiality as a guarantee of contract law – attempt at valuation and other aspects

1. Valuation means weighing up advantages and disadvantages. While the use of the notary as a neutral, competent mediator of the contract conclusion also earns some points on the ‘negative’ side according to understanding in Germany, the advantages on the ‘positive’ side nonetheless outweigh these by far.
 - a) On the ‘negative’ there is the legal requirement to have notarial form, which according to German law is a constituent requirement for the legal validity of the relevant contract. There is no freedom of choice; approaching a notary is unavoidable. Some circles, particularly business circles, regret this.

The fees arising from notarial certification which as stated cannot be waived according to German cost law, are necessarily tied up with this. Nowadays it cannot be overlooked that increased ‘cost consciousness’ in business can create aversions to the imposed notarial form and the ensuing cost burden. A switch to a simpler less expensive foreign certification often involving the mere signature of texts prepared elsewhere is therefore not uncommon with large contracts in business.¹³²

This negative cost factor very often diminishes on closer examination. The value fee system in German cost law ensures that the economic importance of registered legal transaction and costs are in a suitable

¹³⁰ (specifically) compare – MAUNZ-DÜRIG-HERZOG, Commentary on constitutional law, appearing continually, Rd.-Nrn. 101 ff. on Art. 2 GG

¹³¹ RICHTER, loc. cit., 22 f.

¹³² There is constant jurisprudence by the Federal Court of Justice on the legal validity of the ‘foreign certification’, e.g. BGHZ 80, 78 f., demands the ‘equal validity’ of the foreign certification procedure with the following essential criteria: test and certification duty; establishment of the parties identity; a record of the negotiations; oral reading; approval; signing and sealing.

proportion to each other. Advice of both sides of the contract by the notary as the joint legal adviser as a rule generates much lower costs than where both sides involve their own advisers.¹³³

It remains to be pointed out that notarial fees also include the German notary's compulsory professional liability insurance (§§ 6 a], 19 a] Paragraph 1 BNotO). While the insurance cannot contribute anything directly to the 'right' contract, it does guarantee the parties compensation for damages in cases where this target cannot be reached due to an error by the notary.¹³⁴

b) On the 'positive side' there are all the legal and practical advantages of contracting through notarial certification and their 'results', the notarial deed, as presented above. The fact that these advantages are decisive primarily emerges today from their direct confrontation and comparison with the legal-system and practically deviating consumer law system at European level. This newly created consumer law is characterised on a summary level by¹³⁵

- the definition of the consumer
- the compulsory content of the contract
- the written form, understood as consumer information
- the legal provision of time-frames for consideration and revocation or rights of withdrawal.

The fact that new contractual law which is far removed from the previous understanding of contract law determined by freedom of contract has emerged was observed and commented on in the general contract law Part C of this report. To summarise,¹³⁶ the following are subject to criticism: the division of contract law, depending on whether a 'consumer' is involved in concluding the contract or not, with all the difficulties of a safe legal definition of this term; the binding legal content of consumer contracts, where empirical and legal understandability are simply stipulated (this is problematic as regards the well known time-share arrangement, for example); the specified written form for consumer information, with the trend towards never ending contract texts that are reminiscent of US contractual practice; the introduction of general periods for consideration (corresponding to the Anglo-American 'cooling off' principle) as well as corresponding revocation or withdrawal rights, at the price of significant legal uncertainty, with the latter probably being the most important point of criticism.

¹³³ As regards the advantageous organisation of the German notarial fee law for the parties compared with the international situation see KANZLEITER, loc. cit., 80; SCHWACHTGEN, DNotZ 1999, 268, 270 f.; EUE, Administration of justice or legal supply market, loc. cit., 611 f. with a reference to a publication in the business magazine CAPITAL 9/1993, 199 ff. and an expert opinion by the audit firm KPMG.

¹³⁴ Justified reference in KANZLEITER, loc. cit., 82, who also declares the notarial profession as the 'best insured profession'! This estimate should be accepted.

¹³⁵ Overview, with the most important EU directives on consumer law, in RICHTER, Rechts-gestaltende Funktion des Notarys, loc. cit., 25.

¹³⁶ RICHTER, loc. cit., 26 ff.

- c) Certification by the notary as the impartial mediator between the contract parties makes such drastic and legally unsatisfactory interventions in contract law superfluous. There can be no doubt that notarial contracts demonstrate ‘greater parity’ as regards their ‘internal contractual fairness’ than non-registered contracts through decisive support of private ‘self-control mechanisms’.¹³⁷

Notarial contracts adapt flexibly and quickly to changing fairness standards. The German notarial chambers have always reacted quickly with corresponding directives to new business contract implementations, which trigger special requirements for protection. For example, this was noticeable in construction law. A rapid reaction to new organisational and investment models (as well as shortcomings) cannot be offered by any legislative procedure, and even less by respective court decisions many years later.¹³⁸ The notarial contract is also superior in terms of rapid updating of contractual content¹³⁹.

2. Impartial legal advice¹⁴⁰ and legal implementation by the notary aims to avoid conflict. It anticipates the dispute-settling judicial function at the level of free consensus. It works at relieving the courts.¹⁴¹ It takes preventive effects at a preliminary level, in contrast to European consumer law, which defines compulsory contractual content and refers the remainder to the courts.

New forms of notarial activity which are partly not implemented yet in detail but are ‘ready’ designed take their starting point from this special impartial advisory attitude.

- a) In accordance with § 8 Paragraph 4 BNotO the German notary is explicitly permitted to act as an arbitrator. In 2000, the Federal Council of Notaries adopted an arbitration agreement with a procedural and cost agreement which enables the notary act as an arbitrator in accordance with standardised procedural regulations. Arbitration tribunals are primarily suited where specific professional knowledge is required. They require an arbitration agreement, which explicitly excludes the regular legal course.

Essential examples of notarial arbitration jurisdiction have been cited¹⁴² such as commercial law, including private construction law; corporate law and inheritance law. In the latter context final-will arbitration clauses are very interesting for practice, especially for interpretation and validity questions regarding a deceased’s last will.¹⁴³

¹³⁷ LIMMER, loc. cit., 39 ff., m.w.N.

¹³⁸ LIMMER, loc. cit., 41 f., m.w.N.

¹³⁹ WAGNER, Advice and mediation as the notarial contribution to preventing conflict, XXIII. International Congress of the Latin notarial profession in Athens, 2001, Report I, 38, refers to ‘contract inspection’.

¹⁴⁰ Compare with GAUPP, Legal advice during the notarial transfer of property, *Notarius International*, Vol. 4, 1999, 73.

¹⁴¹ RICHTER, Precaution as a principle for a social legal order in Europe, loc. cit., 63.

¹⁴² Cf details in WAGNER, loc. cit., 67, 70 ff. with comprehensive proofs.

¹⁴³ Cf. NIEDER, *Handbuch der Testamentsgestaltung*, 2nd edition, 2000, Rd.-Nrn. 1019 ff.

- b) Mediation, is a much discussed topic, the practical meaning of which does not yet match the scope of the debate yet however. Generally speaking, the goal is to introduce a balance of interests (as distinct from the arbitration process) on a non (exclusively) legal basis, by producing a ‘win-win situation’, where each of the parties involved is promised advantages.¹⁴⁴

The areas of application primarily¹⁴⁵ comprise family mediation; mediation in administrative law, particularly environmental law and including large proceedings¹⁴⁶; mediation in commercial law; mediation during the renegotiation of civil law contracts, if renegotiation concerning long-term and complex contracts (e.g. commercial lease contracts) collapses and judicial proceedings are threatened for contractual amendments.

No final solution is expected, as a rule, from the mediation procedure. The mediator has no competence to decide, like a state court or arbitrational tribunal. The mediation often focuses on showing new paths to solutions of which the parties involved had not thought given their first position of interests.

Independence, impartiality and experience as a mediator predestine the notary for this task. For remainder, reference must be made to the overall representations on the topic of mediation.¹⁴⁷

IV. Summary and prospects

Some concluding observations and a look ahead are permitted.

1. The notarial profession with the continental European characteristics, represented with the U.I.N.L., is confronted by various development trends. On the one hand, this involves an increasing liberalisation and deregulation in its effect on contract law as well as on the notary’s professional law status. On the other, it also concerns the necessary limits on contractual freedom and ways to implement these limits in practical contract law.

‘Deregulation’ is topical and is being propagated effectively among the public. ‘Nobel prize-winner for deregulation’ was the headline of an article in an influential German newspaper, on 7 November 2003; in a presentation to one of the most renowned German economics research institutes, the Nobel prize-winner for economics James Buchanan demands ‘the creation of more importance for contractual freedom in business’.¹⁴⁸ The call is a typical signal at

¹⁴⁴ WAGNER, loc. cit., Rd.-Nr. 125.

¹⁴⁵ Comprehensive presentation in WAGNER, loc. cit., 41 ff., Rd.-Nrn. 119 ff.

¹⁴⁶ Compare the recent aircraft noise conflict at Zurich airport, which heavily involved Ministers of Transport Stolpe in Berlin and Leuenberger in Bern. A mediation proceeding was introduced. ‘Mediation decides on the duration of southern approach flights’ *Neue Zürcher Zeitung*, No. 259 of 07.11.2003, 15 and No. 260 of 08./09.11.2003, 57. Minister of Transport Leuenberger in interview there: mediation can indicate solutions; it will be ‘the professional art of this mediation to make this ill-humour disappear’.

¹⁴⁷ Comprehensive WAGNER, loc. cit., 40 ff., Rd.-Nrn. 109 ff., with comprehensive proofs.

¹⁴⁸ Presentation to the WALTER-EUCKEN INSTITUTE in Freiburg/Breisgau. *Frankfurter Allgemeine Zeitung*, No. 259, of 07.11.2003, 15. – In contrast compare HELMUT SCHMIDT, German Federal

present, which is economically and also legally characterised by internationalisation and globalisation, including in the former socialist states.

The legal advisory professions are participating in these trends. They were an important component of the International Forums at the XXIIIrd International Congress of the Latin notarial profession in Athens 2001. The increasing influence of Common Law was raised there¹⁴⁹ as was the World Trade Organisation (WTO)'s common-law promoting power, and the ever more emphatic establishment of British and American (multidisciplinary) large practices also in countries with a traditional Latin notarial profession in Europe and South America.¹⁵⁰

The European Union is systematically pursuing deregulation, including in the legal advisory professions. This is particularly topical at present (end of 2003). At the end of October 2003, Competition Commissioner MONTI announced at a conference on the 'Regulation of the liberal professions' that the Commission would check all national professional law rules for their compatibility with European competition law 'in the light of the conference's observations' and the 'implemented consultation process'. MONTI raised fee regulations and prohibitions on advertising as well as prohibitions on multidisciplinary partnerships as focuses for investigation which he views as 'difficult to justify'.¹⁵¹

According to the EU concept, the compulsory contract model under consumer protection as discussed should form a counterweight; once again the written form, documented information, revocation rights, judicial content inspections and finally judicial rulings in disputes are named as key terms. Precautionary legal care through the notary drawing up a contract moves into the background.

2. Against this current background, the European and German notarial profession is very seriously concerned about the future of its profession.¹⁵² With this in mind, its institutional and functional characteristics are being shifted into the foreground, and thus the specific professional law aspects, which differentiate and demarcate the notary positively from the other legal and business advisory professions. The notary's independence and impartiality stand out in this case.

Chancellor 1974 – 1982, 'The law of the jungle ... Predatory capitalism threatens public society'; *Die Zeit*, No. 50 of 04.12.2003, 21 f.

¹⁴⁹ TALPIS, written summary of the 'introduction' to the topic, loc. cit..

¹⁵⁰ Extensive, from the practical experience of a business lawyer working a major practice, on this topic de LOUSANOFF, loc. cit., passim.

¹⁵¹ Cf 'An overview of Europe', 33/2003, of 29.10.2003, German Lawyers' Association, Brussels Office, as well as DAV-Depesche, 40/03, of 23.10.2003; LÜHN, EU Commission: does professional law impede competition?, German Lawyers' Association, *Anwaltsblatt* December 2003, 688 ff.; BNotKIntern 6/2003, 6 ff., Report on the European Commission conference on regulating the liberal professions with the alarming overall impression... 'that the notarial profession has fallen between the wheels of a development which not only affects specific professional groups, but the state of the community in Europe as such'.

¹⁵² Contributions from recent years: 'Future issues for the notarial profession – current reform theses against the background of European development', 26th German Notarial Conference, Dresden, 2002, *DNotZ* special issue, 219 ff.; 'Future perspectives for the notarial profession – a public function and liberal professional structures', German Notarial Conference, Münster 1998, HECKSCHEN and EULE presentations, *DNotZ* special issue, 308 ff.; HELLGE, *ZNotP* 2000, 306; OTT, The notarial profession in the field of tension between a traditional legal status and economic development, *Special issue 2001 Centennial German Notarial Journal*, 83 ff.

Public interest in the notary's office is assessed as too low. However, insofar as this observation is made, it remarkably relates primarily to his independence and impartiality. The public very much appreciates these special merits and securities offered by the notarial profession for the parties involved!¹⁵³

The German notarial law amended in recent years primarily safeguards the notary's independence and impartiality, including as regards current developments in legal advisory professions. German notarial law recognises and emphasises the primacy of contractual freedom. German notarial law makes the conflict-avoiding consultation procedure of notarial certification available as an efficient instrument against misdirections of contractual law and offers the notarial deed, considered in many contexts as superior.

The impartiality of the notary as a guarantee of contract law is a traditional value in legal culture in Germany and Europe. Legislative developments in recent years prove its capacity to adapt. This makes it all the more worth retaining.

Something new is not always actually something better. The warning observation by STÜRNER (in a somewhat different but comparable context)¹⁵⁴ is probably also the right one here: 'In social sciences it is often more a question of keeping old wisdom alive and rendering it fruitful during current external changes, rather than coming up with something really new, which could then be proven to be simple folly when measured against the long human struggle for justice'.

¹⁵³ WAGNER, loc. cit., 78, Rd.-Nr. 259; Observations on the notarial profession's inadequate public presence, international in TALPIS, loc. cit., Athens congress.

¹⁵⁴ Judicial independence from the scientific perspective, Reports by the Federal Council of Lawyers, 5/2003, of 15.10.2003, 214.

SUMMARY

Internationalisation and globalisation have not come to a halt when confronted with legal consultancy and are making their effects felt. Common Law and large multidisciplinary practices are advancing steadily.

At European level and consequently also in Germany, legal consultancy is increasingly becoming subject to deregulation and liberalisation. The importance of consumer protection is also expanding, and is having a substantial influence on the content of contracts.

This makes the guarantees of the 'right contract' that the notary provides through his impartiality all the more important.

1. The notary's impartiality is the essential status-forming foundation of the profession.

It is ensured by law and professional law and applies in Germany for all forms of the notarial profession, including for a notary who is simultaneously a lawyer ('lawyer-notary').

Impartiality demarcates the notary from the other legal and business consultancy professions, especially relative to the lawyer. Parallels between the notary and the auditor are of particular interest at present. A prohibition on providing auditing and consultancy simultaneously has been imposed on auditors by law internationally to safeguard impartiality and has already been implemented in practice.

2. There are strict normative safeguards for the notary's impartiality.

This equally applies to the exercise of the profession in general and to the modalities of the certification process specifically.

The notary's impartiality is guaranteed by law, especially during the exercise of several professional functions (lawyer-notary) as well as where professional connections exist (joint practices).

New regulations in German notarial professional law in recent years primarily serve the purpose of ensuring the notary's impartiality in such contexts.

The business environment where the notary works has become more difficult, with his impartiality becoming correspondingly more endangered through business dependencies. Notarial impartiality must be safeguarded in this very instance. Otherwise the notary's profession and office would disappear.

3. The notary's activity in Germany primarily involves the use of contract law.

The principle of contractual freedom (i.e. private independence) forms the basis of German contract law. The fact that this principle does not apply unrestrictedly and an area of tension between formal contractual freedom and contractual fairness exists is generally acknowledged. Contractual freedom is corrected in terms of the rightness of content.

Various paths to solutions exist. European Union Commissions prefer to intervene legally in the interests of consumer protection. Form, information, and revocation provisions are stipulated, and these have entered national legal systems to a broad extent, including the German Civil Code. Jurisprudence corrects the content of encumbering, 'imbalanced' contracts and defines the legal consequence of contractual nullity.

Notarial certification of contracts is a further, **special** way of achieving contractual correctness. This path offers decisive advantages in comparison to legislative restrictions and judicial auditing of content.

4. **The notary is the guarantor of contract law.**

The law assigns competence to the notary. The legal purpose of notarial certification is to ensure adequate deliberation, proof and sufficient information.

Impartial notarial contractual certification therefore acts as a **guarantee in contract law**. It is based on the basic pillars of the notary's **impartial** attitude and his obligation to ensure comprehensive **impartial** inspection and information. 'Disparity' when concluding contracts is therefore avoided to the greatest extent possible.

The notarial process results in the **notarial deed** with its decisive advantages: legal effectiveness in terms of all relevant legal aspects, enforceability and conclusiveness.

The advantages of notarial contractual certification also outweigh any disadvantages, including during the critical stock-taking to which the European notarial profession is currently being exposed. The German body of notaries, supported above all by its **impartiality** and **independence** is convinced of its future prospects!