

NOTARY WORLD



PUBLIC FORM OR AUTHENTIC NOTARIAL ACTS by Michael Bula, President Society of Notaries of Victoria 25 March 2021

Authentic Act

Brooke's Notary¹ definition:

"An authentic act is an act executed in accordance with legal requirements and certified by the proper officer. A notarial act is the act of a notary public, authenticated by his signature and official seal, certifying the due execution in his presence of a deed, contract or other writing, or verifying some fact or thing done in his presence or of which the notary has certain knowledge. Thus, any certificate, attestation, note, entry, endorsement or instrument made, or signed and sealed by a notary public in execution of the duties of his office is a notarial act. In those countries in which notarial acts have full and automatic recognition, a notarial act is probative, that is to say, whatever is certified by the notary as having been done or said in his presence, is taken to be beyond dispute and proved."

Reference is indeed made to civil law jurisdictions with full and automatic recognition where notarial acts have probative force.

Types of notarial acts

Brooke refers to 2 categories of notarial acts [1] in private form and [2] in public form [which is for the purpose of this paper as I submit an authentic act] where for the latter:

¹ N.P. Ready, *Brooke's Notary*, 12th edn, Sweet & Maxwell, London 2002, p.65 [5-01].

Public form ²

Brooke describes the public form act as:

“the notary is the author of the entire instrument whereby a juridical act is perfected, for example the creation of a contractual relationship, or the grant of a power of attorney or of a right *in rem*.”

The section does not specifically equate a public form act to an authentic act in the civil law sense but we are taken to this conclusion as I will discuss below.

Public instruments are in the first person narrative form where the notary assumes ownership and liability of the act [similar to a solicitor’s certificate] and its contents and consequences, recites the appearance of the parties, reads over the contents to them, makes mention of witnesses, outlines personal capacity of the parties and a number of other formal aspects.³

Specifically, Brooke mentions⁴ that notarial acts in public [or authentic] form refer to the distinction between notarial acts which are private documents and those which are public documents.

Common law notaries are often called upon to prepare public form or authentic acts not for domestic common law jurisdictional purposes but purely for international or export purposes/services.

The fact that authentic acts *per se* do not exist or rather do not form part of domestic law in the common law world does not impede/exclude common law notaries from notarising such acts for export to civil law countries. Civil law notaries do receive them and recite them as such in their own acts.

Some writers have described these common law “curiosities” as secondary or even ancillary acts, not quite fully fledged authentic ones as in the civil law notariats, for want of a universal position in their acceptance and treatment – they are in limbo. Recognition seems unjustly and in my view wrongly denied the authentic cousin instruments from the common law – an inconvenience cured by the mighty civilist notary generously treating them as a hybrid and perfecting them by recognition and incorporation in theirs.

The civil law receiving jurisdiction expects that the common law notary has at the very least addressed the essential requirements and included in the notarial certificate matters such as [non-exhaustively of course]:

² Ibid, p.65 [5-02].

³ See *ibid*, p. 65 [5-02].

⁴ *Ibid*, p.201 [11-19].

- appropriating the public act as the notary's own
- reading the act in full to the appearer who must declare understanding of the act full knowledge and understanding of the act and its legal effects and certifying same
- answering any queries and dynamically discussing the effect and consequences of the act in dialogue with the provision of advice.
- addressing appropriately issues of foreign language acts with professional translation and interpretation.

Private form ⁵

A private form document is where the notary appends a certificate to a private deed, akin to a document under private seal or in French: *sous seing privé* where a wide variety of certificates or attestations can be prepared.

The notary is not the author or draftsman or declarant of such work, but a certifier of signature and identity. Does he/she even test capacity or the client's understanding of this instrument?

Essentially, this causes the difficulty in terms of how civil law notaries view common law notaries and their practice, as well as the essential question of validity of the acts themselves.

For the civil law, mostly all notarial acts emanating from a notary and sometimes from public authorities are authentic.

The Hague Convention on recognition of foreign public instruments or the Apostille Convention to which Australia and a number of common law jurisdictions have adhered and ratified, refers specifically to public instruments and recognises as a consequence common law notaries due to article 1(c) which defines [all] notarial acts as public documents.

Common law notaries DO indeed complete such very acts – be they defined domestically as public or private in common law jargon.

Article 3 serves to certify the authenticity of the officer, his/her capacity and seal and stamp to support the contention that common law notaries draw authentic acts in daily practice.

Another difficulty for common law acts is their lack of probative and executory force in domestic common law jurisdictions, but not so on the export level. Civil law notaries again argue that this impedes common law notaries from practising as their civil law counterparts in producing authentic acts.

How can our acts be authentic if they lack the key criteria? Because they have such force in their recognition by our civilist colleagues, if they meet other conditions of form. This is cooperation between notariats on an international level. More on this as a basis for international treaty reform later in this paper.

⁵ Ibid, pp.65-66 [5-04].

In civil law countries, notarial acts are regarded as evidentiary and as such are quasi-judicial and tantamount proof of the veracity of their contents in courts and for administrative purposes⁶.

In common law countries, due to the very structure where law is a combination of statute, precedent and equity, as well as the adversarial system and lack of codified recognition or definition of authentic acts – no such unambiguous support can be cited.

This is a principal reason also why civil law notaries and jurisdictions regard common law notaries as of lower standard [not referring here to our US friends and non-lawyer notaries].

The Professional Conduct and Practice Rules of the Society of Notaries of Victoria are however a codified exception. Notarial acts are defined in no less than 3 parts:

1. Rule 1

'notarial act' means any instrument which has validity by virtue only of its preparation, authentication, execution or completion by a notary

2. and referred to in Rule:

11.3 In the case of a notarial act in authentic or public form, the notary must place an original of the act or a complete photographic copy of it in a protocol which must be preserved permanently by the notary.

3. and in Rule :

14.1 For the purpose of authenticating his or her notarial acts, a notary must have and keep a seal of office.

Brooke's Notary⁷ propounds the fact that there are notarial acts in authentic form being instruments such as – bills of exchange, ships' protests, even though the authentic act or public form is not specified or defined for common law domestic legislative purposes.

Common law notaries draft these documents following the authenticity criteria for exported acts to civil law countries.

In footnote 59, Brooke's Notary reviews documents such as powers of attorney or ancillary acts - as the Montreal conference of the UINL in November 2013 described them – received from civil law countries for execution in public form in common law jurisdictions, where the operative part has been drafted and the foreign or common law practitioner completes the public form certification and text with the appropriate recital and attestation clauses.

Even though ancillary such document is still a separate stand alone authentic act. It is recognised as a public instrument when applying for the Apostille.

⁶ N.P. Ready, *Brooke's Notary*, 12th edn, Sweet & Maxwell, London 2002, p.71 [6-01].

⁷ Ibid, p.201 [11-19].

Brooke describes a “public instrument” in French, as the *acte authentique*, in Italian the *atto pubblico*, and in Spanish the *documento público*.⁸

Civil law notarial acts

- Most Notarial documents are public or authentic acts.
- By law, they have executory and probative force and are granted authenticity by the executive and legislation delegating powers to notaries as public or ministerial officers, unlike other legal professionals.
- They bear authenticity and serve as quasi-judicial proof of contents and date on their face.

Common law notarial acts

- There is a public and private form distinction which only clouds the assessment by civil law notaries of the common law notary's capacity to draft authentic acts with authentication or even authenticity
- There is often no domestic definition, application or recognition of authentic instruments in the common law world – perhaps except since 2008 by the Professional Rules in the State of Victoria
- The conundrum is that our authentic acts are export instruments with no less force, even if domestically no legislative recognition exists.

Common law authentic acts are not treated equally perhaps because:

1. Private form acts are confused with *sous seing privé* or private “unnotarised” deeds and not as notarial acts
2. Confusion between lawyer and non-lawyer notaries [US]
3. Our work is not domestic but as exporters of services [extra-territoriality]
4. The authentic act is not defined, nor is the role of the notary in legislation.

⁸ Ibid p.202 [11-19].