

Impartial Contract-Engineering in Real Estate Transactions

The Swedish Broker and the Latin Notary

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Abstract

Even in the days of an ever closer European union, Europe contains no less than four different legal cultures with respect to real estate conveyances: the Latin-German notary system, the deregulated Dutch notary system, the lawyer/solicitor system, and the Scandinavian licensed real estate broker system. The latter is of particular interest in that Scandinavian brokers play a far larger role in real estate transactions than their European counterparts.

This paper examines and compares the Swedish real estate broker and the Latin notary. The Swedish broker is required by law to act as an impartial intermediary, to provide counseling to both parties, and to assist in drawing up all contracts and other documents necessary for the transaction at hand. To that end, the broker must be active and observant of the particular needs of the parties to the present transaction, always striving to enable them to reach equitable and practical agreements so as to prevent future disputes. In other words, the broker is required to tailor the transaction to fit the needs of the buyer and seller.

The Latin notary profession prevails in large parts of the world, particularly the Latin-German parts of continental Europe, and Latin America. While there are divergences in the notarial laws of all countries, the similarities are greater still, and it is correct to speak of a single profession throughout all these countries. The notary carries out several important functions, the nexus of which is the authentication of legal documents. In the preparation of these documents, the notary is required to provide impartial counseling in order to tailor the transaction at hand to fit the will and needs of the parties. To uphold the *integra fama* of the profession, and to safeguard the proper performance of the notarial functions, lawgivers in all countries emphasize the importance of impartiality and integrity. There are national divergences as to the specific rules of conduct related to impartiality, particularly those concerning what activities are considered incompatible with the notariat, but they rest on common principles. Most importantly, not only must the *publica fides* be honored, it must be seen in the eyes of the public to be honored.

The organization and regulation of the notary profession raises important economic issues, particularly with regard to competition/monopoly and market failures. The discussion of the regulation or deregulation of the notariat is by no means settled.

Comparing the two professions, it is striking to see the enormous similarities in the legal frameworks and their respective rationales. Two common features are of particular interest. Firstly, both the Swedish broker and the Latin notary are required to assist the contracting parties in the contract phase, drawing up any necessary documents and counseling the parties as to the implications of the transaction. In that respect, both professions function as tailors to the transaction. Secondly, both the broker and the notary are required to act impartially and independently – impartially visavi the contracting parties, and independently in order to preserve the public faith in the independence and integrity of the professions.

The similarities can be summarized as a function on the real estate market: impartial counseling and contract-engineering. This function exists alongside other functions, such as the brokers' traditional matchmaking, or the registration of property rights. This functional approach may prove very useful in all kinds of analyses of the real estate market, whether of political, legal, or economic nature. For instance, with respect to the merits and/or necessity of the Swedish impartiality rule, those wishing to amend the law and introduce a system of

overtly partial brokers acting solely on behalf of their principal have to face the question of what is to become of counseling for the principal's counterpart. Should the counterpart be forced to choose between hiring their own legal counsel or make do without? Further, those wishing to contest the mandatory notarial intervention in real estate transactions have to face the same question: what is to happen to impartial counseling, given not only to the client but also to the client's counterpart? Both instances illustrate the common feature shared by the two examined professions: impartial contract-engineering and counseling. To complete the picture and cover the whole arena of real estate transactions, the next logical step is therefore to compare and analyze different systems for registration of property rights. Doing so will hopefully achieve a tool for examining the real estate market that will prove useful indeed, particularly in future discussions concerning European harmonization.

Preface

The study you are about to read is as much a tentative probe into the unknown as a journey home to that which is in some ways closest to my heart. The unknown here does not consist in laws and ways foreign to me, but rather in the plunge into a multi- and interdisciplinary approach to the subject matter, fearing – nay, knowing – that I am restrained by my training and perhaps only really fit for my own discipline, which is the Law. The journey home consists in returning to, and building on, the languages of my childhood, not only experiencing vicariously what it could have been like had events taken a different turn, but also creating something new that hopefully transcends the sum of its parts. Also, to finally be allowed to indulge professionally, albeit briefly, in history, in some ways the love of my youth, is a treasure of value beyond reckoning.

I would like to thank my major supervisor, Professor Hans Lind at the Royal Institute of Technology, for invaluable guidance and inspiration. I would likewise thank my assistant supervisor, John Sandblad at Malmö University for inspiring me to get into research to begin with, ever spurring me on.

Warm thanks also to my colleagues at Malmö University, and to my students at the real estate brokerage program for their support and understanding when research got the better of teaching...

Last, but certainly not least, my eternal gratitude goes to my wife Michelle and to Harry, our ever faithful dachshund.

Malmö, April 2008

”Si un homme se prétend neutre au sujet d’une question d’argent, c’est qu’il ne s’agit pas du sien.”

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1 Introduction

1.1 Background

The last ten years have seen a major and long lasting increase in residential real estate prices in Sweden. Connected to this development is an increased public focus on homes and the real estate market, be it home staging, interior design, property tax, capital gains, interest rates and so forth. This increased focus has, in turn, created an unprecedented focus on the profession of real estate brokers. The role of brokers in real estate transactions has received extensive media coverage during the last years, much of it with a negative connotation.

This increased focus has not been lost on the legislative authorities. In December 2005 the Swedish government appointed a commission assigned with the task of revising the Swedish Estate Agents Act of 1995 (EAA).¹ The directives charged the commission with the task of revising, *inter alia*, the legal relation between the real estate broker, her client, and her client's contracting party.² The current legislation stipulates that the real estate broker must act as an impartial intermediary with the obligation to safeguard the interest of both the buyer and the seller in a real estate transaction, and expressly prohibits brokers from representing either party as attorney or agent. The EAA also lays down a number of limitations on brokers in the interest of safeguarding the impartiality. Both the broker's relation to the contracting parties and the limitations are under revision, and the business is eagerly anticipating legislative changes, particularly on the latter point. The question of the broker's relation to buyer and seller is not likely to see changes, since the commission directives clearly indicated that the broker's impartial role were not to be questioned as such.³ On January 29th, 2008, the commission presented its final report. As was expected, the report contains no proposal to amend the impartiality principle as such.⁴

According to the commission directives, the overall objective of the current legislation is to create and safeguard consumer protection in connection to residential real estate transactions. The position has support in the legislative history, where it is stated that the objective of the Estate Agents Act is to provide adequate protection for private persons and thus allowing them to feel secure when availing themselves to the services of a real estate agent.⁵ The commission directives state that consumer rights and consumer protection are of paramount interest, and that any and every proposition presented by the commission in its final report must offer at least the same level of protection to private persons as does the current legislation.

The idea that the broker's impartiality should be upheld, read in conjunction with the assertion that the current legislation is motivated by consumer concerns and that any proposal must safeguard that interest, gives the impression that the broker's impartiality is in itself a form of consumer protection. Indeed, there seems to be a general consensus in Sweden that the impartiality of the broker is essential in safeguarding consumer interests in the residential real

¹ SFS 1995:400.

² Dir. 2005:140.

³ "Utgångspunkten skall vara att mäklaren även i fortsättningen skall ta till vara båda parter intressen."

⁴ SOU 2008:6, *Fastighetsmäklaren och konsumenten*.

⁵ Prop. 1994/95:14, p. 13.

estate market.⁶ This idea, while by no means outrageous, is not self-evident, and it raises issues. *Firstly*, the impartiality principle is quite old and cannot possibly have been created in the interest of consumer protection. The real estate broker is a legal character that has existed and evolved for a long time. By contrast, consumer protection as a legislative interest is a relatively novel idea that emerged in the first decades after WWII and was not reflected in any acts of legislation in Sweden until the early 1970's.⁷ The legal status of the real estate broker can therefore hardly be considered a product of consumer protection ideas. Further, the 1981 report by the Home Ownership Commission⁸, which contained the first proposal to the Estate Agents act of 1984, states that real estate brokers *according to jurisprudence as well as established real estate brokerage practice* are expected to act independently and impartially towards both contracting parties in the transaction. The commission refers, *inter alia*, to Scandinavian legal works published in 1924 and 1946, well before consumer protection became an explicit legislative interest.⁹

It is established, then, that the impartiality principle could not possibly have been originally devised in the interest of consumer protection in the contemporary sense. Of course, that does not mean the principle could not serve this purpose nonetheless. It does, however, suggest that other factors must be considered when analyzing the current legislation. In fact, in some instances consumer protection may to some extent be opposed to other legislative interests. The question of the remuneration to the real estate agent is a perfect example. As a general rule, real estate brokers are remunerated through commission fees, i.e. a percentage of the sales price of the sold property.¹⁰ It is readily understood, even intuitive, that the broker has a clear economic incentive to do whatever she can in order to maximize the sales price. Evidently, that is in direct conflict with the interests of the buyer since they are naturally inclined to pay as little as possible. The buyer, who is generally a private person, and the broker will thus to some extent have opposing interests. From a consumer protection point of view, this may be perceived as a reason to change the form of remuneration to the broker. Indeed, this is sometimes suggested in public discourse. However, changing the method of calculating the remuneration to the broker is not necessarily desirable. The commission fee is a well-known remuneration method with the obvious advantage that it follows the price of the sold property and thus is proportionally just as expensive no matter the price of the property. This means that the brokerage services are just as expensive or affordable (depending, presumably, on one's view of brokerage) irrespective of the price of the property. Changing this could be construed as making brokerage services more expensive for those who can least afford it. Further, banning brokers from charging a commission fee could be perceived to be in direct opposition to the interests of the seller, and since the seller of residential real estate is generally a private person just as the buyer, the law would only be favoring one consumer over the other.

Secondly, there is no consensus as to what consumer protection in the real estate market really means, much less what its legal or political implications are. This is perhaps to be expected, given that there is no uniform definition of consumer protection and consumer rights in general. The matter is further complicated by the fact that in most residential real estate

⁶ Google the Swedish words "opartisk mellanman" (impartial intermediary) and "konsumentskydd" (consumer protection), observe the number of hits, and examine a couple of them; the point should soon be proven!

⁷ SOU 2000:110, p. 45.

⁸ Småhusköpskommittén.

⁹ SOU 1981:102, p. 190.

¹⁰ This attested to by 21 § EAA, where it is provided that where no other form of payment is expressly agreed upon, the real estate agent is to be remunerated through a commission fee.

transactions, both the buyer and the seller are private persons and thus consumers *per se*. In such cases, which party is the more entitled to consumer protection? As it is, when consumer protection is discussed in connection with real estate transactions and brokerage, the main focus is generally on the needs of the buyer: even the Swedish National Audit Office¹¹ in its audit of the Board of Supervision of Estate Agents presented in May 2007, has obvious difficulties in distinguishing between “consumers” and “buyers”.¹² The underlying idea seems to be that the buyer must be protected from the seller as well as the broker. With only the slightest exaggeration, the latter two are generally suspected of cheating the buyer as much as they can and by any means possible in order to maximize the sales price.

To be fair, the public’s fears are to some extent understandable. It is indisputable that the buyer typically has less information about the property than both seller and broker, which constitutes a case of asymmetric information. Further, since Swedish property law does not provide for an auction or any other kind of transparency in the bidding process between prospective buyers, the buyer often lacks information about the competition. This information gap, along with the fact that bids are not legally binding¹³, is what gives rise to the possibility to fake bids in order to maximize the sales price. Also, most buyers lack the legal, financial, and technical expertise that is necessary to make informed decisions in real estate transactions. Furthermore, the focus on the needs of the buyer can to some extent be explained by the fact that brokers in Sweden are by custom most often hired by the seller. The broker thus has contractual as well as statutory obligations towards the seller, whereas she only has statutory obligations towards the buyer. In addition, irrespective of legal provisions, people often tend to perceive the broker as an agent for the seller. All of this would seem to give the seller a stronger position. Thus, irrespective of the legal position of the seller, the buyer is most certainly in need of consumer protection. Nonetheless, it is essential to bear in mind that, in most cases, both buyer and seller in residential real estate transactions are private persons and thus consumers.

1.2 Different Perspectives

It is evident from the foregoing that the current legislation, as well as the ongoing legislative process, is not necessarily based on well-defined policies and criteria. Jaded though it may sound, there is nothing unusual about this. Laws are frequently motivated, evaluated, and interpreted according to policies and criteria that are ultimately based on what is (at best) most adequately referred to as “common sense”.¹⁴ While using one’s common sense is by all means commendable in itself on some level, it would seem preferable for legislation to have a more solid foundation. One way to accomplish this is to broaden the analysis to different perspectives. There is of course any number of possible perspectives, but two would seem particularly adequate in this context. First, there is the law-and-economics perspective. Second, there is the international (particularly European) perspective.

¹¹ Riksrevisionen.

¹² RiR 2007:7.

¹³ 4:1 Land Code (1970:994); 6:4 Tenant Ownership Act (1991:614).

¹⁴ Sandgren 1996, at p. 727-728.

1.2.1 The Law-and-Economics Perspective

When discussing an issue with bearings on a market representing as large values as the real estate market, it is only natural that there will be a number of economic issues involved. Raising these issues within a legal context makes them law-and-economics issues. While there are admittedly more issues than can reasonably be discussed here, the most interesting issues involving real estate brokerage may be summarized as follows.

Firstly, there is the obvious question of transaction costs. The idea here is of course that the solution that maintains the lowest possible transaction costs is the most desirable one. In this connection, Lindqvist has conducted a comparative study of different brokerage systems and compared transactions costs. In studying Sweden, Finland, Norway, England, the United States and Poland, Lindqvist found the Swedish system to involve the lowest total transaction costs of all compared countries.¹⁵ While there are several contributing factors, taxes being one of them, two seem particularly interesting. First, the country in Lindqvist's study with the highest total transaction costs is Poland. The Polish system involves the mandatory intervention by a third party, namely the notary. The notary is assigned, *inter alia*, with the task of drafting and authenticating the necessary legal documents. Since few are inclined to work without remuneration, the notary of course has to be paid for their services, adding to the total transaction costs. Second, in the United States it is common practice for the seller and buyer to hire their respective broker to find a counterpart. The seller's broker is often referred to as the "listing" broker.¹⁶ The listing broker and the buyer's broker may often be acquainted and even work at the same brokerage firm (!). Again, since working for free is not particularly appealing to most people, both brokers have to be paid; giving rise to brokerage fees twice the amount as those of the single broker in Sweden.

Both the Polish and the American example suggest, *prima facie*, that the Swedish system, involving only one party besides the buyer and seller (i.e. the broker) offers the lowest possible transaction costs among the compared countries.¹⁷ Whether this holds true when adding more factors to the analysis, such as legal disputes and their costs, is not clear. Elucidating the matter, however, falls beyond the scope of the present study.

Secondly, there is the question of whether the broker has economic incentives to abide by the rule of impartiality, and what consequences this may have on the real estate market. The background is fairly straightforward. Section 12 of the EAA provides for the broker to act in accordance with *sound estate agency practice* and, in so doing¹⁸, safeguard the interests of both the seller and the buyer. However, as mentioned above, the fact that the broker is typically hired by the seller to find a buyer, she will have contractual as well as statutory obligations to that party, whereas she will only have statutory obligations towards their counterpart. In addition, since the typical remuneration method is a commission based on a percentage of the purchase sum of the property, the broker would seem to have strong incentives to promote a maximization of the sales price, and thus promote the interests of the

¹⁵ Lindqvist, pp. 137-38.

¹⁶ <http://www.yourdictionary.com/listing-broker> (2008-04-20).

¹⁷ Not taking into account the other costs such as taxes and other fees.

¹⁸ The translation published on the website of the Board of Supervision of Estate Agents (FMN)

seller to the detriment of the buyer.¹⁹ This could be carried out in any number of ways. For instance, the broker might not disclose detrimental information known to her with respect to the property, or she might be less than diligent in carrying out the obligation laid down in 16 § EAA to ensure that the buyer inspects the property prior to the sale. The most frequently voiced suspicions from the public, however, concern fake bids and “lure prices”. The latter entails improbably low advertising prices, more than 40 % lower than the final sales price, often lower than the seller’s reservation price, with the objective of luring more prospective buyers into the bidding process in hope of maximizing the sales price. Critics of this method hold that, besides being bluntly dishonest and dishonorable, it deceives people who would probably not have entered the bidding process had the advertising price been more accurate into purchasing a home they cannot rightly afford.

Finally, there is the question of market failures, defined as situation where free markets fail to yield efficient results. Market failures may result from, for instance, asymmetric information. Where one party has more information about the offered good or service, which the counterpart cannot control, the latter will only be willing to pay a low price since they cannot be sure that they are buying good quality. The informed party, for their part, will not be willing to provide high quality for the low price, and will therefore provide a lower quality. The market therefore drives out players providing high quality.²⁰

1.2.2 The International Perspective

A second alternative or complement to the traditional legal analysis is the international perspective. The international perspective, in turn, encompasses several dimensions and an international approach can therefore take several different shapes. Firstly, there is the comparative analysis, where the point is to examine the legislation of a particular country and comparing it to the corresponding domestic legislation. Secondly, there is the European perspective, which in itself is manifold. European Community law is of course a natural part of the legal order of all member states and therefore any existing or upcoming Community law on a particular subject matter must always be taken into account when addressing that subject. However, the European perspective also has a more problematic dimension, namely where harmonization becomes difficult – or sometimes downright impossible – due to fundamental differences in the member states’ legislation and/or legal cultures. For instance, harmonizing the requirements for real estate brokers has proven more than problematic even in the case of a “quasi-legal” standard as the CEN standard currently in progress.²¹ It is not difficult see the connection between the experienced difficulties and legal/cultural differences.

Which type of analysis is the most appropriate depends on what one wishes to accomplish. For instance, there are a number of valid reasons for an international outlook and analysis. The first and perhaps most obvious reason, besides the “merely” academic joy of gathering

¹⁹ It is actually plausible that the broker’s incentive to maximize the sales price may collide with the best interest of the seller as well. For instance, the seller may need a disclaimer clause in the sales contract in order to limit their liability concerning defects in the property. The broker has an obligation under 19 § EAA to foresee the needs of the parties and suggest that the needed clauses are included in the sales contract. However, a disclaimer will typically lower the sales price (since it transfers some degree of liability, and therefore risk, from the seller to the buyer), and since this does not harmonize with the interests of the broker she may be less inclined to abide by this provision.

²⁰ Concerning market failures, see below (4.4).

²¹ CEN/BT/TF 180 *Requirements for the Provision of the Services of Real Estate Agents*.

knowledge from near and afar, is that it provides a benchmarking of sorts, where the solutions used by other countries serve as inspiration or deterrent in national policy-making. For instance, if one is evaluating a legislative proposal to regulate a profession, it seems natural to study the countries that have enacted such regulations. There is, however, so much more to be learned from an international/comparative study. The laws of the examined country will of course be underpinned by legal, political, and cultural factors that may or may not be known to the researcher. For instance, 19 § EAA provides that brokers must assist the contracting parties during negotiations and the drawing up of contracts. To that end, the broker must be “active and observant”, which means she must use her expertise to determine the needs of the contracting parties. If, for instance, the broker realizes the buyer will not be able to afford the purchase without a mortgage, the broker has an obligation to suggest to the parties that they include a mortgage clause (see below chapter 2). To be able to fulfill this obligation as intended by the legislator, the broker must be versed in contract law and property law, which in turn requires university training. Therefore, the law stipulates that the mandatory two year college education for brokers must include courses on those fields of law.

It is of course possible to dispute the merits of mandatory university education for brokers, though this writer favors it strongly. It is, however, fairly straightforward that if the broker is to assist the contracting parties in the drawing up of contracts, it is essential that she be versed in the law to some extent. Therefore, one rule conditions the other. If in a certain country there is no support for mandatory university education for brokers, then the rational conclusion would seem to be that in such a country a rule stipulating that brokers must assist the parties in the contract phase is not an ideal solution. This has proved true in the case of the drafting of the CEN Standard *Requirements for the Provision of the Services of Real Estate Agents*.²²

Thus, apart from the important and rewarding work of benchmarking between countries, an international/comparative study can provide additional insights by analyzing the factors underpinning the legal provisions in a certain country. These factors – legal, political, cultural, institutional, economic – ultimately condition the legal provisions. Taking due note of this connection is therefore crucial if one is to gain any useful understanding.

In the case of the real estate market, Europe encompasses several legal-cultural spheres. Oftentimes cultural differences in legal systems are explained in terms of a dualistic view of the world, with the Latin civil law system on the one hand and the Anglo-Saxon common law system on the other. While these cultural spheres do in fact exist, the dualistic approach is not entirely adequate since there are countries that do not fit into either system. An ongoing European study conducted by Schmid *et al.* has issued a preliminary report. It reports four distinctive regulatory systems governing conveyancing services in Europe.²³

- 1) *The Latin-German notary system.* Under this régime, real estate conveyances are accomplished by the notary, a specialized lawyer/jurist operating in the service of the public. Notarial intervention in real estate transactions is either mandatory or quasi-mandatory in these countries. The profession is highly regulated with respect to rules of conduct, assigned tasks, organization, remuneration, etc. Among the most prominent conduct rules is the obligation to act impartially.

²² The draft European Standard, prEN 15733, has been submitted to CEN members – in the case of Sweden SIS, the Swedish Institute for Standardization – for review and comments. It has been drawn up by CEN/BT/TF 180 and is planned to enter into force during 2008. For further reference, see <http://www.sis.se>.

²³ Schmid *et al.*, pp. 1-2.

- 2) *The deregulated Dutch notary system.* Previously belonging to the traditional notary system, the Netherlands deregulated its notariat in 1999 with respect to conduct, fees, and market structure.
- 3) *The lawyer/solicitor system* prevails on the British Isles, Hungary, the Czech Republic, and Denmark. The role of the lawyer varies between the countries, but the common characteristic is that the conveyancing services are provided by lawyers.
- 4) *The Nordic licensed broker system* prevails in the Nordic countries. Sweden belongs to this family. The chief characteristic is that conveyancing services are provided by real estate brokers whose profession is regulated with respect to assigned tasks and rules of conduct. In former times this system could encompass regulation of fees as well, but modern competition laws have made such regulations impossible.²⁴

Interestingly, there are two systems that include a strictly regulated profession providing conveyancing services: the Latin-German notary system and the Nordic licenced broker system. Both systems regulate a professional who performs conveyancing services – i.e. legal services in connection to real estate transactions, such as the drawing up of contracts, counseling, etc. – and is required to act impartially while doing so. This is highly interesting. Whereas the broker’s relation to the contracting parties varies from country to country²⁵, the Latin notary is governed by an impartiality principle just as the Swedish broker. Whereas the tasks of brokers vary from country to country, the Latin notary is expected to draw up contracts and counsel the contracting parties just as the Swedish broker.

1.2.3 The Present Study

The fact that the Swedish broker and the Latin notary are both required by law to act as impartial intermediaries is highly interesting. It has already been established that the broker’s impartiality was not *actually* conceived as a way to protect consumers, since the concept of the broker’s impartiality by far precedes the era of consumer protection. The question is, can a comparative study shed new light on the issue of impartiality – and a study of an entirely different profession, at that? Strange as it may seem, there are already *prima facie* several common characteristics.

- 1) Both professions provide conveyancing services with respect to real estate.
- 2) Both are required to draw up contracts.
- 3) Both are required to act as impartial intermediaries.

Already, it would seem there are remarkable similarities between the two professions. This speaks in favor of carrying out a comparative study of the two. Further, every analysis must take into account the context in which the object of study exists, lest one misses the wood for the trees. The real estate broker is not only a profession but a professional performing certain functions, operating on a certain market. To analyze the profession properly, one must therefore examine the function and the market. This leads us further yet.

²⁴ Mäklarsamfundet, the largest real estate broker association in Sweden, issued the so-called Riksprovisionstaxan, recommended fees, until the enactment of the 1993 Competition Act (SFS 1993:20).

²⁵ Lindqvist, pp. 34-38.

As will be described below (chapters 4 and 5), the Latin notary system has been under attack for the last decade or so, due to the inherent conflict between its anti-competitive traits on the one hand, and economic theory and EU competition rules on the other. As a result, there is an ongoing economic – legal-and-economic, as it were – discourse concerning the merits of regulating or deregulating the notary profession. Given the similarities already evident between the notary and the Swedish broker, could it be that these economic studies are to some extent valid for the broker profession as well? If so, it would provide valuable nutrition indeed for the domestic discussion surrounding the regulation of brokers. It is definitely worth the attempt.

1.3 Purpose

The purpose of this study is to examine and compare the Swedish real estate broker and the Latin notary, and their respective roles in connection to real estate conveyances. In particular, the rules governing the two professions concerning counseling, the drawing up of contracts, and impartiality will be examined and discussed. It is also the purpose of this study to analyze the function performed by the two professions on the real estate market, in order to assess whether they are comparable with respect to economic discourse. In order to fulfill these purposes, the study seeks to answer the following questions.

- 1) What are the legal obligations of the two professionals with respect to their relation to the buyer and the seller in real estate conveyances?
- 2) What are the other rules governing the two professions with respect to impartiality?
- 3) What are the obligations of the two professionals with respect to the drawing up of contracts in connection to real estate conveyances?
- 4) What are the obligations of the two professionals with respect to counseling in connection to real estate conveyances?
- 5) What is the historical and institutional framework of the Latin notary profession?
- 6) What are the common traits of the two professions with respect to questions 1-4?

1.4 Scope

The study concerns three main aspects of the Swedish broker and the Latin notary: the counseling obligation, the contract-engineering obligation, and the impartiality principle. The scope is tailored so as to fulfill the aforementioned purpose and to answer the posed research questions. There are naturally numerous issues in the periphery of the subject matter – indeed, in some cases quite close – that could be highly interesting. An example is the registration of real estate rights and real estate information, an area that has substantive bearing on the obligations of the broker and notary, even the rules that are the subject matter of this study. However, to give an appropriate account of the registration systems and real estate

information of a number of countries is a task best reserved for a dissertation in its own right. They have therefore not been studied.

Further, since the notary performs public functions he is subject to administrative laws of varying character. Administrative law is a field of law in its own right and is best omitted from the present study.

The counseling obligation laid down in the EAA has close connections to the obligation in 17 § to check in the land registry that the seller is entitled to sell the property, to check for existing encumbrances, etc. Since the counseling obligation is partly about providing information about the property, it is also connected to the obligation in 18 § to provide written information at an early stage of the transaction concerning certain specified facts. While these provisions are indeed important, they fall outside the scope of the present study.

Finally, since the nature of the study is legal, all references to economics are kept at the strict minimum. While the subject matter will hopefully evolve in a law-and-economics direction, with an economic study as a natural future study, economic theory is auxiliary in the present context.

1.5 Methodology

For a jurist in Sweden, the methodology chapter is usually either the easiest or the most difficult chapter to write. Which of the two it is varies depending on the context where the study or dissertation is presented. Among fellow jurists at a law faculty, it is usually not a big problem since everybody is familiar with the scientific methods of jurists and few are inclined to spend a whole lot of time discussing it. Rather, most jurists seem to prefer to skip right to the subject matter, rendering the methodology chapter a mere pro forma operation that does not receive very much attention.

By contrast, in the present study it is of utmost importance to discuss methodology and the choices of method underpinning the study. It is particularly important because this study is written and presented in a multi- and interdisciplinary context. Within the impregnable (?) fortresses of the traditional disciplines, it is usually possible to be less questioning and self-conscious since the reader comes from the same discipline and therefore has the same frames of reference. Within the safe walls of a traditional discipline there is an implicit mutual understanding of how scientific research is conducted and what constitutes “good” research. In a multi- and interdisciplinary context, it becomes necessary to question and justify each step more carefully. This need not be detrimental since it serves as a baptism by fire, as it were.

1.5.1 The Nature of Legal Science

It has happened in the past, and sometimes still happens, that representatives of classic scientific disciplines have questioned whether there is, or could even be, such a thing as legal science. The problem came with the new scientific and philosophical ideas that saw the light of day in the early 20th century, essentially different versions of logical empirism, positivism,

and realism. The idea grew ever stronger that science, in order to be recognized as such, must fulfil a requirement of verifiability, eventually evolving into a requirement of exact measurability. That which could not be observed with the five senses could not be measured, and could therefore not be of a scientific nature. Legal science in Scandinavia was at the time heavily influenced by German 19th century jurisprudence, and therefore very much centered on abstract terms such as “the will of the state”, “rights”, “obligations”, etc. Such terms were dismissed as unscientific since they did not describe the physical reality that allows itself to be measured.²⁶ This view has colored jurists for many decades, but in later years the acceptance for theoretical analyses has recovered some lost ground.²⁷

The root of the problem is the fundamental difference between legal science and most other sciences. It is not really a question of ontology or epistemology, although those topics could be discussed at length. Rather, it is a matter of what one seeks to study; the unique trait of legal science is that a legal paper seeks to describe, discuss, examine and analyze the law; that is, the legal reality, as opposed to the “real world”. A typical legal research purpose could be, for instance, to examine the extent of sellers’ liability within property law for defects on the sold property in the light of recent case law in the Swedish Supreme Court. Another example, within the field of intellectual property law, could be to analyze the possibility to register colors as trademarks in the light of recent case law of the OHIM²⁸ and the European Court of Justice. Whatever the field of substantive law, the common denominator is that the very object of study is some part of the legal system. The question is of a legal nature, the “reality” in which the answer is sought is the legal system itself, and the answer will consequently be of a legal nature. The context in which the whole study takes place is the “legal reality”. The legal study is not primarily concerned with the “real world”²⁹; it does not seek to measure, describe or examine our physical, biological, chemical, social, or economic reality. Rather, it essentially seeks to answer some variation of the basic question “what does the Law say in this matter”?³⁰

As a result, a typical legal study will not contain any empirical element in the traditional sense, such as natural or social sciences do. Therefore, in turn, there is no need for lengthy theoretical discussions about validity or reliability, as tradition within many fields of science dictates.³¹ Or is there? After all, all methodological theories, discussions, and choices exist to serve a single purpose: to safeguard the validity and reliability of the claims made in a scientific study. This, in turn, serves one single purpose, namely to ensure that we can trust the results of a scientific study and regard them as facts.³² Does this purpose then not have a place in legal science? Of course it does. Suppose a jurist writes an article on the aforementioned topic, the liability of sellers for defects on the sold property. One would expect the author to find the right sources of law and to interpret them correctly. One would expect the author not to draw too far-reaching conclusions based on the sources at hand, like for instance one scientific article alone or court cases from District Courts (which are generally considered of less value than cases from courts of higher instance; see below 1.5.2). One would equally expect a Swedish jurist to understand that case law from other countries,

²⁶ Strömholm, pp. 81-109.

²⁷ See for instance Sandgren 2005, where theory and legal science are discussed at length.

²⁸ Office for Harmonization in the Internal Market; registers Community Trademarks and Community Designs, www.oami.eu.int. (2008-04-19).

²⁹ Of course, the practical consequences of the legal reality are quite real.

³⁰ Strömholm 1996, p. 54.

³¹ It is left for the reader to decide the extent to which such discussions need be lengthy in any field of science.

³² To paraphrase the illustrious Dr. Henry Jones, Jr., “facts” should not be confused with “truth”. Readers searching for “truth” are strongly recommended to pick up a dissertation in philosophy instead.

however interesting, has no direct bearing on Swedish law and that, consequently, such case law can never be used as a direct source of law when analyzing Swedish law. These are but a few examples of scientific requirements, but it is possible to see a pattern. Firstly, it is important to use the right sources in order to find the answers one is looking for. This is essentially what validity is all about: to ensure that one is really measuring that which one sets out to measure. Secondly, the sources must fulfil some sort of quality requirement, whether in the form of formal authority or based on the merits of the legal argumentation. For instance, jurisprudence must be judged on its merits since it holds no normative power in the same way as legislation (and, to a lesser extent, case law). The fact that the works of learned writers are oftentimes treated as authorities, giving them an influence that surpasses their formal significance, does not change this. Case law from courts of lower instance must likewise be used carefully. The general point is that the better the source, the more accurately it answers the legal question.³³ This is very similar to the reliability issue in empirical studies. Thirdly, since the answer to the posed question is found in the law, finding and interpreting the relevant sources of law is the functional equivalent in legal science to the empirical phase in other disciplines. Thus, what is *prima facie*, and on a superficial level, perceived as a fundamental difference becomes less and less so on a functional level.

This basic understanding is quintessential. Since the legal question concerns the position of the Law, it is in the Law that the answer must be sought. The following section will therefore discuss the sources of law.

1.5.2 The Legal Method and the Sources of Law

The search for the answer to the legal question is conducted by means of what Swedish jurists commonly – oftentimes rather flippantly – refer to as the “legal method” or “legal-dogmatic method”. In a nutshell, it means that the jurist examines the existing sources of law applicable on the present subject matter and, interpreting the various sources and weighing them against each other, seeks (and hopefully finds) the answer to the question. In Sweden, the main sources of law are the following: (1) legislation³⁴, (2) case law, particularly from courts with the power to give precedents³⁵, most notably the Supreme Court and the Supreme Administrative Court, (3) legislative history, where the intention of the lawgiver is hopefully made clear, and (4) jurisprudence, that is, legal works by learned writers. It is open to debate whether there is a hierarchy between the sources, as well as how each type of source should be treated. Peczenik³⁶ presents a more detailed list of sources which, besides the four sources mentioned here, also includes international treaties (of which some have given rise to national legislation whereas some have not) and customary law. Perhaps more importantly, Peczenik divides the sources into three categories; the “must-follow”, the “should-follow”, and the “may-follow”. The first category represents the truly binding sources, namely legislation and “fixed” rules of customary law. These sources hold complete normative power and must

³³ This is, of course, assuming that the source in question actually has some sort of answer, which is not always the case.

³⁴ Legislation has its own internal hierarchy: (1) constitution (grundlag), (2) statute (lag), and ordinance (förfordning).

³⁵ Legal precedent means that other courts, are bound by the ruling and its interpretation of the law.

³⁶ Peczenik, Aleksander (1995), *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Norstedts Juridik, Stockholm, pp. 212-223.

therefore be followed based on their authority alone.³⁷ The second category includes case law (precedents only) and legislative history. These sources “should” be followed, which means that they are not binding and that a court is at liberty to choose whether to follow them or not. The courts must, however, have a strong line of argumentation not to follow these sources. The third category “may” be followed, meaning that they hold no normative power at all and must be judged on their merits.

Strömholm³⁸ summarizes Peczenik’s theory along with those of fellow writers Ross, Sundberg, and Augdahl.³⁹ He then proposes that the appropriate definition of a “legal-source-theory” depends on two variables. First, sources of law can be viewed as either *authorities* or *sources of information*. In Strömholms view, Ross and Sundberg fall into the former category whereas Peczenik and Augdahl fall into the second. Strömholms chooses to view sources of law as authorities. Second, one must decide whether the definition of a source of law should be descriptive or normative; that is, whether it should be concerned with what sources courts *actually* use and how, or with what sources courts *ought to* use and how. Strömholm sides with the former and proposes the following list of sources of law.

- A. Principles concerning the sources of law.
- B. Other sources of law;
 - i. Legislation;
 - ii. Legislative history;
 - iii. Case law, mainly from courts of higher instance;
 - iv. Customary law;
 - v. Views taken by lawyers/jurists (occasionally other professionals who are experts within a given field, such as technical experts);
 - vi. Considerations that are not of a specifically legal nature.⁴⁰

In contrast to the cited writers, Hellner⁴¹ takes a pragmatic view and dismisses any and all theories about sources of law. He cites Strömholm’s theory as “extreme” and points out that Peczenik has received criticism from other writers for being too generous in regarding sources as sources of law.⁴²

It is readily observed that there is no uniform definition of what constitutes a source of law. Nor is there any consensus as to how the different sources should be treated, nor their hierarchy, nor if there is a hierarchy at all. Only one assessment seems to unite the different writers, and that is that legislation is the highest ranking source of law. Many, particularly older, jurists will probably argue that the legislative history outranks case law, if not in authority then at least in importance. Indeed, legislative history has traditionally been used extensively. In some fields of law, it is common practice to cite them as though they were an

³⁷ Though Peczenik, in contrast to positivists, also holds that strong arguments to the contrary, such as a law being obviously and strongly unequitable (such as discriminatory laws), can render a “must-follow” source hollow of authority; see p. 218.

³⁸ Strömholm, Stig (1996), pp. 311-321.

³⁹ These theories will not be accounted for here since a full account of all theories falls well beyond the scope of this chapter. The interested reader is urged to read Strömholm 1996 at pp. 311-317 with references.

⁴⁰ Strömholm 1996, pp. 317-321.

⁴¹ Hellner, pp. 24-26.

⁴² Hellner, p. 25; however, it must be pointed out that criticizing another’s views by merely pointing out that the other person has been criticized by a third party is not in itself a very convincing argument.

integral part of the written law.⁴³ In these fields, at least, the legislative history is without question regarded as important. However, since Sweden became member of the European Union in 1995, the massive impact of law and legal-cultural influence from the EU institutions, particularly the ECJ, has led to a *de facto* paradigm shift, with case law receiving ever more attention in legal science as well as in any other legal discourse. The growing habit of writers to cite court cases from courts that have not traditionally been considered to have power to give precedent (i.e. all other courts than the Supreme Court and the Supreme Administrative Court) clearly attests to this; Melin, for instance, is quite fond of citing case law from administrative courts of lower instance. This new, more extensive use of case law as a source of law is not necessarily wrong. Firstly, it is not in conflict with the views taken by the abovementioned writers; any “red lights” as to the use of a particular type or source would of course come from writers on the subject. Secondly, all case law is important if one is looking for a *descriptive*, or indeed *predictive*, answer to a legal question. In a nutshell, all case law can be used to describe how courts actually, in practice, interpret a certain law. If this “descriptive” case law is coherent and consistent enough to present a pattern, it can also be used to predict how courts will rule in the future, or how they would rule in the hypothetical event of a trial. Sometimes, where there is little or no case law, a single new ruling, even in a court of lower instance, is given a significance that goes far beyond its usual reach. Needless to say, one must be extremely careful not to overestimate the importance of a single ruling, especially those from courts of lower instance. A ruling that seems revolutionary at first may be overthrown completely if the same case, or a similar one, is contested in the Court of Appeals. In sum, it is my contention that case law is now the second most important source of law in Sweden. Whether this also bestows upon it a higher *rank* is a question that falls outside the scope of the present study.

The matter of hierarchy is not really important unless the sources are in direct conflict, which thankfully does not happen very often.⁴⁴ A far more common problem is when the sources are vague and do not give a clear answer to a question. It is, however, clear that legislation outranks all other sources of law. Indeed, legislation is the only “must-follow” source of law. Case law is “must-follow” within the limits of the precedents, but the Supreme Court and the Supreme Administrative Court are not themselves bound by their earlier precedents. All other sources, including the legislative history, are “should-follow” sources.

1.5.3 The Present Study

So what are the methods employed in the present study? I will spare the reader excessive accounts of all existing schools and ideas within the field of scientific theory. Attempting to satisfy all readers, with their different disciplinary backgrounds, with in-depth theoretical discussions about methodology would be hard work indeed, and perhaps of questionable value. The following account will be kept on a functional level; that is, I will strive to explain what I have done, and why. Hopefully this will satisfy the reader as to the scientific solidity of the study.

⁴³ Real estate brokerage law is a perfect example: see for instance Melin (numerous instances throughout the book) or the Board of Supervision of Estate Agents case law.

⁴⁴ Since legislative history is considered a high-ranking source of law, it would indeed take extraordinary circumstances for a court to rule in direct opposition to them (this is not to say that it could not occur).

As has become apparent, the present study is first and foremost of a legal nature. Thus, its framework is mainly the law, the presented questions are legal, and their answers are to be found in the law. Therefore, there is no need for empirical work in the traditional sense, though finding and interpreting legal sources is the legal equivalent. Indeed, an empirical approach would not yield any satisfactory answers. For instance, whichever stance one chooses to take on brokerage, the impartiality principle is a principle of law derived from legal provisions. Questions concerning the principle can therefore only be answered by using the sources of law. Interviewing brokers to ascertain the contents and significance of legal provisions would raise serious issues of reliability and validity. The same applies to notaries: insofar as the research questions concern the notary's legal obligations, the question, the sources, the method, and the answer are all of a legal nature. In these respects, there is no room for other scientific methods.

As for the Swedish broker, the method used is traditional, using statutes, case law, legislative history, and works by prominent writers. Much focus is placed on the case law of the Board of Supervision of Estate Agents and the administrative courts. The reason for this is the way the applicable statute, the Estate Agency Act (1995:400) is structured and worded: while it has a number of specific provisions, much centers around the general rule in 12 §, laying down the obligation to act in accordance with "sound estate agency practice". As will be described below (chapter 2), the lawgiver was reluctant to regulate in statute too much of the broker's obligations; explicitly providing, instead, that the specific contents of sound estate agency practice should evolve through case law. Therefore, case law is of paramount importance. For the same reasons, the legislative history – of both the 1984 law and the current 1995 EAA – also have a prominent position among the sources. As for literature, there are not many writers in this field of law – if indeed real estate brokerage could be called a field of law in its own right. Notwithstanding, Melin's book has quickly become the authoritative work in the area of brokerage law, and cannot be ignored. Zacharias is another writer in the field who has helped shape the legal debate.

In the case of the Latin notary, it is most often referred to as a legal character common to many countries. The way writers choose to denote the "family" to which this character belongs varies: the Latin countries, the Latin-German countries, the civil law countries, etc. Consequently, the name of the legal character may vary, but the most common name is Latin notary. It is most importantly distinguished from the sort of notary public that exists in the Scandinavian and common law countries. However, legal characters are abstractions – generalizations of specific provisions that are applicable in certain jurisdictions. In a nutshell, the Latin notary is a profession existing in the "real world" but also a generalization of legal sources in numerous countries all over the world. Again, given that the nature of the present study is legal, the appropriate method is to use the right legal sources. Since laws are territorial, they can strictly speaking only provide answers for the jurisdiction where they are applicable. Thus, to speak of an international legal character presupposes that the laws governing this legal character are identical or very similar in a number of countries. Therefore, we face the problem of deciding how many countries should be examined, and what countries. Given that the study has been conducted entirely from Sweden, those decisions have been conditioned greatly by the availability of sources on the Internet! As to the number of countries, the more countries one examines and finds to have identical or similar laws, the better the result. However, the principle of decreasing marginal benefit is applicable in this context, and it would not be worthwhile to examine too many laws. Intuitively, examining a representative mix of countries should yield reliable results.

With regard to all the stated factors, the countries whose notary-related laws have been studied are the following:

- 1) *Europe* – Belgium, France, Germany, Portugal, Spain
- 2) *South America* – Argentina, Brazil
- 3) *Central/North America* – Mexico, Puerto Rico

Three major difficulties are involved in a comparative study. First, the right sources have to be found. Fortunately, this task was much facilitated by the excellent information on the websites of the Brazilian and Argentinean national notary associations, with links to the notarial laws of a large number of countries. Second, the sources have to be understood. The sources used in the present study are in English, Spanish, Portuguese, French, and German. The language issue was no problem, with the possible exception of German which is the least familiar language for this writer. A French translation of the German BNotO (see below chapter 4) and online dictionaries did an excellent job in leveling the odds! Third, the sources have to be interpreted and used properly. The legal method used in one country is not necessarily valid in another country, and not all legal rules and principles can be derived from statutes. Thankfully, the civil law tradition in Latin countries makes for rather complete laws, which made this part of the endeavor so much easier. Also, a salute is in order for the jurists who shaped the rational legal tradition embodied in above all the German BGB but also the Code Civil. The anticipated rough ride became much more comfortable by the common legal heritage of all examined countries. Naturally, the difficulty in finding case law of other countries online (they are rarely published online for free) made it necessary to rely on text books, articles, and internet sources to complement the statutes. In that respect, however, there is no significant difference from the study of domestic law. Finally, it should be noted that using legislative history as a prominent source of law is a typically Swedish/Scandinavian tradition. The fact that there is no word for it in English, forcing the writer to resort to French, clearly attests to that.

Regarding secondary sources to notarial law – mainly articles – it seems prudent to point out that, as will become apparent below (4.4), the regulation of the notary profession is currently debated and has been under attack particularly from the EU Commission. Many articles on notarial law, therefore, appear biased in the sense that the writers seem quite eager to emphasize the merits of the existing rules. The said sources have been read and cited with due note to this fact.

To give a more complete – if indeed “complete” can be used as a relative term – picture of the institutional framework and the purpose of the notary profession, and consequently the notary as a legal character, the study includes a historic outlook. As will be elaborated below (chapter 3), the historic outlook is not merely intended as pleasant but less important storytelling, but rather as an attempt to explain the origin and evolution of the notary as a profession and as a legal character. The subject matter in that respect is history and legal history (if, indeed, it is meaningful to distinguish between the two). The historic chapter evidently presupposes the study of historic sources. Since the purpose of the historic chapter is to give perspective to the rest of the material, and not to constitute the main theme of the study, it would be over-ambitious to use primary sources where good secondary sources exist. Among the sources to Roman law, the 1904 translation of Gaius’ *Institutiones* is of course close to being a primary source but falls just short since a translation – and a comparatively modern one at that – is technically a secondary source. Most sources fall within the scope of

what is referred to as legal history, but Reyerson's work on intermediaries of trade in medieval Montpellier is perhaps most aptly categorized as economic history.

1.6 Terminology

1.6.1 Language Barriers and the Use of the Term "Broker"

Anybody who has conducted a comparative legal study, or translated a legal text from one language to another, can attest to the fact that there are unexpected and sometimes frustrating obstacles involved. In the humble view of this writer, the most difficult problem lies in the incongruence between different languages and legal cultures. There is a common misconception that (almost) every word in one language has an exact translation in any other language, a translation that can readily be found in a good-enough dictionary. Though completely understandable, this naïve view of the world can lead terribly astray. Consider, for instance, translating the Swedish word "professor" into English (or vice versa). Now, the word "professor" is by no means uncomplicated in the Swedish language, but the distinguishing trait of the Swedish word "professor" is that it is an acquired title and not a generic word for a university teacher. The Swedish professor not only has a doctor's degree but has also earned the title through years of research and teaching. Meanwhile, the English word "professor", as used in the United States, commonly refers to any college teacher with a doctor's degree. In turn, the American terminology uses different attributes to differentiate between career levels. There is probably no perfect equivalent between the two systems, which underscores all the more the importance of exercising due care in the use of specific terms.

The language problem is by no means smaller in the field of law and legal science. Legal terms may have an approximate equivalent in other languages, but differences in legal provisions, cultures and/or systems oftentimes make for a substantial incongruence. An excellent example of this can be found in the aforementioned CEN Standardization efforts. The countries had unexpected difficulties in agreeing upon a term for the profession; should it be denoted as broker, agent, estate agent, real estate agent, property agent, real property agent, and so forth? These difficulties can easily be traced to differences in legal cultures. The term that was finally agreed upon was "real estate agent". While this term seems neutral enough, there are at least two culturally related problems with it. First, the word "agent" inherently implies a person that represents another, and thus acts on his or her behalf. If language is to be taken seriously – and in matters legal the general consensus dictates that it is – then at least a couple of countries would have to find fault with the term "agent" since it does not harmonize completely with their national law. As has been made abundantly clear, the Swedish broker has a legal obligation to safeguard the interests of both seller and buyer. Granted, she is obviously hired by one of the parties – most frequently the seller – and therefore works on their behalf on a contractual level. However, the term "agent", implying a partial role, has a specific connotation. It is an English word, developed to describe a legal character existing in the Anglo-Saxon legal-cultural family where the broker does indeed work on the behalf of her principal. Therefore, using the term "agent" would seem inadequate when discussing the Swedish professional.

The common trait of the professional at hand is that she takes on the task of finding a counterpart for her principal. This activity is most aptly named “brokerage”, whereas the term “agency” does not fit the description as accurately. The logical term for a person who engages in brokerage would seem to be “broker”. For these reasons, I have chosen to use “broker” or “real estate broker” to describe the professional who engages in real estate brokerage. While there may of course be those who, despite these stated reasons, have issues with this choice of terminology, I believe it is well within my academic and literary discretion. The term “agent” will, however, appear in quotations of legal provisions or of other writers, as well as in names and titles.

1.6.2 The Use of Gender

The use of gender is a good example of how something trivial, depending on how it is read, can be interpreted as though it were of paramount importance, as well as bringing a connotation to what is written that was never intended by the writer. To forestall any objection concerning the use of gender and prepositions, the following choices have been made.

- *The broker is a woman.* All references to brokers are feminine. It would doubtlessly satisfy some readers no end if there were well planned motives – whether insidious or good-intentioned – behind this. Some readers may interpret it as a statement that most brokers are women. While the impression of this writer, based on the gender ratio among students attending the real estate brokerage program at Malmö University, is that women are or will soon be in clear majority among brokers, no inquiry has been made to ascertain the ratio among registered brokers in Sweden. The use of the feminine gender should therefore not be interpreted as an assertion of facts, nor as a political statement. It is merely a 50-50 situation – given that the number of available genders is two – and the decision fell on the feminine gender. Any analysis as to the psychological explanation to this is beyond the conscious plane of this writer.
- *The notary is a man.* All references to notaries are masculine. This decision is even easier to explain than the previous: in the 50-50 situation, where one option was chosen for brokers, it seems reasonable to choose the other option for notaries. Again, the reader is urged not to read too much into it.
- *The buyer and seller are undefined.* There has been no conscient strategy as to the gender of the buyer and seller.

1.7 Structure

The rest of this paper is structured as follows. Next, in chapter 2, follows an account of the Swedish broker with particular regard to counseling, contract-engineering, and impartiality. The historic outlook on notaries follows next (chapter 3), preceding the account on the contemporary notary (chapter 4), comparative analysis and discussion (chapter 5), and conclusions (chapter 6).

2 The Swedish Broker

In this chapter, the tasks and role of the Swedish broker will be examined and discussed. It is of course neither possible nor relevant to encompass all aspects of brokerage and its regulation in the present study; there is also plenty of literature for that purpose. Keeping in mind that the purpose of the study is, *inter alia*, to examine and discuss the broker's role in the real estate transaction and her relation towards the contracting parties, two aspects of the broker's work would seem to be of particular interest. Firstly, there are the basic and most central *tasks of the broker* as laid down by law. These tasks correspond to 1, 16, and 19 §§ of the EAA. 1 § is of course the first provision in the whole Act, laying down a definition of what brokerage is essentially about. This is the well-known *matchmaking function* of the broker. 16 § lays down different obligations on the broker to guide the contracting parties, who generally cannot be assumed to possess more than rudimentary training and/or skills in important areas, through the real estate transaction. This can be referred to as the *counselling function* of the broker. 19 § lays down an obligation for the broker to actively pursue a comprehensible and adequate sales contract, as well as any side agreement that may be needed, between the parties. This can be called the *mediating* or *contract-engineering* function of the broker.

Secondly, there is the aforementioned, much-discussed, impartiality rule – or, in other, more famous words, the stipulation that the broker act as an *impartial intermediary*. On a statutory level, this corresponds to not only one but rather four different provisions, namely 12, 13, 14, and 15 §§ of the EAA.

2.1 The Tasks of the Broker

Most people are likely to know that finding a counterpart for one's principal is at the very heart of brokerage. In no way, however, does the work of the real estate broker stop there. While achieving a sale of the property is indisputably the *aim* of brokerage, there are, as indeed there have been in the past, obligations to observe while carrying out the service. The report of the Home Ownership Commission asserted that the brokerage service normally encompassed obligations of examination, information, and counselling with respect to legal, economical and, to some extent, technical issues.⁴⁵

2.1.1 The Matchmaking Function - Bringing the Parties Together

Brokerage is by definition to bring two contracting parties together, which makes a broker a person who assists clients in finding a counterpart.⁴⁶ In this, the common linguistic definition and the legal definition coincide. 1 § of the EAA defines a real estate broker as a physical person⁴⁷ whose occupation is to negotiate the sale of real estate (...). While this wording is not entirely clear, the legislative history is more precise. The key word is “brokerage”.

⁴⁵ SOU 1981:102, p. 91.

⁴⁶ <http://oxfordreference.com/> (2007-09-22).

⁴⁷ In Sweden, the broker is always the physical person and never the juridical person where she is employed. Thus, all rights and obligations apply to the broker herself; see Melin pp. 37-40.

Brokerage is defined as the contractually based task of introducing to the principal a counterpart with whom the principal may enter a contract.⁴⁸ This is considered the first and foremost task of the broker; it is also the one that earns her commission fee.⁴⁹ Consequently, 21 § EAA stipulates that the broker is only entitled to her commission fee once there is a mutually binding agreement between buyer and seller.

The EAA, quite rightly, leaves it up to the marketplace and individual broker to decide exactly how to go about finding a counterpart for the principal. Typically, real estate brokerage will involve advertising in relevant media. In that respect, Sweden has a unique forum in Hemnet which is accessible to all on the web and where all properties for sale may be listed. It will also involve displaying the property, whether by traditional means – that is, physically – or by means of web cameras. None of this, however, is expressly required by law. By contrast, what *is* required in 12 § is for the broker to exercise due care in the performance of her services. In relation to the principal, this could simply be interpreted as a reminder to honor the client-agent agreement and perform the agreed services to one's best ability. Be that as it may, it is clear that the broker is required to act in the client's best interest and do what is in her power to find, not only a counterpart, but a good one at that. In short, the obligation to exercise due care must be interpreted as an obligation towards the seller (who is usually the principal) to fetch as high a price as possible for the property if that is the seller's wish (and it usually is). Thus, what was hinted at as a problem above (1.1) is not only permissible but also an obligation. Luckily for the broker and the seller, most brokers seem comfortable enough with this obligation due to the common interest inherent in the remuneration method. This has serious implications as to the impartiality rule which will be discussed below (2.2).

2.1.2 The Counseling Function – 16 §

16 § of the EAA stipulates that the broker must, to the extent required by *sound estate agency practice*, provide the buyer and the seller with such advice and information as they may require concerning the property and other matters relevant to the sale. The broker must also strive to ensure that, prior to the sale, the seller provides such information with respect to the property as may be assumed to be of importance to the buyer. Finally, the broker must strive to ensure that the buyer inspects the property prior to the sale or hires a professional examiner to do so. A spontaneous lexical interpretation of the provision reveals four main obligations;

1. Provide both parties with *advice* concerning the property and other matters that are relevant to the sale;
2. Provide both parties with *information* concerning the property and other matters that are relevant to the sale;
3. Strive to ensure that the seller provides such information with respect to the property as may be assumed to be of importance to the buyer; and
4. Strive to ensure that the buyer, prior to the sale, inspects the property or hires an examiner to do so.

These four obligations will be dealt with one by one in the following.

⁴⁸ Prop. 1983/84:16, p. 27.

⁴⁹ Prop. 1994/95:14, pp. 41, 44; see also Melin, p. 40.

2.1.2.1 Advice

As to the obligation to provide the parties with advice, the wording is not very specific and raises questions. What advice may the parties require and who decides this? Should all buyers and sellers be given the same level of advice, or can it be left to the discretion of the broker to adjust the information given according to the parties' level of knowledge? What level of expertise can the parties expect from the broker in her counseling role? The legislative history is not very informative on the issue of advice. It is merely asserted that the broker is required to provide advice concerning such issues of legal, technical, or economical nature that are relevant in connection with the real estate transaction.⁵⁰

An important question embedded here is the *extent* of the obligation to give advice. Besides the fact that advice is helpful to the parties, a substantial counselling role does not seem completely unreasonable given that Swedish brokers of today have a formal two-year college education with compulsory courses in, *inter alia*, contract law, property law, and tax law. The EAA says nothing on the matter. The question, then, is whether the obligation to provide the parties with advice concerning "other issues relevant to the sale" should be interpreted as an obligation to give legal advice. For instance, the seller may be interested in help in calculating the capital gains tax if the property is sold at a profit. There is, however, no support for the notion that the broker must provide this service. It is clear from the legislative history that the broker may refuse to answer a question should she feel that it is beyond her skills.⁵¹

This is further supported by a decision by the Swedish National Board for Consumer Complaints.⁵² A couple had asked the broker a question concerning taxes. To be able to afford their intended purchase, the couple needed to claim a respite, in accordance with Chapter 47 of the Income Tax Act⁵³, with the capital gains tax due for the sale of their current property. Their question to the broker was whether, to his knowledge, they would be eligible for such a respite. Upon a positive answer from the broker, the couple proceeded to sell their property. The following year, however, the couple's application for a respite was denied by the tax authorities, who added a fine for untruthful tax declaration⁵⁴ and interest to the tax due; in all around 156 000 SEK. The Board found the broker negligent under 20 § of the EAA and awarded the full 156 000 SEK to be paid to the couple. The conclusion of this case, "soft law" though it is, is that the broker is entitled to refuse to answer a question, or to undertake certain services, if it is beyond her professional competence. However, if the broker accepts to answer the question, or performs the service negligently, she is fully liable for any damage caused. Curiously, the BSEA did not in its subsequent decision find the broker culpable enough to issue a warning. This should not, however, be interpreted as a more lenient position from the part of the BSEA. Rather, the decision was conditioned by insufficient evidence.⁵⁵

2.1.2.2 Information

Providing information with respect to the property and other relevant matters is arguably one of the most important tasks of the broker. At the very least, this seems to be the predominant

⁵⁰ Prop. 1983/84:16, 37; Melin p. 188.

⁵¹ Prop. 1983/84:16, p. 37.

⁵² ARN 2006-46-13, decision of 5 December, 2006.

⁵³ SFS 1999:1229.

⁵⁴ In accordance with Chapter 4 of the Tax Procedure Act (SFS 1990:324).

⁵⁵ Dnr 4-921-07, 29 August, 2007.

view among the public, judging by complaints to the Board of Supervision of Estate Agents. A very common complaint is that the broker has not provided enough information, or that the information provided has proved incorrect.

Firstly, the broker must give the parties information concerning *the property*. This means that the broker is under an obligation to disclose any and all information known to her concerning the property being sold. It must not, however, be construed as an obligation for the broker to examine the property in order to obtain such information. Though, admittedly, it would often be helpful for buyers if brokers had more specific information concerning the property, there is no legal obligation for her to undertake an examination. The broker is, however, expected to possess a certain level of expertise and as such cannot ignore defects that are apparent to her (but not necessarily to the buyer and/or seller) when viewing the property.⁵⁶ However, the fact that the broker has no inspection obligation concerning the property, and thus is not required to actively look for defects, does not change the fact that the broker must disclose to the parties any information that may be assumed to be of importance to the transaction, *irrespective of how she has obtained the information*. In a nutshell, the broker is not allowed to withhold information that she has. This obligation applies not only to facts that are *known* to the broker, but also *suspensions* that she may have, based on her experience and expertise.⁵⁷ It should also be pointed out that the disclosure obligation is not limited to “defects” in the contractual sense; instead, “information” means just what it seems and applies to *any* fact or circumstance that may be of importance.⁵⁸

Consider the following example. Prior to advertising the property for sale, the seller renovates the bathroom. To cut costs, and since he finds manual labor gratifying, the seller does most of the job himself. Suppose that he is no professional and that he performs the job such that there may be future moisture damages. Suppose, further, that the broker recognizes the job as sub-par and that there may be future problems. In such a situation, where the broker has reason to believe that there may be a defect, she is required to disclose this to the buyer.

The question of the broker’s disclosure obligation has appeared in the case law of the administrative courts. **RK 8375-04**⁵⁹ concerned, *inter alia*, the question of to what extent the broker is required to disclose information that she has received during the brokerage of a property.⁶⁰ The relevant facts of the case were the following. In connection to the brokerage of a tenant-ownership apartment in 2003, the written information from the broker stated that the apartment had a fireplace and included a picture of the said fireplace. After taking possession of the property, the buyer became aware that the chimney did not function properly. The municipal authority subsequently issued an injunction against the active use of the fireplace in the apartment. In the complaint to the Board of Supervision of Estate Agents, the buyer contended that the broker had known from an inspection report from 1996 that the chimney was not tight. The broker did not deny having known about the defect but contended that he had informed all prospective buyers “that there may be some uncertainties as to the proper function of the fireplace”. The Board found the broker in breach of 16 § for not disclosing to the buyer all available – and highly relevant - information about the chimney and

⁵⁶ On the question of the broker’s information obligation, and inspection obligation or lack thereof, see SOU 1981:102, pp. 202-203, prop. 1983/84:16, p. 15, prop. 1994/95:14, Melin, pp. 189-199.

⁵⁷ Prop. 1983/84:16, p. 14 and 37-38, Melin, p. 194.

⁵⁸ This follows from the wording of 16 §: “advice and information concerning the property and other matters that may be of importance (...)”. See also Melin, p. 195.

⁵⁹ Judgement of the Appellate Administrative Court of Stockholm of the 4 July, 2005.

⁶⁰ The other question in the case concerned the disclosure of raised fees to the tenant-ownership association.

issued a warning. The broker appealed to the Administrative Court of First Instance of Stockholm, contending that he had in fact informed all prospective buyers about the chimney as soon as he had the information; at the time the prospect was written, he had not had that information. The court merely concluded that the broker had known while brokering the apartment that the chimney was not tight. By failing to disclose the full information to the buyer, he had therefore acted in breach of 16 §. The broker appealed to the Appellate Administrative Court, who concluded that the broker had received information of the malfunction of the chimney after the prospect was produced. The Board of Supervision of Estate Agents did not even contest that the broker had informed the prospective buyers orally that there was a risk that the fireplace would not function properly. While the court pointed out that it would have been preferable had the broker added this to the written information, it nevertheless did not find him in breach of the EAA. The warning was rescinded.

From the case law of the Board of Supervision of Estate Agents, the following is noteworthy. In **2004-02-25:1**, the broker had not obtained information from the seller concerning an existing defect on the roof of the property for sale. The Board pointed out that the broker is not expected to perform an examination of the property, but must disclose such defects as are known to her. In the case at hand, there was no evidence to support the notion that the broker had known about the defects.⁶¹ In **2004-02-25:2**, the buyer complained that they had not received correct information concerning the physical state of the property. The broker admitted to having known about the defects and to failing to convey the information to the buyer. The Board concluded that this was in breach of the information obligation in 16 §, but refrained from issuing a warning due to mitigating factors.⁶²

Secondly, the broker must provide the parties with information concerning *other matters relevant to the sale*. The primary obligation here is to inform the parties about any facts and circumstances that, while not pertaining to the property itself, nonetheless affect the transaction in a substantial manner. Fields of particular interest include interest rates, market prices, planned construction in the area, and – last but not least – legal matters. As is the case with information concerning the property, opinions are divided as to whether the broker is or should be under an obligation to *obtain* the said information. Such information may concern planned construction and/or changes in land use in the area. The Home Ownership Commission proposed in its report that a provision be introduced whereby the broker was required to gather any such information. The idea was, however, rejected, and no such provision was introduced in the 1984 EAA.⁶³ Nor was it introduced in the 1995 EAA. It seems clear that no such obligation exists today; in **RÅ 2006 ref. 53**⁶⁴, the Supreme Administrative Court held that the broker is under no obligation to gather such information. However, once the broker has received the information, she must convey it if it can be assumed to be of importance to the buyer. The court rejected the view of the broker who contended that the requirement to convey information only applied to facts and circumstances concerning the property itself. The assessment whether the received information is of such importance that the broker must convey it must, held the court, be made in each individual

⁶¹ The complaint concerned the fact that the broker had not obtained the said information from the seller. The Board did not discuss the question of whether the broker should have obtained the information from the seller, which may have some merit since the broker must urge the seller to disclose known defects (see below). The decision says, however, that there was no reason “to believe that [the broker] acted in breach of sound estate agency practice (...)”. The statement implies that the Board found no fault on that account either.

⁶² Upon realizing the mistake, the broker contacted his insurance company who admitted that the insurance covered the damages. The broker also offered to pay the excess cost, but this was turned down by the buyer.

⁶³ SOU 1981:102, p. 203, prop. 1983/84:16, p. 15.

⁶⁴ For the facts of the case, see below.

case, depending on the actual impact the planned construction or planned changes in land use may have on the property to be sold and the conditions of living there. The court further held that it is of no consequence whether the said information is typically advantageous or disadvantageous to the buyer. In fact, that is not for the broker to decide. What is perceived as positive by one prospective buyer may well be negative to the next. The broker is required to convey the information so that they themselves can make that decision.

This means that the buyer must seek out this information himself. Similarly, the broker is under no legal obligation to *know* the market prices or interest rates, even though this is extremely helpful to buyers and sellers. In practice, most, if not virtually all, brokers do inform the parties about market prices and interest rates. This is, however, done as a service rather than to satisfy legal demands.⁶⁵

An important issue concerns the broker's accountability for information – whether it concerns the property or other relevant matters - she receives from the seller and passes on to the buyer. As has been stated in the aforementioned, it is indisputable that the broker is required to pass on such information as may be deemed to be of importance to the transaction. An important question in that connection is what responsibility the broker has as to the veracity and accuracy of the information. Should the broker be made accountable to some degree, such that if the information proves incorrect she may be liable for damages towards the buyer, or should she be regarded as a mere conduit with no liability? At a glance, there seem to be good arguments for both positions. On the one hand, it is of utmost importance to the buyer that information concerning sensitive issues such as grave defects on the property or costs of living (heating, electricity etc.) are accurate so that they can make informed decisions as to the purchase, the price, and other important issues. This speaks in favor of placing some level of liability on the broker, requiring her to check the accuracy of the information. On the other hand, placing too much responsibility on the broker may serve only to make the transaction as a whole more cumbersome and expensive.

The legislative history is clear insofar as that the broker may be required to check the accuracy of the received information *when there is reason to do so given the circumstances*. This means, for instance, that the broker may not uncritically convey information from the seller concerning the physical state of the property.⁶⁶ While this makes it safe to conclude that the broker is *not* a mere conduit who has no responsibility for the conveyed information, it is not very informative as to the *level* of responsibility. In short, under what sort of circumstances is it reasonable to require that the broker check the information before she conveys it to the buyer? Fortunately, the case law of the Board of Supervision of Estate Agents sheds further light on the issue.

In **2005-03-16:2**, the broker was told by the seller that the commons association⁶⁷ was responsible for the physical condition of the roof on the property, and conveyed this information to the buyer. It turned out later that the information was incorrect. The Board found that the question of the responsibility for the condition of the roof was of particular importance in the case at hand since the inspection report indicated defects. For this reason, the broker should have either checked the information with the association or urged the buyer

⁶⁵ It has become common practice for brokers to undertake a valuation of the property for the benefit of the buyer and their creditor. Ultimately, this service is essential to all parties involved since the seller is also dependent upon the buyer receiving a loan.

⁶⁶ Prop. 1983:/84:16, pp. 37-38.

⁶⁷ Samfällighetsförening.

to do so. The broker was given a warning. In **2005-12-14:3**, the broker conveyed allegedly incorrect information; the broker had stated the area size 170 m² whereas the Lantmäteriet database indicated 155 m². The explanation was to be found in a newly refurbished guest room that had previously been used as a horse stall. The Board found the broker without fault on this account. **2005-09-28:5** concerned information in the information booklet that the apartment for sale had broadband capacity. As it turned out, there was a cost of 1390 SEK involved. The Board concluded that the broker had had no reason to suspect that the information, emanating from the seller, was incorrect. In **2006-05-10:2**, the broker had conveyed the information from the seller that the property for sale was situated in an area with small chances of radon in the houses. However, the buyers later contacted the municipal authorities and received the opposite information; a subsequent measurement revealed radon values that surpassed the limit values. The broker contended that she had had no reason to question the accuracy of the seller's assertion that he had not heard of radon problems in the area, especially since this was corroborated by a so-called "radon map" that the broker had previously received from the municipal authorities. The Board found the broker without fault.

Merely conveying information does not in itself satisfy the information obligation of the broker; at times the *time* the broker informs the buyer or seller is crucial. A case in the Supreme Administrative Court, **RÅ 2006 ref. 53**, illustrates the point. The broker was engaged in 2002 to sell a house in a residential area in Gothenburg that was close to the Fiskebäck harbor, which had mainly industrial buildings. Two years prior, the municipal authorities had approved a plan whereby the harbor was in part to be transformed into a residential area. Of course, this would involve construction. The seller informed the broker of these plans, but the broker in turn did not inform the buyer until the time of the signing of the sales contract. The Board of Supervision of Estate Agents issued a warning on the ground that the information was conveyed to the buyer at too late a stage in the transaction. Held the Board, such important information must be conveyed in good time before the signing of any contracts so that the buyer may consider it. The warning was appealed to the Administrative Court of First Instance of Stockholm, who shared the Board's view and upheld the warning. The broker then appealed to the Appellate Administrative Court who pointed out that, since the information was not conveyed to the buyer until the time of the signing of the sales contract, the buyer cannot be said to have been afforded a fair opportunity to evaluate the importance of the information. The warning was again upheld. The broker proceeded to appeal to the Supreme Administrative Court, who first concluded that information concerning planned construction must be conveyed (see above). The court then upheld the warning without further comments save that the buyers had been afforded no opportunity to educate themselves as to the plans and evaluate their importance.

A case that was explicitly based on 12 § rather than 16 §, but which nonetheless concerned the broker's counseling function, was case **19859-06** before the Administrative Court of First Instance of Stockholm. The complainant buyers had won the bidding competition. The broker informed them of this on the 22 March, 2006 by e-mail, saying "[t]he sellers of the property (...) have orally sold the house to you for 4,2 million SEK". On the 28 March, the broker informed them that the property had been sold to another buyer and that the contracts had been signed four days earlier. The broker contended that he had informed the complainants that only written sales contracts are binding in real estate conveyances. While the Board did not contest this, it nonetheless issued a warning on account of the e-mail stating that in writing the said e-mail the broker had failed to observe due diligence in relation to the complainants. The broker appealed to the Administrative Court of First Instance, arguing that the e-mail in question also requested the buyers' social security numbers for the purpose of drafting sales

contracts; the e-mail must therefore be understood in its context. The broker argued that he had observed his duties according to the EAA. The court held that, even if the broker's statement that he had informed the buyers that only written contracts were binding, the e-mail must be considered inappropriate and confusing. The court further held that the broker should have been quicker to inform the complainants that the seller had changed their mind and sold to another buyer. The warning was upheld.⁶⁸

2.1.2.3 Strive to ensure that the seller provides information

The next obligation laid down in 16 § is to ensure that, prior to the sale, the seller provides such information with respect to the property as may be assumed to be of importance to the buyer, as well as to ensure that the buyer inspects the property prior to the sale or is afforded an opportunity to inspect the property. This is common practice among brokers today and is done by asking the seller to fill out a form, disclosing any defects on the property known to them.⁶⁹ In the eventuality of a court dispute or disciplinary proceeding before the Board of Supervision of Estate Agents, this is an excellent way for the broker to prove that she has fulfilled her obligations.⁷⁰ Thus, the form serves two ends.

The obligation to urge the seller to disclose all known defects on the property is not completely unproblematic. It is of vital importance to keep the legal relation of the broker to the contracting parties separate from the relation between the contracting parties themselves. The latter is regulated, apart from the sales contract, by the Land Code which stipulates a quite stern obligation for the buyer to inspect the property prior to the sale. Under 4:19 of the Land Code, the seller is not liable for defects that would have been detected through a diligent inspection. It is of no consequence whether an inspection has actually taken place; it is sufficient that the defect in question would, or rather *could*, have been detected if such an inspection had in fact taken place.⁷¹ Thus, the main responsibility concerning defects is placed on the buyer. The seller, on the other hand, is under no general obligation to disclose such defects as can be detected through a diligent inspection. The merits of this can of course be discussed – though such a discussion is outside the scope of this study – but it is, nonetheless, established law and equilibrium of sorts. Now, when 16 § of the EAA places an obligation upon the broker to urge sellers to disclose all defects, with no respect to the provisions of the Land Code, this equilibrium is disrupted, in practice if not at law. Judging by the legislative history, this may not have been intended – indeed, the matter may have been overlooked – in the legislative process.⁷²

2.1.2.4 Strive to ensure that the buyer inspects the property

The third obligation laid down in 16 § is to strive to ensure that the buyer inspects the property, either himself or with the assistance of a professional examiner, prior to the sale. This is an important provision due to the stern obligation laid down in 4:19 of the Land Code for the buyer to inspect the property. Thus, the broker is required to explain to the buyer the

⁶⁸ By decision 6082-07 of 21 September, 2007, the Appellate Administrative Court of Stockholm has decided that it will try the case in substance. As of 14 January, 2008, the case has not yet been tried.

⁶⁹ "Frågelistan".

⁷⁰ This point is also argued by Melin, at p. 199-200.

⁷¹ Grauers, Folke, pp. 204-218.

⁷² Melin, p. 199. This applies, however, only to urging the seller to disclose defects. The Home Ownership Commission voiced the opinion that it was not appropriate to give the broker obligations that interfered in the relation between buyer and seller; SOU 1981:102, p. 202.

extent of his inspection obligation, and urge him to inspect the property. There is no general obligation to urge the buyer to hire a professional examiner, merely to inspect the property. This is perhaps not optimal given that many - if not most - buyers lack the necessary technical know-how to satisfy the requirement of 4:19 of the Land Code.⁷³ However, since the broker is required to be observant of the needs of the individual buyer, it may often become necessary all the same.⁷⁴

At times it becomes impractical, for some reason or another, to inspect the property prior to the signing of the sales contract. This may for example be the case where the buyer wishes to hire a professional examiner but cannot find one who is available before the determined date for the signing of the contract. As will be described and discussed below (2.1.3), in such circumstances it is possible to solve the situation by means of an inspection clause in the sales contract. However, 16 § requires the broker to urge the buyer to inspect the property *prior* to the sale. Since the signing of the contract is instrumental in accomplishing a valid and binding contract in the conveyance of real estate or tenant-ownership apartments, the provision cannot possibly be interpreted in any other way than that the inspection is normally expected to take place prior to the signing of the contract. Consequently, the Board of Supervision of Estate Agents pointed out in **2006-08-23:5** that it is not in accordance with sound estate agency practice to recommend the buyer to inspect after the sale, *unless this is justified by the circumstances in the individual case*. Rather, the broker should strive to ensure that prospective buyers are afforded the chance to inspect the property prior to the sale and, where necessary, perform a technical examination. This was presented as the position of the Board; however, no warning was issued in the case at hand. The same declaration was made in **2006-08-23:6**, but in the absence of sufficient evidence no warning was issued.

2.1.3 Assisting in the Contract Phase – 19 §

A part of the broker's work that is receiving ever more attention is the task of assisting the parties in the contract phase of the transaction. It is also without a doubt one of the most knowledge-demanding tasks and one that is creating problems for brokers. The Board of Supervision of Estate Agents has issued warnings on numerous occasions to brokers failing in this respect (see below). The statutory basis is the following. 19§ of the EAA requires the broker to strive to enable the buyer and seller to reach agreement with respect to issues that must be resolved in connection to the transaction. In the absence of an express agreement to the contrary, the broker must also assist the parties in drawing up the necessary documents.

What then, does it mean to ensure that the parties enter agreement in matters that must be resolved in connection to the transaction? Is there a check-list that must be satisfied? Do real estate sales contracts always have to look the same, with the same clauses? The answer is of course no, and it is precisely this that is currently creating problems for brokers as well as buyers and sellers. The legislative history calls for the broker to be "active and observant" with regard to matters that must be resolved in connection to the transaction.⁷⁵ This means that the broker cannot merely use standardized documents with no accord paid to the particular needs of the parties to the current transaction. Instead, the broker is required to use her full professional knowledge and experience to safeguard the particular needs of the buyer and the seller. It is of utmost importance to draw up contracts that adequately reflect the will

⁷³ Melin, pp. 200-201.

⁷⁴ This follows, if nothing else, from sound estate agency practice as laid down in 12 §.

⁷⁵ SOU 1981:102, p. 208; prop. 1983/84:16, p. 41.

of the parties. It is thus not sufficient to use standardized documents available from different legal services. A clause that does not reflect the will of the parties must be amended or erased.⁷⁶

Unfortunately for the broker, it gets more complicated yet. The broker is a professional within the field of real estate whereas the typical buyer and seller are laymen. As such, the latter two may not know “what is good for them”. In situations where the broker can tell that one of the parties will need a certain type of clause, the broker cannot sit idly watching but must instead counsel the parties and urge them to consider a solution. There is case law from the common courts as well as disciplinary rulings in both the administrative courts and the Board of Supervision of Estate Agents, to illuminate the subject.

The cumulated proceedings of **NJA 1997 s. 127, I and II**, concerned two cases where the buyers were in need of a mortgage to finance their respective purchase. In case I, the broker inquired as to the personal finances of the buyer, who answered untruthfully, claiming a higher income than she actually had. The broker felt it was in order and that the buyer would not have troubles getting a loan. In case II, the background was almost identical with the exception that the buyer did not give false information to the broker. In both cases, the buyers were denied financing. In both cases, the sellers were entitled, under 4:13 of the Land Code, to indemnity for damages incurred since the buyer failed to make payment. The buyers proceeded to sue the respective brokers for negligence. The Supreme Court found that, in both instances, the broker was required by law to foresee and prevent the situation and to suggest that a *mortgage clause* be included in the sales contract. Both brokers were therefore found in breach of the EAA; however, the broker in case I was not found negligent since the buyer had in fact misled the broker as to her financial status. In case II, the buyer was awarded damages.

Inspection clauses are another type of clause that has become popular in real estate sales contracts. Normally, the buyer should inspect the property prior to the sale. 4:19 of the Land Code and, in the case of tenant-ownership homes, 20 § of the Sales Act⁷⁷, assume that the inspection takes place prior to the signing of the sales contract. However, at times this becomes impractical for the parties; a typical example is where the professional examiner is not available right away. In such cases it is possible to include an inspection clause in the sales contract, whereby the buyer is afforded the right to terminate the contract, without incurring damages, should the inspection reveal unacceptable defects. This has been particularly common practice in the last few years due to the hot real estate market where transactions are swift and the prospective buyers are many. Buyers wishing to inspect the property before signing the contract may find themselves surpassed by competitors.⁷⁸

The problem with inspection clauses, as indeed is the case with all types of clauses, is to formulate them properly. Merely including the right *types* of clauses in the sales contract does not satisfy the requirements in 19 §. The said clauses must also be *adequate*, in more than one sense. To begin with, the clauses must be clear and unambiguous so that the parties understand them, in order to prevent future disputes. In fact, preventing future disputes between the buyer and the seller is one of the main purposes of 19 §.⁷⁹ Unfortunately,

⁷⁶ Melin, p. 224.

⁷⁷ SFS 1990:931.

⁷⁸ Reports from the last quarter of 2007 indicate that prices have begun to decrease. How this will affect behavior on the market remains to be seen.

⁷⁹ Prop. 1983/84:16, p. 41; see also the various Board cases cited in this section where this is either part of the decisions or mentioned as *obiter dicta*.

satisfying this requirement has proven difficult for brokers, as is attested to by the case law of the administrative courts and the Board of Supervision of Estate Agents.

The requirement that the clauses in the sales contract be clear and unambiguous can in turn be divided in two sub-requirements. Firstly, the broker must *actively pursue the regulation of all matters that may be deemed to be important* in the transaction at hand; failure to do so may cause uncertainty as to the interpretation of the clause or the contract as a whole. This may seem to have been made clear above, but it is important to stress that merely adding e.g. an inspection clause does not in itself resolve all problems involved with the inspection and the seller's liability for defects. The lack of an express, written agreement often gives rise to unnecessary disputes or – which could be seen as even worse – be prejudicial to one of the parties since the lack of proof may cause them to lose a dispute they should rightly have won. Secondly, the *wording* of the clauses must be clear. Again, inspection clauses may serve as an example. Now, one difficulty involved in such a clause is how to define “unacceptable defects”; i.e. what defects should give the buyer the right to terminate the agreement. “Unacceptable” is probably unacceptably vague!

Regarding the requirement to actively pursue the regulation of all relevant matters, the sales contract in case **645-06**⁸⁰ before the Administrative Court of First Instance of Stockholm included an inspection clause that failed to specify what formalities the buyer should observe when terminating the contract, or which party was to decide whether the defects on the property amounted to more than the set threshold of 45,000 SEK. The broker was given a warning by the Board of Supervision of Estate Agents. Appealing to the Administrative Court of First Instance, the broker argued that there had been no doubts or discord between the parties as to the meaning of the contract clauses. The court did not refute these arguments but rather summarily concluded that the contested clause was unclear and that the failure merited a warning. The decision of the Board was upheld.

As for the case law of the Board of Supervision of Estate Agents, the broker in **2005-02-23:6**, had assisted in drawing up a sales contract whose § 15 stipulated that the validity of the contract was conditional upon the buyer receiving permission to keep three horses on the property. Unfortunately, the contract gave no information as to by whom this permission should be granted. There was also no stipulated time limitation for the clause. The Board issued a warning. In **2005-03-16:8**, the sold property had a fireplace. The buyer hired a chimney-sweep who inspected the fireplace and issued an injunction banning the owner to make use of the fireplace. The buyer and seller agreed that the seller was to pay for the reparation of the fireplace, whereupon the chimney-sweep was to perform a new inspection and annul the injunction; this was all included in § 15 of the sales contract. However, there was no stipulated deadline for the seller's obligations; nor did the contract specify the consequences should the seller fail to perform the obligations. According to the broker, the parties had an orally agreed deadline (which, naturally, the seller failed to observe). The Board issued a warning on account of the lack of specificity, and added as an *obiter dictum* that it is important that the broker discusses the conditions of the contract with the parties. Similarly, in **2005-11-16:2**, the sales contract included a clause that imposed an obligation on the seller without specifying the consequences of not abiding by it. The Board noted that this is unsatisfactory but refrained from issuing a warning. In **2006-08-23:1**, the inspection clause failed to specify which party was entitled to assess the costs to repair the defects revealed at the inspection. It also failed to specify how and to whom the buyer should address an

⁸⁰ Ruling of 30 June, 2006.

invocation of the termination right. The Board issued a warning on both accounts. The inspection clause in **2006-09-27:4** also failed to specify who should assess the repair costs; in this case the Board went no further than to point out that professional examiners normally do not calculate the repair costs. However, the same clause also conferred a right on the seller to decide whether they wished to repair the defects or terminate the agreement, without specifying any time limit. The Board issued a warning on this account instead. In **2006-09-27:6** the inspection clause did not specify any time limit nor how or to whom the buyer should announce that they invoked the right of termination; the broker was given a warning. **2006-10-25:9** concerned an inspection clause that entitled the seller to decide whether to repair the defects or to terminate the agreement, without specifying any deadline for this decision or how it was to be announced. The broker was given a warning.

In rare cases, uncertainty can be the effect of including unnecessary clauses in the contract. In the aforementioned **2006-10-25:9**, the sales contract included a mortgage clause that was unnecessary since the buyer had secured a loan prior to the signing of the contract. The Board found that including the mortgage clause under such circumstances gave rise to unnecessary uncertainty as to the validity of the contract, issuing a warning for the mistake.

As to the wording of the clauses, case **1683-05**⁸¹ before the Administrative Court of First Instance of Stockholm concerned an inspection clause granting the buyer the right to terminate the contract should the inspection reveal defects whose repair cost surmounted 3,000 SEK, *unless the seller agreed to indemnify the buyer, in cash, for the part of the repair costs that surmounted 3,000 SEK*. The wording was deemed unclear and likely to cause disputes; among other things, it failed to specify a deadline for the seller to announce whether they would indemnify the buyer or let the contract be terminated. The Board issued a warning. The broker appealed to the Administrative Court of First Instance, arguing that the contested inspection clause had been drafted by the legal counsel of her broker association, and citing the court case RÅ 2002 ref. 30 to support the notion that a broker following the counsel of her lawyer could not be held responsible. The court rejected the argument and held that the broker bears full responsibility and liability for the wording of contract clauses. The broker further argued that the contested clause was not unclear at all and that it was evident that the seller's deadline must be interpreted as identical to the buyer's deadline to terminate the contract. The court rejected this interpretation and criticized the broker for failing to specify a deadline in the clause. The court further found it unsatisfactory that the clause afforded the buyer the right to appoint the inspector and that this inspector was to assess the repair costs; the broker was criticized on this account as well. Other than that, the court found the clause to be clear and well-balanced in substance. The warning was rescinded "with doubt", but two members of the court – including the presiding judge – issued a dissenting opinion arguing for upholding the warning.

Case **23380-05**⁸² concerned an inspection clause that had given rise to a dispute between buyer and seller where the latter refused to accept the former's termination of the contract. The clause afforded the buyer the right to terminate the contract should the inspection reveal defects of which the buyer had not previously been informed and that were not such "*as may be expected given the age and state of the property*". The Board of Supervision of Estate Agents issued a warning on the ground that the clause was unacceptably unclear and likely to cause disputes. The broker appealed to the Administrative Court of First Instance, who

⁸¹ Ruling of 16 December, 2005.

⁸² Ruling of 20 December, 2006.

likewise found the clause unclear, the assessment supported by the fact that a dispute had in fact arisen with respect to the said clause. The court upheld the warning.

The sales contract in case **20260-06**⁸³ included an inspection clause that gave the seller the right - in the case the buyer's inspection should uncover unacceptable deviations from the specified standard - to repair those defects no later than the day of possession. The buyer, in turn, was required to announce whether they wished to invoke their right to terminate the contract *within three days upon the seller's announcement that they would not repair the defects*. Since there was no specification as to when the seller had to make this announcement, it could not be deduced from the clause what deadline the buyer had to observe. The Board issued a warning. The broker appealed to the Administrative Court of First Instance, arguing that, while the clause may have its faults, it was the result of a conscious and responsible choice between a clear but substantively less satisfying clause on the one hand, and a less clear but substantively more satisfying on the other. Finding a compromise between these conflicting interests is not easy, and brokers should not be punished for it making the same type of choice lawyers make. The broker further argued that the contested clause was not unclear since it was natural that the seller would be required to make their announcement "within reasonable time". The court rejected these arguments and held that the broker is required, in the interest of preventing disputes between buyer and seller, to write clauses that are clearly worded in order to be indicative as to how their subject matter is regulated. The court shared the Board's view that the clause in question was vague and unclear in several ways and that it merited a warning. The Board's decision was upheld.

The inspection clause in the aforementioned **2006-09-27:4** was generally incoherent and in parts incomprehensible. In addition to what has been mentioned, it stipulated, *inter alia*, that the technical inspection of the property was to take place no later than 19 April 2006; at the same time, the deadline for any claims from the buyer with respect to the said inspection had to be raised no later than 16 April 2006. It also stipulated that if the inspection should reveal defects, the reparation cost of which amounted to more than 80,000 SEK⁸⁴, the buyer was entitled – provided the defects were not such "that could have easily been discovered or that the buyer would have had reason to expect given "age, state, or price"⁸⁵ – to demand that the seller repair the said defects. The seller, on the other hand, was entitled to decide whether to repair the defects or terminate the agreement. Not even a very thorough examination can yield anything that resembles a clear-cut interpretation of such a clause. This can be overtly detrimental to the contract as a whole; it does nothing to prevent future disputes but rather quite the opposite. Therefore, the Board of Supervision of Estate Agents issued a warning to the broker in question. It should be noted that the clause in question is in fact horribly worded and quite difficult to grasp on a purely semantic level; however, the Board quite rightly based the warning on the aspect that was *overtly* detrimental to the interpretation of the contract. **2005-09-28:4** concerned another inspection clause, which gave the buyer the right to terminate the contract should the inspection reveal defects "of which the buyer ha[d] not been informed, or which the buyer ha[d] reason to expect given the age and state of the property". The broker explained that the seller had informed the buyer of a number of minor defects prior to the sale. The termination right was meant to apply to any *serious* defects the seller had not already disclosed. The Board rejected the broker's arguments and held that the clause was open to virtually any interpretation and thus likely to give rise to further disputes. It is

⁸³ Ruling of 5 February, 2007.

⁸⁴ Two "basbelopp" in the meaning of the Social Security Act (SFS 1962:381). Symptomatically, there was no reference to the statute, nor any other specification of the sum, in the clause.

⁸⁵ The age, state, and price of exactly *what*, was not specified in the clause.

easy to concur with the Board: defects “that the buyer has reason to expect given the age and state (sic!) of the property” is not only more than a little vague, it is also arguing in a circle.

Further, the broker is required to *actively promote an appropriate and acceptable contract*. This is of course very sensitive since the property sale is a contract between the buyer and seller. The broker has no right to override the will of the parties and should therefore as a rule not interfere in substance. However, as has been made clear, the broker is required to be active and observant and foresee the needs of the parties. This may involve interfering to some measure in negotiations. In **2005-12-14:4**, the parties had signed the sales contract on 6 September 2004. The contract included an inspection clause granting the buyer the right to inspect the property and to terminate the contract no later than 16 September 2004. Problems arose when the buyer could not find a professional examiner available before the 20th. The broker admitted being contacted on 14 September by the buyer who wanted the time limitation in the sales contract extended. There was, however, no contact between the broker and the seller. On 24 September the buyer announced that she unilaterally terminated the contract. On the 27th the broker contacted the seller who refused to accept the termination of the contract, on the ground that the buyer had missed the deadline. A legal dispute between the parties followed. Citing the legislative history⁸⁶, the Board noted that the broker is required to act diligently to prevent disputes. In not acting upon the buyer’s request for a prolongation of the deadline in the contract, the broker had failed to meet her legal requirements and was given a warning. An important point about this case is that the warning was issued, at least in part, for not trying to persuade the seller to agree to a prolongation of the deadline, which is a form of interference in substance. Similarly, in the aforementioned **2005-03-16:8**, the broker was given a warning, in part, for failure to safeguard the interests of the buyer; according to the Board, the broker should have actively pursued an agreement that specified the consequences if the seller failed to meet their obligations. In **2005-06-15:4**, the Board issued the warning, in part, because the unclear inspection clause was likely to render the buyer’s termination right practically useless. A plausible interpretation is that the broker is required to interfere with the will of the parties where necessary in order to prevent disputes. Interestingly, in **2005-01-19:3**, the Board asserted that, because of the impartiality rule, the broker cannot be required to remind the parties of existing deadlines or in any other way actively seek to affect the transaction after the sales contract has been signed. This would seem to contradict the other cases. However, in the very same decision the Board concluded that the broker *is* required to act if the progression of the transaction should make it necessary to reach further agreements or amend the previously signed contract. In **2006-10-25:9**, the inspection clause stipulated that the inspection take place no later than 3 June 2005 whereas the buyer’s deadline for invoking the clause – which required that the buyer deliver to the seller a copy of the inspection report – was only three days later. The Board pointed out that the time limit was rather short and that the broker is required to design inspection clauses in such a manner that the buyer is afforded enough time to hire an examiner and get the report back; however, no warning was issued on this account.

The cited decisions should not, however, be interpreted as a green light for brokers to adjust their compliance with the EAA in every individual case. In case **20385-06**⁸⁷, the broker had written an inspection clause that afforded the buyer only one day in which to obtain the inspection report and give announcement to the seller. The Board pointed out that it is virtually impossible to receive the report, analyze it, make a decision, and announce to the seller in such short time. The clause was therefore practically useless. The Board issued a

⁸⁶ Prop. 1983/84:16, p. 36 compared with prop. 1994/95:14, pp. 75-76.

⁸⁷ Ruling of 30 October, 2006.

warning. Appealing to the Administrative Court of First Instance, the broker argued that the buyer in the individual case had extensive experience with real estate transactions, and that the broker had thus concluded that the – admittedly short – time of one day would be enough. The broker further argued that the parties agreed orally that the deadline could be extended if necessary; this was subsequently done. The court held that whatever agreement the parties may have entered orally was immaterial, and that the clause in question had not been worded in a way that was acceptable under the EAA. The broker had thus failed to safeguard the interests of both buyer and seller, as well as to draw up a clear contract clause. The warning was upheld.

As indicated above, the broker must ensure that the parties *understand* the contract and its implications. There is no formal requirement in the EAA as to how this is to be accomplished. However, in the aforementioned cases **2005-01-19:3**, **2005-03-16:8**, **2005-04-13:2**, **2005-06-15:4**, as well as in **2006-08-23:6** and **2006-10-15:3**, the Board stressed the importance that the broker discuss the contract and the conditions of the transaction with the parties. Also, the requirement to pursue an agreement between the parties with respect to all relevant matters must by any reasonable standard be interpreted as encompassing a requirement to ensure the parties understand the said agreement. In a way, this could be construed as a part of the counseling requirement laid down in 16 §, since that provision requires the broker to give the parties advice and information that may be of importance with respect to the transaction (see above 2.1.2). It cannot possibly be called equitable and in accordance with sound estate agency practice to persuade the parties to enter agreements they do not comprehend. The same applies to *not* regulating a certain issue. The broker must ensure that the parties understand the implications and the importance of reaching an express agreement on important issues; see **2006-08-23:1**. Thus, it is safe to conclude that the broker has an obligation to discuss the transaction with the parties and to ensure that they have understood the contract, its clauses and their implications. How this is to be done is left up to the broker, as well as the level of assistance each buyer or seller may need.

In the interest of preventing further dispute, the broker is further required to *document* the agreements between the buyer and seller, or at the very least actively persuade the parties to document them. In case **889-06**⁸⁸ before the Administrative Court of First Instance of Stockholm, the parties had agreed *orally* that the buyers would remunerate the seller for being allowed to take possession of the purchased tenant-ownership apartment earlier than was stipulated in the sales contract. A dispute arose and the seller lacked evidence of the details of the agreement. The Board pointed out that the broker should have pursued a *written* agreement between buyer and seller on the matter, and issued a warning. The broker appealed to the Administrative Court of First Instance, who subscribed to the view taken by the Board of Supervision of Estate Agents, that written documentation prevents disputes and that the broker is required to pursue the written documentation of all agreements. The warning was upheld.

The Board of Supervision of Estate Agents came to the same conclusion in the aforementioned cases **2005-01-19:3** and **2005-06-15:4**, though the documentation itself was not the main issue in those cases. **2005-12-14:1** concerned the purchase of an empty house lot. The lot had a large hole in the ground, and the parties agreed orally that the seller was to pay for its filling so that a house without basement could be erected on the spot. Upon inspection, the buyers found that the work had been executed negligently (the merits of this was not clear

⁸⁸ Ruling of 31 May, 2006.

but it was the position of the buyers). The parties then agreed – again, orally – that the buyer would assume the seller’s rights and obligation in the agreement with the hired company.⁸⁹ A dispute followed where the seller gave testimony, claiming that there had never been an agreement whereby the seller promised to pay for the filling of the hole.⁹⁰ The broker, however, admitted before the Board that there had in fact been an oral agreement to that effect. The Board issued a warning on the ground that the broker should have pursued the documentation of the agreement. In **2006-10-25:3**, the inspection clause stipulated that the buyer was to perform a measurement of radon on the property, without specifying a deadline. The broker contended that the parties had agreed orally on the subject; the Board pointed out that the broker should have ensured that the agreement was made in writing but refrained from issuing a warning.

Finally - and this is where things really start to get complex – the clauses and the broker’s activities with respect to 19 §, as well as almost everything else the broker does, must be *in accordance with the impartiality rule in 12 §*. This means that the broker must ensure that the needs of both parties are met by the included clauses. How, then, can this be reconciled with the obligation to observe the needs of the parties and suggest contract clauses, in situations where such a clause works to the advantage of one of the parties, to the detriment of the other? There is no simple answer to this.

Case **28148-05**⁹¹ before the Administrative Court of First Instance concerned the sale of a tenant-ownership apartment. The parties agreed upon the price 710,000 SEK, but the contract also included a clause requiring the seller to pay the fees to the tenant-owner association for 10 months, which would amount to 80,150 SEK. This solution had been suggested by the buyer in order to get a loan; the real sales price was in fact 629,850 SEK. The broker was issued a warning by the Board of Supervision of Estate Agents on the ground that the clause unduly favored the interests of the buyer, to the detriment of the seller whose tax cost for capital gains was likely to be calculated on the higher sum of 710,000, thereby causing the seller to incur higher tax costs than should have been the case. The broker appealed the decision and argued, *inter alia*, that the contracting parties had made a separate agreement and that she had included it in the sales contract lest it be deemed invalid under the Tenant Ownership Act.⁹² The parties were perfectly aware of the reasons and implications of the chosen solution. The court rejected the broker’s arguments and upheld the decision of the Board.

It is of course impossible to draw far-reaching conclusions from one lower-instance court case, but the cited case makes it abundantly clear that there is a limit to the broker’s possibilities to assist one party to the detriment of the other. The case concerns a situation where the seller suffers, or is more than likely to suffer, damage in the form of higher capital gains tax costs. This consequence, which is well within the range of what the broker is required to foresee and prevent, is impossible to reconcile with the requirement in 12 § to safeguard the interests of both parties. It is interesting to note that the Board did not mention the possibility that the broker was in breach of her client-agent agreement; it cited only 12 and

⁸⁹ It is another point entirely that this type of agreement is null and void since such an agreement cannot bind the hired company.

⁹⁰ Again, the merits are not clear and it is therefore not possible to conclude whether the testimony constituted perjury.

⁹¹ Ruling of 29 May, 2006.

⁹² SFS 1991:614.

19 §§ of the EAA. This is an indication that the decision would have been the same had the buyer been the injured party.

2.1.4 The Level of Expertise of the Broker

It has been established that the broker is required by 16 § to give advice, including legal advice, to the contracting parties. It has likewise been established that the broker's obligation in 19 § to strive to ensure that the parties reach agreements on important issues requires her to be active and observant and document the agreements properly so as to prevent future disputes. It goes without saying that performing these duties requires some level of legal expertise. A question that remains to be addressed, however, is *what level of expertise* the broker can be expected to possess.

The question of the broker's level of expertise remains one of the most elusive aspects of the whole EAA. The few statements on the matter in the relevant sources are tentative at best. In its 1981 report, the Home Ownership Commission concluded, while discussing the broker's role in the contract phase, that the broker could "naturally" not be expected to give in-depth legal advice concerning the contract clauses.⁹³ The statement was made without further reference and seems rather to appeal to some sort of common sense. Yet the Commission asserted that in residential real estate conveyances, the broker is usually the only person with the necessary insights as to what steps must be taken and what issues need to be settled with respect to the transaction. Thus, held the Commission, the broker is an expert the parties should be able to trust. The statement is ambiguous and inconclusive: on the one hand, it is asserted that the broker must be expected to provide assistance in drawing up the necessary documents and explaining their contents to the parties. On the other hand, it is likewise asserted that it is sufficient that the broker give a short account of the relevant clauses.⁹⁴

The subsequent legislative history of the 1984 EAA did not provide any further insight except the aforementioned statement that the broker was entitled to decline to answer a question concerning e.g. taxes, if she felt it was beyond her skills (see above 2.1.2). That statement has not been contested since, which has led to the current situation where the broker is not required to give legal advice but will be liable for negligent counsel. Meanwhile, as is evident from the foregoing, the case law surrounding the contract-engineering provision in 19 § has become ever stricter. Here, the broker is expected to perform highly qualified legal tasks in drafting the necessary contracts. She cannot rely on standardized contracts since she is liable if the contents of the contract do not meet the needs of the parties. Further, the broker is expected to foresee these "needs" and cannot merely include clauses the parties have explicitly requested. These requirements, whose existence is hardly to be contested, are not consistent with the statements concerning legal advice. Indeed, the case law concerning 19 § not only bluntly disregards the notion that the broker need not provide legal advice; it makes it obsolete, since the broker's obligations with respect to contract engineering clearly constitute legal advice.

It is no exaggeration to assert that this constitutes a major shift in the legal demands on the broker. An important question is how this shift could take place. There are presumably several

⁹³ SOU 1981:102, p. 208.

⁹⁴ Ibid.

contributing factors, but three are of particular importance. Firstly, the change did not occur overnight but rather incrementally over two decades that saw two new brokerage statutes. Both these statutes have stressed the importance of case law and business practice in the interpretation of its provisions. In part, the change can be seen as a natural evolution.

Secondly, the inconsistency is not new. While the 1981 report proposed that the broker be required to explain the meaning of important contract clauses, the authors immediately pointed out that this should “naturally” not be interpreted as an in-depth legal presentation.⁹⁵ It is possible, indeed even likely, that this ambiguity has never been perceived as double standards but rather as separate issues. On the one hand, the broker is expected to provide counsel concerning contractual matters with respect to the property sale. On the other hand, the she is not required to give advice beyond the scope of what one might expect from a real estate broker. The problem is, the limits of that scope are anything but clear. This leads us to the third factor.

Thirdly, a minor revolution occurred on January 1st, 1999, with the introduction of a mandatory two year university education for brokers. Since then, all prospective brokers must fulfill the two year education requirement, including *inter alia* courses in contract law, real estate law, tax law, economics, business administration, real estate valuation, and psychology. The requirements were amended in 2005 to include a larger portion of law courses than before; however, the two year requirement was not altered.⁹⁶ The introduction of a mandatory university education is of course bound to affect the expectations upon brokers; a person who has passed university courses in real estate law can reasonably be held to a higher standard with respect to contract clauses than a person without such training. However, brokers who were registered at the BSEA before the introduction of the new rules, and who for the most part lack formal training in law, are still active. The law does not distinguish between the two categories, and neither the BSEA nor the administrative courts have made an issue of education levels when discussing the obligations of the broker. Nevertheless, the level of education remains an important factor in any serious attempt to assess the broker’s obligations. This is doubtlessly a question that must be explored further in the future.

2.2 The Impartial Intermediary

As should be abundantly clear at this point, the Swedish broker is expected to act as an impartial intermediary. The spontaneous, at-a-glance interpretation of this is that the broker must see to the interests of both seller and buyer. While this is of course true, it is not a very precise description of the concept. As will be shown in the following, at a closer look, the impartiality rule in the EAA is not so much a rule laid down in one clear provision, but rather a principle of law based on specific obligations laid down in four different provisions. In the present section, these provisions, these elements giving life and shape to what is referred to as the impartial intermediary, will be examined and discussed. The subsections follow the provisions in the following manner:

- 12 § Safeguarding the interests of both parties (2.2.1);
- 15 § Prohibited to represent either party (2.2.2);

⁹⁵ Ibid.

⁹⁶ 6 § REAA; 3 § of the Real Estate Agency Ordinance (SFS 1995:1028); KAMFS 2005:3.

- 13-14 §§ Maintaining the independence and integrity of the broker (2.2.3);
 - 13 § prohibited to purchase the property
 - 13 § prohibited to cater to relatives
 - 14 § prohibited to trade in real estate
 - 14 § prohibited to engage in other activities that may affect the broker's professional trustworthiness.

2.2.1 Safeguarding the Interests of Both Parties – 12 §

12 § EAA requires the broker to perform her services with due care and in accordance with “sound estate agency practice”, all the while safeguarding the interest of both the buyer and the seller. This is the basic statutory foundation of the impartiality principle. The rule/principle itself, however, is of older origin. The Home Ownership Commission suggested, in its 1981 report that was one of the foundations of the 1984 EAA, a provision requiring the broker to give both parties all necessary advice and information and, as far as possible, to safeguard the legitimate interest of both parties. According to the commission, such a rule would not be novel but merely a codification of customary law and common practice, since the rule originated in the 14th century. The commission likewise cited the Brokerage Ordinance of 1720, where it was stipulated that the broker must not “deceitfully serve one of the parties to the detriment of the other”.⁹⁷ In the end, no such provision was introduced in the EAA of 1984. Whether and to what extent there was an impartiality rule before the 1995 EAA is not entirely clear; however, that is a piece of legal history that will not be discussed further here. Suffice to say that the rule exists today.

The impartiality rule is not limitless; the wording of 12 § expressly delimit the obligation to safeguard the interest of both parties to “sound estate agency practice”. Thus, where compatible to sound estate agency practice, it is possible for the broker to focus on the interest of one of the parties to a greater extent. This seems to have been foreseen by the Home Ownership Commission who suggested that the broker be required to pay accord to the legitimate interests of both parties *to the extent this is possible*. The wording implies that there are exceptions, and indeed there are.

There is one fundamental problem with the impartiality rule, namely the inherent asymmetry in the party constellation buyer/broker/seller. One of the parties – again, in Sweden almost exclusively the seller – hires the broker to find a counterpart. The broker has a contractual relation to this party, meaning in turn that she has contractual as well as statutory obligations towards them. An important contractual obligation is the general principle of loyalty between contracting parties. This double relation, in turn, means that with respect to her principal, the broker will be liable under contract law as well as the EAA for any negligence in the service performance. It seems only natural, then, that the broker would, at least in some aspects, show greater loyalty towards her principal. For instance, the seller hiring the broker will typically want as high a sale price as possible for the property. In contrast, and quite naturally, the buyer will want as low a price as possible. Which should take precedence? Given the double obligation towards the seller, it would seem sensible to allow the broker to lean towards the

⁹⁷ SOU 1981:102, pp. 190, 200-201, 208, and 244-245; see also Melin, p. 147.

seller. This is all the more so given that brokers usually charge a commission and therefore share the buyer's interest in getting a higher sales price.⁹⁸

The lawgiver has taken note of this and the legislative history makes it clear that the sales price is one instance in which the broker is allowed to make an exception from her impartiality and lean towards her principal.⁹⁹ Curiously, the lawgiver justifies this with the assumption that buyers in general do not expect the broker to be neutral with respect to the sales price (!). The wisdom in this assumption is left for the reader to decide. Melin goes as far as asserting that the broker is not only *allowed* to act partially in favor of her client, but also *required* by her contractual obligations to do so.¹⁰⁰ While on a conceptual level it is easy to sympathize with this view given the double relation between seller and broker, it is, unfortunately, not as easy as that.

The problem lies in determining the scope of the exception. According to the legislative history it applies to "purely commercial considerations". Exactly what are these? The sales price is without a doubt such a consideration, but the sales price is ultimately the function of other aspects of the brokerage services, not least the contract negotiations. For instance, a liability shield will typically bring down the sales price (provided the buyer understands the clause, which we must assume since the broker is required under 19 § to explain it).¹⁰¹ Are the negotiations and drawing up of contracts such "commercial considerations" that are exempt from the impartiality requirement? The law is not entirely clear on this point, a fact (among others) that has made Zacharias to question the merits of the rule altogether.¹⁰² Melin offers a possible solution in the interpretation that the law allows the broker to take her principal's party with respect to clearly visible and easily comprehensible contract clauses, of which the sales price would be a perfect example. With respect to more complex issues, however, such as for instance liability shields, the broker is required to exercise full impartiality.¹⁰³ There is much to be said for such an interpretation. It is clear that 12 § calls for impartiality except in certain instances. Such instances must be well-defined and clear, and therefore a line must be drawn somewhere.

In sum, it seems that there is no general consensus as to the scope of the impartiality rule. Is there, then, no way to elucidate the requirements of 12 §? The matter gets all the more complex since there is no legal definition of impartiality or, more to the point, what it really means to "safeguard the interests of both the seller and the buyer to the extent required by sound estate agency practice". What seems fairly straightforward in theory becomes more elusive when it comes to establishing boundaries that work from a legal and practical point of view. Nevertheless, we must make the attempt.

To begin with, the impartiality requirement applies within the limits of *sound estate agency practice*. The lawgiver was loath to give a specific definition of the term, on the ground that it is better to provide the possibility to shape the rule to fit the needs of society at any given

⁹⁸ Brokers sometimes disagree with this and point out that many factors, including the interest in a quick transaction in order to be able to concentrate on new clients, equally affect the broker's work. The apparent incentive to maximize the sales price would therefore, by the same token, not be as strong as one may be inclined to believe.

⁹⁹ Prop. 1994/95:14, pp. 41-42.

¹⁰⁰ Melin, p. 149.

¹⁰¹ Melin, p. 149.

¹⁰² Zacharias, pp. 213-222.

¹⁰³ Melin, p. 149.

time.¹⁰⁴ The Board of Supervision of Estate Agents has a special task to summarize, develop, and give a practical meaning to the term. It does so by virtue not only of its administrative practice and case law, but also through the publication “God fastighetsmäklarsed” which the Board publishes and continually expands on its website.¹⁰⁵ The professional organizations, Fastighetsmäklarförbundet and Mäklarsamfundet, have their respective disciplinary boards whose decisions are considered material for sound estate agency practice. The former is also one of the principals behind a dispute resolution body¹⁰⁶ where unhappy clients can get a (formally non-binding) decision concerning damages and other contractual matters. Finally, the organizations themselves on occasion publicly announce their views on sound agency practice. All of these are considered valid sources as to the contents of sound estate agency practice. It should pose no problem to accept the case law of the Board of Supervision of Estate Agents as a source of law since it is a government agency. The same goes for the Board’s published opinions.¹⁰⁷ However, the decisions and opinions of private entities may seem dubious as sources of law. This is particularly so where the organization provides legal representation when its members answer before the Board of Supervision of Estate Agents. Nevertheless, while the dual role of the organization surely does nothing to strengthen the credibility of its statements, both statements and practice from private entities can of course be useful if judged on their merits and used accordingly.

The case law of the Board of Supervision of Estate Agents, and in appealed cases that of the administrative courts, sheds some further light on the subject. Admittedly, the number of disciplinary cases before the Board that directly and ostensibly concern the broker’s impartiality in relation to the seller and buyer are limited. The number is, quite naturally, even smaller in the administrative courts. This is mainly because most cases primarily concern some specific statutory task. For instance, a case where the broker (allegedly) has not disclosed to the buyer certain information known to her about the property directly concerns 16 § of the EAA and the express requirement to provide information to the parties. However, not disclosing the information to the buyer can readily be construed also as failing to abide by the impartiality rule in 12 §. There are, however, cases that directly concern 12 §, and it is possible to detect a pattern.

Firstly, it is generally not compatible with the impartiality rule to take extraordinary measures in order to promote a sale of the property. One such measure is to extend loans to either of the contracting parties. In **2005-10-26:7**, the broker arranged a short-term loan from his employer to the buyer in a transaction where he had acted as broker. The loan made the purchase possible since the buyer was required to pay for the purchased property a week before they received the purchase sum for their own sold property. The Board concluded that extending loans to either buyer or seller compromised the broker’s position as an impartial intermediary, but found that there were mitigating factors and refrained from issuing a warning. In **2003-02-21:1**, the broker offered to lend 30,000 SEK to the seller to facilitate the seller’s acquisition of a new home. The case, where the loan offer was only a small count among others, led to the revocation of the broker’s license; however, the Board made it clear that the loan offer alone merited a warning. In **2006-05-10:1**, the seller was a small company with poor finances. After the contracts had been signed, but prior to the completion of the sale, the broker purchased fixtures and equipment from the seller. The Board pointed out that such transactions are

¹⁰⁴ Prop. 1994/95:14, p. 40.

¹⁰⁵ <http://www.fastighetsmaklarnamnden.se> (2008-04-19).

¹⁰⁶ Fastighetsbranschens Reklamationsnämnd (FRN), <http://www.fmf.se/frn.html> (2008-04-19).

¹⁰⁷ The fact that the Board’s decisions can be appealed to the administrative courts – and the fact that the courts do not always uphold the Board’s decisions – must of course be taken into consideration.

generally not conducive to an impartial behavior, but refrained from issuing a warning, on the ground that the transaction had apparently not affected the broker's performance as broker. It is interesting to note that the Board based their decision on how the individual broker actually carried out his commission. As will become apparent below (2.2.3), the same does not hold true in decisions concerning 14 §. In that section, another interesting case concerning loans to clients will be related.

Secondly, the broker is not at liberty to assist either party in a subsequent dispute. As Melin points out, this follows from 15 § since that provision prohibits acting on behalf of either party.¹⁰⁸ While at a glance the provision seems sound enough – after all, an impartial intermediary can hardly be counted as such if she suddenly acts in the interest of one of the parties - at a closer range it raises intricate questions as to how the broker should act in the event of a dispute. Typically, as a private person the party in question would be in need of advice as to possible courses of action, advice concerning the legal situation, and assistance in drawing up the necessary documents. As for advice concerning possible courses of action, it falls within the requirements of 16 § to give such advice to either party should they wish it. This requires some level of legal, technical, and/or economic expertise, but most cases should fall within the competence of brokers given the 2-year college education. Due to the impartiality rule, however, it is of utmost importance that the broker takes care not to advise one of the parties to the detriment of the other. Exactly how this razor's edge is to be trodden is not entirely clear. The same applies to advice concerning the legal situation. A typical example of this is whether a defect on the property classifies as a defect under Chapter 4 of the Land Code (real estate/land) or the Sales Act (tenant-ownership homes) and, if so, whether the seller is liable for the defect. In these situations, the broker must of course take care that she does not give incorrect answers. If the question is technically or legally difficult, it is acceptable according to sound estate agency practice to decline to answer; however, should the broker answer the question she will be liable for damages incurred by the buyer or seller if she answers wrong. The problem with respect to impartiality is where to draw the line between acceptable, or perhaps even required, advice when answering a question from the seller or buyer, and an unacceptable favoring of that party to the detriment of the other?

To shed some light on the situation, let us return to the example in 2.1.2 above. The broker in that situation was required to disclose her suspicions to the buyer. Suppose, now, that the broker also knows that the faulty renovation job constitutes a defect within the meaning of the Land Code. Suppose, further, that the defect would be impossible to discover at an inspection without breaking the tiles and thus damaging the property (i.e. a *hidden defect*), and that the buyer did no such thing and thus did not discover the defect. Suppose, finally, that after some time the buyer discovers signs of moisture damage on the bathroom wall and asks the broker if the seller is liable for the costs the buyer will incur in order to repair the damages. Now, the broker knows that the seller *is* in fact liable for these damages under 4:19 of the Land Code since the defect was a hidden defect. The buyer has asked a perfectly legitimate question and the broker may seem bound – legally as well as morally - to answer it. However, answering it truthfully could be construed as taking the side of one of the parties to the detriment of the other.

This formidable manifestation of the Scylla and Charibdes is illustrated by the following case law. In **FMN 04-1377-9**, the broker had assisted the buyer in drawing up documents to be sent to the district court in a dispute against the seller. The Board issued a warning. In case

¹⁰⁸ Melin, p. 151.

7338-01, the Administrative Court of First Instance upheld the Board's decision to issue a warning to a broker who had applied for a deed on behalf of the buyer in spite of the fact that there was a dispute between buyer and seller as to the validity of the purchase.

By contrast, **2003-05-28:6** offered a far more clear-cut case. In the client-agent agreement between the broker and seller included, on the first page, the phrase "[t]he broker stands faithfully on the seller's side". The Board, concluded, quite rightfully, that such a phrase in the agreement was in stark contrast to, and therefore clearly in breach of, 12 § of the EAA. Held the Board, the requirement that the broker safeguard the interests of both parties may not be deviated from in contracts. However, the Board refrained from issuing a warning on account of the clause, since there was no evidence that the broker had in fact acted upon it.

The bidding process has been much debated in Swedish media recently, and one of the key issues is what obligations the broker has in that process. One must bear in mind that the bidding process is not expressly regulated. It seems, therefore, a logical conclusion that the contracting parties are at liberty to determine the rules of the bidding process as they see fit. The only rules governing the issue is 4:1 of the Land Code and 6:4 of the Tenant Ownership Act which stipulate that only written sales contracts are binding. Therefore, perhaps contrary to popular belief, the broker is neither required nor authorized to dictate the terms of the bidding process. This does not mean, however, that the broker has no obligations at all. The provision governing the issue is 12 §, meaning that the broker must act diligently and in accordance with sound estate agency practice, and safeguard the interest of both the seller and the prospective buyers. The question is how the broker is to act in order to abide by the provision.

It is indisputable that the broker must convey all messages and bids from prospective buyers to the seller, *in the interest of the seller*. This follows from the diligence requirement in 12 §, and from the contractual relation towards the seller. The broker is not at liberty to single out buyers or bids, even should she deem this to be in the best interest of the seller.¹⁰⁹ The next question, then, is whether the requirement to convey all messages applies equally *in the interest of the buyer*. The question is not clearly answered in the EAA or the legislative history. Indeed, in most cases the question is moot since the right of the seller coincides with the interest of the buyer. However, there are instances where that is not the case. Suppose, for instance, that the seller and broker have discussed the terms for the bidding process, and that the seller has decided that all bids must raise the previously highest bid by at least a certain interval. Now, this is oftentimes a very practical rule since the process could be cumbersome indeed if bidders were to raise by trivial sums each time. Suppose, further, that the seller has made it clear to the broker that he is not interested in bids that fail to observe this rule. Suppose, lastly, that a prospective buyer gives a serious offer that is more than marginally higher than the previously highest bid, but nonetheless not high enough as to satisfy the interval rule set up by the seller. Is the broker required to convey such a bid, despite the instruction from the seller? Such a requirement presupposes that prospective buyers have an independent right to have their messages conveyed to the seller. The question is whether such a right exists. Two recent rulings by the Administrative Court of First Instance shed some light on the situation.

In case **14196-07**¹¹⁰, the broker had received instructions from the seller not to convey any bids on the property that surpassed the previously highest bid by less than the interval 20,000

¹⁰⁹ Prop. 1994/95:14, p. 45-46.

¹¹⁰ Ruling of 27 September, 2007.

SEK (or, in the case of the first bid, from the advertising price of 2,300,000 SEK). One of the prospective buyers, a couple, who subsequently won the bidding process and purchased the property, wished to raise by 10,000 SEK but were denied by the broker. The couple reported the broker to the Board of Supervision of Estate Agents who concluded that, while it is the prerogative of the seller to determine the rules for the bidding process, the broker is not at liberty to accept and carry out an instruction to ignore certain bids. The Board held that 12 § of the EAA requires the broker to safeguard the interests of both seller *and* buyer, bestowing upon prospective buyers a right to have their bids conveyed to the seller. The broker must convey all messages and bids until the property is sold and a sales contract has been signed. The fact that in the case at hand the broker had acted at the behest of the seller was not regarded as mitigating; the broker was issued a warning. The broker appealed the decision to the Administrative Court of First Instance, arguing, *inter alia*, that the broker's obligation to convey all messages is not absolute and that it can be overridden by instructions from the seller. The broker further argued that the only instance where the broker is not both allowed and required to observe the instructions from the seller, is where such an instruction would be in violation of the Anti-Discrimination Act.¹¹¹ The court rejected these arguments and concurred with the Board in substance, stating that the broker is required by law to convey all bids to the seller, notwithstanding if it fails to observe a certain rule or if the broker believes that the seller will not be interested in the said bid. The court therefore concluded that, by refusing to convey bids with a lower interval than 20,000 SEK, the broker had acted in breach of sound estate agency practice. However, the fact that he had acted on the express instruction of the seller was seen as a mitigating factor and the breach was deemed minor. The warning was therefore rescinded.

The case was similar in **5035-07**¹¹², with the exception that in that case, the complaining prospective buyer had offered a price that was below the advertising price. According to the broker, the seller had specified that they would not accept any price below the advertising price. In addition, there were at the time four different bids that were higher than the advertising price. The Board disregarded these objections and issued a warning. The broker appealed the decision, arguing that since the seller had given the instruction that bids below the advertising price should not be taken into account, such bids are not to be considered as bids and, consequently, not to be conveyed to the seller. The broker further argued that if there is indeed a diligence requirement to observe in relation to prospective buyers, that requirement was met when he informed the complainants about the instructions of the seller. As in the aforementioned bidding interval case, the Administrative Court of First Instance rejected these arguments and held that by failing to convey the bid of the complainants the broker had acted in breach of sound estate agency practice. However, given that the broker had in fact acted on the instruction of the seller, the breach was considered minor and the warning was rescinded.

It is not completely unproblematic to draw clear conclusions from these cases. On the one hand, in both cases the court concurred with the Board of Supervision of Estate Agents and held that it is in breach of sound estate agency practice not to convey bids to the seller, even where the seller has given instructions to that effect. While there are arguments against it – e.g. that the broker has a contractual obligation to follow instructions from her principal, and that the broker is allowed to lean towards the interests of the seller with respect to “purely commercial considerations” - this is by no means an unforeseeable interpretation of 12 §. The broker must safeguard the interest of both buyer and seller, and the interest of the buyer is

¹¹¹ SFS 2003:307.

¹¹² Ruling of 28 June, 2007.

most certainly to have his bids conveyed. It is thus valid and reasonable to interpret the law as requiring the broker to convey the bids despite the instructions of the seller. On the other hand, the fact that the brokers in the two cases had acted upon express instructions from the seller was seen as mitigating, which led the court to rescind the disciplinary sanctions. The situation would therefore seem to be that blocking bids from prospective buyers is against the law but not punishable. This is of course less than satisfactory and must be remedied in one way or the other.¹¹³

The areas where the impartiality of the broker could be compromised can be summarized as follows.

1. Contractual/financial relations towards either party
2. The bidding process
3. Information and advice
4. Assisting in disputes.
5. Negotiations and drawing up contracts

2.2.2 Acting on Behalf of the Parties - 15 §

15 § of the EAA prohibits the broker from representing the buyer or the seller: however, the broker may take limited measures where permitted by sound estate agency practice. At a glance, the whole provision would seem, if not moot, then at least of questionable value given that 12 § already stipulates that the broker must safeguard the interests of both parties. How can one act impartially when at the same time one is acting on behalf of one of the parties? While this point is straightforward enough to seem self-evident, the following will show that the provision has further implications yet.

The fact that representing one of the contracting parties was already incompatible with the impartiality rule was not overlooked in the legislative process. It was pointed out in the legislative history that, given that the wording of the EAA made it applicable to *brokering*, i.e. finding a counterpart for one's principal, representing for instance a seller would fall outside the scope of the act. In such instances, therefore, the counterpart would lack the legal protection afforded to them by the EAA.¹¹⁴ Three ways were conceived to solve the problem. Firstly, an obligation could be imposed on brokers acting on behalf of either party to inform the counterpart of the situation so that they might choose whether to hire a representative of their own. This solution was, however, rejected on the ground that it was not deemed effective. Secondly, the act could be made expressly applicable in cases where a broker is hired to represent one party. However, this solution was deemed to cause inconsistencies and uncertainties as to what is required of the broker in different situations. Thirdly, representing either party could be made expressly prohibited. This solution was favored on the ground that

¹¹³ The deadlock illustrates the need for more nuanced disciplinary sanctions. As it is, under 8§ of the EAA the Board can revoke the broker's registration, issue a warning, or waive the sanction. Revocation is tantamount to forbidding a person to practice the profession and is (and should be) used with extreme care. A warning is perceived as a harsh sanction in smaller communities where the broker is often well-known on a personal basis; in larger towns this is much less so. It would seem that there is a need for a sanction that is less harsh than a warning but nonetheless a sanction. This would allow for a more nuanced case law, and would give the Board better means to communicate the seriousness of the violation at hand.

¹¹⁴ This conclusion was probably incorrect, and was indeed rebutted by the parliamentary Law Committee; LU 1994/95:LU33, p. 10-11. See also Melin, pp. 181-184.

representing somebody is fundamentally different from brokerage in that whereas the broker has obligations towards both parties, representing one party is directed at safeguarding the interests of the principal. Satisfying both sets of requirements therefore seems impossible.¹¹⁵ However, the lawgiver admitted that it was necessary for brokers to be able to represent a contracting party in certain limited instances. Such instances could include accepting payment on behalf of the seller, handing over the keys, and the like – as long as the situation is not such that the counterpart has reason to question the impartiality of the broker. The lawgiver admitted that the rule could give rise to complex situations, but maintained that, since sound estate agency practice must guide the broker at all times, those problems could be solved by the work of the Board of Supervision of Estate Agents.¹¹⁶

Despite these uncertainties, the scope of the exception in 15 § is in fact defined in at least two ways. The legislative history makes it clear that representing a party is only permitted by sound estate agency practice if the issue at hand is undisputed by both parties. Both the seller and buyer must be in agreement.¹¹⁷ It should also be pointed out that a registered broker is not at liberty to accept a commission to represent a person, for instance sell their property with a power of attorney, and thus temporarily “take off the broker suit”. The EAA applies equally irrespective of how the parties choose to label their agreement.¹¹⁸

The Appellate Administrative Court of Stockholm upheld a warning in **RK 7861-03**¹¹⁹. The facts of the case were the following. A dispute had arisen between seller and buyer where money was paid from the seller’s insurance company to the buyer on account of defects on the property. The seller contended that the buyer had received too much. The broker who had negotiated the sale indemnified the seller and – as per an agreement between seller and broker – took over the seller’s claim on the buyer. The broker then proceeded to sue the buyer for the surplus money; the parties reached a settlement. The buyer complained to the Board of Supervision of Estate Agents, alleging that the broker had acted in breach of the impartiality rule. The Board pointed out that 12 § requires the broker to safeguard the interests of both parties whereas 15 § forbids the broker from acting on the behalf of either party. The Board concluded that the broker’s actions could not be construed as falling under the exception in 15 § intended for limited, *undisputed*, matters. The broker was found in breach of 12 and 15 §§ and was issued a warning.

The broker(s) appealed to the Administrative Court of First Instance of Stockholm, arguing that the Board of Supervision of Estate Agents had no jurisdiction over the case, since the Board only had jurisdiction over brokerage activities, whereas suing debtors did not constitute such an activity. The court rejected that argument and proceeded to try the case in substance. The court subscribed to the view taken by the Board that the activity at hand could not be construed as such limited measures in undisputed matters that fall under the exception in 15 §. The warning was upheld. The broker proceeded to appeal to the Appellate Administrative Court who subscribed to the position taken by the Board and the Administrative Court of First Instance, and thus upheld the warning.

¹¹⁵ Prop. 1994/95:14, pp. 47-49.

¹¹⁶ Prop. 1994/95:14, pp. 49-50.

¹¹⁷ Prop. 1994/95:14, p. 80-81.

¹¹⁸ Melin, p. 184.

¹¹⁹ Ruling of 9 September, 2004.

In case **11645-04**¹²⁰ before the Administrative Court of First Instance of Stockholm, the broker had represented the seller under power of attorney. The power of attorney granted the broker authority to sell the principal's tenant-ownership apartment and specified a certain minimum price. It also empowered the broker to receive, on behalf of the principal, all monies and documents and to take any other measure necessary with respect to the sale. The broker cited, to no avail, an earlier Board decision where no warning had been issued.¹²¹ The Board held that the broker had abandoned her role as an impartial intermediary and that signing the sales contract on behalf of the seller went beyond the acceptable exceptions in 15 §. A warning was issued. The broker appealed to the Administrative Court of First Instance of Stockholm, and argued, *inter alia*, that the measures taken fell within the exception in 15 § since her signing the contract had been a matter of expedience only and that all negotiations had been completed. The court held that the signing of the sales contract is the very act by which the buyer and seller become legally bound to the contract; only at that point can the negotiations be considered finalized. The act of signing the sales contract on behalf of the seller could therefore not, held the court, be considered such a limited measure of merely formal significance as to be exempt from 15 §. The warning was upheld.

As for the case law of the Board of Supervision of Estate Agents, in **2004-12-15:4**, the broker had received a power of attorney from the seller, authorizing the broker, *inter alia*, to sign the sales contract and other relevant documents on behalf of the seller. As it turned out, the sales contract was actually signed by the seller, but the Board held that merely accepting such a power of attorney constituted a breach of 15 §. The broker was given a warning.¹²² In **2005-02-16:1**, the client-agent agreement contained the clause “[the broker] is hereby commissioned to sell (...)”. The Board pointed out that the broker is prohibited by 15 § to sell real estate on behalf of sellers and that such an agreement was in breach of the law. However, in the present case it was clear that the broker had in fact acted as broker and that the written contract did not reflect the actual agreement; no warning was issued. **2005-02-23:7** contained two cases of representing a party, one for the buyer and one for the seller. The broker had received from the seller a power of attorney, the wording of which was such that it went beyond the exception in 15 §. However, since the power of attorney was not issued until after the sales contract was signed, it could in practice only be used for such limited measures as are permissible; no warning was issued on this account. Unfortunately for the broker, it did not end there. In connection to the completion of the transaction, the buyers – who purchased the property together and with the agreement that they would own 50 % each – wanted to change the percentages to 90 % and 10 % respectively. The documents had already been sent to the court along with an application for a deed, which meant that the transaction was complete and that the ownership was transferred to the buyers. The Board held that in assisting the buyers in drawing up new documents whereby the percentages of shared ownership were amended, the broker had unlawfully represented the buyers. The broker was issued a warning. In **2006-08-23:5**, the broker repeatedly negotiated terms for the transactions with the buyer. The Board pointed out that in doing so, the broker risked being perceived as representing the seller, which would be in breach of 15 §. However, no warning was issued on this account since it could not be established that the broker had acted without instructions

¹²⁰ Ruling of 8 December, 2004.

¹²¹ Decision 4-64-01 of 29 May, 2002. The Board did not broach the subject of the power of attorney in that decision.

¹²² It should be noted that the case involved several counts and that the decision does not specify whether the power of attorney would in itself have justified a warning. This case had, compared to 2004-05-12:7, the mitigating factor that the broker did not make use of the authorization to sign the sales contract, which must be taken into account.

from the seller. The logic of this is questionable; representing a party entails, by necessity, taking instructions from that party. Thus, acting on instructions from the seller can never in itself exonerate the broker from being in breach of 15 §. The decision points, however, at the difficulty in establishing the boundaries of the impartiality provisions.¹²³ In **2006-09-27:5**, the sales transaction was problematic and led to a dispute in court. The broker represented the seller in the proceedings, but contended before the Board that the measures fell under the exception. The Board rejected this argument and issued a warning. This was of course the only reasonable outcome; representing one of the parties in court proceedings must by all accounts be considered in blatant breach of both 12 and 15 §§. The decision in **2006-09-27:6** is interesting; subsequent to the signing of the contracts, a dispute arose between buyer and seller concerning defects. The seller refused to speak to the buyer and gave the broker power of attorney to “handle discussions” with the buyer; however, the broker was given no right to make decisions on behalf of the seller. The Board refrained from issuing a warning due to lack of evidence that the broker had acted in breach of sound estate agency practice.

2.2.3 The Independence and Integrity of the Broker – 13-14 §§

The impartiality of the broker is complemented by her *independence*. The broker is expected not only to be neutral and impartial in relation to the buyer and seller; she must also be independent of any loyalties or engagements that may be assumed to affect that impartiality or that may raise suspicions among the public to that effect. The independence of the broker, or rather the obligation to act independently, is laid down in 13 and 14 §§ of the EAA.

13 § forbids the broker to purchase a property the sale of which she has been engaged to negotiate. The broker is likewise prohibited from negotiating the sale of that property to any person closely related to her. Evidently, there are two rules involved here. However, they can both be seen as two twigs from the same branch, or two manifestations of a common principle: that the broker is required to keep her personal interests and that of her family apart from her professional engagements as broker.¹²⁴

14 § stipulates that the broker may not trade in real estate. The broker is also prohibited from engaging in any activities that are likely to affect her professional trustworthiness. As is the case with 13 §, this provision contains two separate rules that give voice to a common principle: that the integrity of the brokerage profession must be protected from other kinds of activities that may be assumed to affect the broker’s impartiality while carrying out her work or which may raise suspicions to that effect.

2.2.3.1 13 § – Prohibited to Purchase the Property

The notion that it is inappropriate for the broker to purchase the assets the sale of which she has been hired to negotiate is by no means a novel one. In medieval Montpellier, brokers were sworn in at the town square and took a number of oaths. One of these was never to take part in a transaction in which they acted as intermediary and never to substitute themselves as the destined participant in a commercial transaction.¹²⁵ Despite the fact that lawmakers close to a millennium ago found this issue important enough to regulate, the 1984 EAA contained no

¹²³ See further discussion below (2.3).

¹²⁴ A similar view is hinted at by Zacharias, at p. 383.

¹²⁵ Reyerson, p. 97-98.

prohibition against brokers purchasing the property being sold.¹²⁶ However, in the legislative process preceding the 1995 EAA, it was contended that it was not compatible with the broker's role as an impartial intermediary to purchase the property. Firstly, it was found highly questionable whether a broker can be expected to act impartially when in fact she has interests of her own in the transaction. Secondly, it was deemed important for the public's faith in the broker profession that all parties involved in a transaction could be sure that the broker acted completely objectively and did not act upon self-interest.¹²⁷

The legislative history gives a full account of how a broker wishing to purchase the property must proceed. First, she must terminate the client-agent agreement and explain the reason to the principal. Next, the broker must afford the principal fair time to consider whether to hire another broker, and if so then whom to hire.¹²⁸ In this connection, the seller might ask the broker for assistance in finding a new broker. Should this happen, the broker must be very careful since it will most certainly be in breach of sound estate agency practice to exercise undue influence on the seller.¹²⁹ Exactly what period of time the seller should be afforded before the broker is allowed to enter negotiations for the purchase is not clear and may of course vary, but around a week has been suggested.¹³⁰

Curiously, there is no comment in the legislative history as to the possible contractual implications of terminating the agreement. This is in itself questionable since it can hardly be considered sound estate agency practice to be in breach of contract. The reasonable interpretation is that the legislator assumes that wishing to purchase the property of the principal is a valid ground for termination that will not cause contractual complications.¹³¹ Naturally, this part can be skipped if the broker knows before signing the client-agent agreement that she will want to purchase the property. However, even in such cases there is a standard to be observed. Where the broker knows before signing a client-agent agreement that she will be interested in purchasing the property, she is required to decline and explain the reason for doing so. She must then, just as in the previous case, afford the seller fair time to consider.¹³²

13 § paragraph 2 provides that the broker who purchases the property must report the purchase to the Board of Supervision of Estate Agents. This is required even if the broker has observed the aforementioned requirements and acted in accordance with sound estate agency practice.¹³³

¹²⁶ It did, however, contain a provision (17 §) that a broker who had purchased the property had no right to be remunerated for the brokerage service; see prop. 1994/95:14, p. 51, Melin, p. 165, and Zacharias, p. 369.

¹²⁷ Prop. 1994/05:14, p. 51.

¹²⁸ Prop. 1994/95:14, p. 52.

¹²⁹ Zacharias, p. 370.

¹³⁰ Melin, p. 165.

¹³¹ It could of course be argued that the broker's purchasing the property is advantageous to the seller and that the termination will thus not cause any damage. However, the lawgiver has indirectly rejected this argument by requiring the broker to give the seller time to consider; it is also hinted in prop. 1994/95:14, p. 77 that the termination could be detrimental to the seller. Ultimately, it would seem the lawgiver hopes that pragmatism is going to win the day. One would hope it is not a fool's hope.

¹³² Prop. 1994/95:14, p. 77, Melin p. 166.

¹³³ Prop. 1994/95:14, p. 52.

2.2.3.2 13 § – Prohibited to Broker for Relatives

13 § stipulates that the broker may not negotiate sale of the property to relatives or other closely related persons, as defined in 4:3 of the Bankruptcy Act.¹³⁴ This provision is underpinned by the same rationale as the prohibition for the broker to purchase the property herself, namely to safeguard the integrity of the broker as an impartial intermediary. In these cases, it is possibly more frequent that the broker only learns about the interest to buy after the client-agent agreement. However, the situation is similar enough that the lawgiver has seen fit to treat the two cases equally. The broker must therefore choose between the same two courses of action. Either she persuades the relative to step down and refrain from buying the property, or she terminates the client-agent agreement, explains to the seller why, and gives them fair time to consider. The fact that the broker in these cases may well have incurred costs, e.g. for advertising, is immaterial.¹³⁵ Where a purchase of the property by the broker's relative or other closely related person takes place, it must be reported to the Board of Supervision of Estate Agents; 13 § paragraph 2.

Who, then, are the relevant “closely related persons” to whom the provision applies? There is an excellent figure of the relevant *relatives* in Melin and Zaccarias originally made by Hans Elliot.¹³⁶ However, the prohibition applies to a larger group. The rule also applies to “other people to whom the [broker] is particularly close”. The legislative history suggests foster children and partners in a relationship.¹³⁷ The ban further applies to parties to whom the broker has *economical* ties; fellow shareholders, executives in the company, etc. Colleagues who are not shareholders or executives are normally not “close” in the legal sense, but it should be noted that share-owning and share-option programs may cause unwanted uncertainty.¹³⁸

In short, the following are considered closely related in the meaning of 13.

- relatives;
- other closely related parties;
- fellow shareholders, e.g. partners in a brokerage firm;
- executives or shareholders in the brokerage firm where the broker is active.

In case **21503-05**¹³⁹, the broker had terminated the client-agent agreement when it became known that the broker's sister and her partner were going to buy the apartment for sale. However, the broker failed to report the acquisition to the Board and was therefore issued a warning. The broker appealed the decision, arguing that while he had admittedly failed to observe the requirement to immediately report the acquisition to the Board, he had otherwise handled the affair immaculately. Therefore, the warning was a disproportionately harsh sanction. The Administrative Court of First Instance rejected the argument and upheld the decision of the Board.

A recent ruling in the Appellate Administrative Court, case **RK 6550-06**¹⁴⁰, demonstrates that 13 § is only mandatory in relation to consumers. The broker in the case negotiated the sale of

¹³⁴ SFS 1987:672

¹³⁵ Prop. 1994/95:14, p. 78, Melin p. 166.

¹³⁶ Melin, p. 167, Zacharias, p. 375.

¹³⁷ Prop. 1994/95:14, p. 78.

¹³⁸ For a more thorough description, see Zacharias, pp. 373-380.

¹³⁹ Ruling of 31 October, 2005.

¹⁴⁰ Ruling of 21 September, 2007.

a property to an enterprise where the broker's sister was one of the two partners. The broker contended that the prohibition in 13 § was not applicable since neither seller nor buyer was a consumer. 4 § of the EAA stipulates that no deviations from the provisions in the EAA may be where the buyer or seller is a consumer, i.e. where that party buys or sells real estate primarily for private use. The broker contended, with the aid of two expert legal opinions, that deviations from 13 § are acceptable where neither buyer nor seller is a consumer. The Board rejected the notion and held that 13 § may under no circumstances be deviated from; the broker was issued a warning. The broker appealed to the Administrative Court of First Instance, still arguing that 4 § of the EAA must be interpreted *e contrario*, such that the provisions in the EAA can be contracted out where no consumers are involved. To support his position, the broker presented expert legal opinions from three well-renowned law professors. The court rejected the argument, stating that the possibility to contract out of the act's provisions is only possible with respect to such provisions as can be the subject of agreements, such as the requirement in 11 § that client-agent agreements be made in writing. Allowing for contracting out of the entire act would lead to the unacceptable conclusion that brokers could contract out of the obligation to observe sound estate agency practice. Thus, 13 § must be understood as a mandatory prohibitive provision that can never be deviated from. The warning was upheld. The broker appealed the ruling to the Appellate Administrative Court, arguing that the Administrative Court of First Instance was wrong in holding that 12 and 13 §§ of the EAA could not be contracted out. He further argued that the ruling implied that brokers should be subject to higher standards in legal matters than law professors, and that issuing disciplinary sanctions for making the same legal assessment as three high-ranking tenured professors was wrong and morally offensive. The court concluded that, while the legislative history holds that the prohibition is "unconditional"¹⁴¹, the wording of 4 and 13 §§ does not eliminate the possibility that 13 § can be contracted out where neither buyer nor seller is a consumer. The legal uncertainty thus created cannot, in the name of due process, be allowed to affect the individual broker negatively. The court reversed the ruling of the lower instances and rescinded the warning.

The wording of 13 § allows for yet further uncertainty. The provision expressly prohibits the broker from brokering the property *to* closely related persons. Another matter entirely, and one that has caused uncertainty and debate, is whether the broker is allowed to cater to relatives in the opposite sense, namely to *broker the property of relatives*. It is not unimportant, here, to bear in mind that the wording in Swedish allows for some degree of uncertainty. The Board of Supervision of Estate Agents has consistently interpreted the provision in the light of sound estate agency practice and proceeded to issue warnings in three cases in 2002 and 2003 to brokers who had brokered the properties of relatives/related parties. As the warnings were appealed, however, the administrative courts did not uphold them. In the cases **2226-04** and **6721-04**, the Appellate Administrative Court of Stockholm withdrew the warnings on the following grounds. The wording of 13 §, it was found, did not give sufficient support to the notion that brokering the property of relatives was expressly prohibited. The question remained whether the actions of the brokers could be seen as in breach of sound estate agency practice as laid down in 12 §. This matter was complicated by the guidelines from the Swedish Consumer Agency, KOVFS 1996:4, which assumed that brokering the property of relatives was allowed; in such cases, the guidelines merely required the broker to announce to prospective buyers that she was related to the seller.¹⁴² The legislative history expressly provides that, *inter alia*, guidelines issued by the Consumer

¹⁴¹ Prop. 1994/95:14, p. 77.

¹⁴² KOVFS 1996:4, p. 11.2; the announcement was required to be made in both the marketing and the sales contract.

Agency were to be regarded as sources of sound estate agency practice. Under those circumstances, the court held that it would be incompatible with due process to issue any sanction where the broker has followed the Agency's guidelines. Since this was the case, the warnings could not be upheld. By contrast, in case **4882-04**, the Appellate Administrative Court found the broker in breach of sound estate agency practice; in that case, the broker had failed to comply with the guidelines, and as a result a warning was deemed justified.

As a result of the rulings, the Board of Supervision of Estate Agents has kept a low profile. In **2006-02-22:1**, the Board refrained from issuing a warning to a broker who had brokered the property, owned by his wife, where the couple was living. The broker had complied with the guidelines and announced in the marketing prospect that he was married to the seller. Under those circumstances – although the Board pointed out that it was still of the opinion that brokering for relatives was illegal – could not issue any sanction. As of 30 April, 2007, matters are simpler. On the previous day, the Guidelines of the Consumer Agency were withdrawn. The Board, who maintains that brokering for relatives is incompatible with sound estate agency practice, will resume issuing warnings for such activities taking place as of 1 January 2008, after a grace period of eight months.¹⁴³ Once the Board resumes its former policy, it will do so based on 13 § in conjunction with 14 § (see below) of the EAA, interpreted in the light of sound estate agency practice as laid down in 12 §. The issue of brokering for relatives/related parties is one of the issues at hand in the current revision of the EAA.¹⁴⁴

2.2.3.3 14 § paragraph 1 – Prohibited to Trade in Real Estate

14 § paragraph 1 prohibits brokers to trade in real estate. The provision does not offer any closer definition of “trade”. However, it is possible to discern the main traits of the rule. Firstly, the broker is not allowed to sell her own property within the framework of her brokerage firm, irrespective of whether she has her own firm or if she is an employee. The argument underpinning this rule is that a prospective buyer who has seen an advertisement with the broker's logotype, telephone number, or other information identifying the broker's firm, should not have to face the situation where the broker is in fact the seller of the property. The public should always be confident that a registered broker always acts as such and does not suddenly appear in another role.¹⁴⁵ As Melin has pointed out, this argument is perhaps not very convincing. Consider, for instance, a commercial player wishing to purchase a commercial property. Such a prospective buyer contacting a real estate company will hardly expect to find an impartial intermediary as her counterpart. The argument that the public may be confused would seem moot in such cases.¹⁴⁶

In **2007-03-28:X**¹⁴⁷, the broker was issued a warning for marketing her own property in an advertisement. The advertisement explicitly referred interested parties to a number at the broker's firm, along with the firm name. By contrast, no warning was issued in **2006-02-22:2**. The buyer had contacted the broker offering to buy his private home; after short negotiations the offer was accepted. All discussions took place outside the broker's firm except the times

¹⁴³ <http://fastighetsmaklarnamnden.se/> (2008-04-19).

¹⁴⁴ Dir. 2005:140.

¹⁴⁵ Prop. 1994/95, pp. 53-54, 79, Melin, pp. 171-175.

¹⁴⁶ Melin, p. 172.

¹⁴⁷ Dnr. 4-929-06; at the date of writing (14 January, 2007), the 2007 yearbook has not yet been issued; consequently, the case has not yet been given a yearbook case number.

the buyer sought the broker there. Payment was made to the broker's private bank account. The signing of the sales contract was carried out at the brokerage firm's office, but no reference was made in the contract to the firm. However, the contract stated that it was drawn up in three copies, one of which was "intended for the broker". The Board pointed out that this wording in the contract, as well as meeting at the firm's office, was not appropriate since it might easily give the impression that the broker is to some extent acting in the capacity of broker. However, given the circumstances of the case the Board deemed these remarks enough.

2.2.3.4 14 § paragraph 2 – Activities That May Affect the Broker's Trustworthiness

In addition to the prohibition to trade in real estate, the broker is prohibited under 14 § paragraph 2 to engage in any activity whatsoever that may affect her trustworthiness. The main principle underpinning this ban is the same as in 13 § and 14 § p. 1, namely to protect the integrity of the broker profession. In this connection, it is important to note that it is immaterial under the present provision whether the broker has in fact strayed from her obligations as an impartial intermediary; much less whether the contracting parties in a particular transaction have voiced any complaints or not. The crucial factor is whether it may be assumed that the activity in question will typically affect broker's trustworthiness, *in the eyes of the public*, as an impartial intermediary.¹⁴⁸

What, then, are the activities that may affect the broker's ability to act as an impartial intermediary, or that may raise suspicions among the public to that effect? The legislative history does not offer any precise definitions of acceptable and unacceptable activities but leave it up to the Board and the courts to decide. However, an example that is mentioned is where the broker is paid by a construction company, or a supplier of parts for houses and whatnot. In these cases, it is conceivable that the broker may steer the buyers into purchasing from this company. Or, the broker may try to steer the transaction towards buyers that agree to purchase these parts.¹⁴⁹

In **RÅ 2006 ref. 84**, the Supreme Administrative Court was presented with another type of integrity-detrimental activity. The broker in the case had undertaken to broker a tenant-ownership apartment in a tenant-ownership association that had sub-contracted its economic administration to a firm partially owned by the broker. The Board of Supervision of Estate Agents held that since the broker had economic interests in the activities of the administrating company, brokering a unit on a property where that company had an administration contract called the impartiality of the broker into question. This point was, held the Board, all the stronger given that the administrating firm was the sole owner of the brokerage firm where the broker was employed. The broker was issued a warning. Appealing to the Administrative Court of First Instance, the broker contended that the fact that she and her husband had chosen to run different businesses in a joint-owned group did not endanger her trustworthiness as a broker. She further argued that she had no other interests than to broker the apartment of the seller, which bore no resemblance to the instances of integrity-detrimental activities mentioned in the legislative history. Finally, she argued that given the uncertainty of the law, strict standards should be applied as to what activities to consider unlawful. The court held, citing the said legislative history, that the broker may not combine her brokerage activities with any other activity that may raise suspicions that she may be influenced by irrelevant

¹⁴⁸ Melin, p. 176; see also the cited case law below.

¹⁴⁹ Prop. 1994/95:14, pp. 54 and 80.

interests to the detriment of buyer and seller whilst carrying out her brokerage commission. The court found that, all in all, the ownership constellations were such as to give rise to suspicions as to the broker's impartiality. The warning was upheld.

The broker appealed to the Appellate Administrative Court who upheld the warning without further comment. Appealing to the Supreme Administrative Court, the broker contended that, since the brokerage firm and the administration firm performed services for fundamentally diverse customers, and since she had taken no active part in the activities of the administration firm, she could not have been in breach of 14 § of the EAA. Further, subsequent to the proceedings before the Board the broker had resigned from the board of directors of the administration firm. Finally, she contended that a broker having good insight as to the finances of a tenant-ownership association is beneficial to both buyer and seller. The Board contested the appeal and maintained that the broker's diverging interests called her impartiality into question. The Board further contended that 14 § does not require that it be established that the integrity of the broker is at risk in the individual case; it is sufficient that the situation gives rise to suspicions to that effect. The court concluded that the assessment of whether an activity is in breach of 14 § must be based on whether the activity by its very nature is detrimental to the integrity of the broker. The economic administration of real estate should not generally be considered as such. However, a broker running a parallel business cannot disregard that business when carrying out a brokerage commission. Where there is such a connection between that business and the brokerage commission that the trustworthiness or the broker might be called into question, it is incompatible with sound estate agency practice as laid down in 12 § to accept the commission. The court therefore upheld the warning, not on account of 14 § but rather 12 §. One judge dissented and adduced in his opinion that 14 § prohibits activities that *are such as to* call the integrity of the broker into question. It is clear from the wording that the assessment must be made objectively, and that the fundamental question is whether the activity is such that it will *typically* be detrimental to the trust of the parties involved in the transaction in the broker's impartiality. It is immaterial whether any of the parties involved has *actually* suffered any loss. The dissenting judge shared the majority's view that administration services need not be in breach of 14 §. However, the same cannot be said about brokering in tenant-ownership associations where the broker has interests by virtue of those administration services. The dissenting judge therefore upheld the warning based on 14 § rather than 12 §.

The Appellate Administrative Court of Stockholm delivered a highly interesting ruling in case **RK 8008-05** on 6 March, 2007. The case concerned a broker employed by a Swedish construction company, broker being her job description. She received a salary with a limited bonus. The company sold their newly built apartment buildings to equally newly organized tenant-ownership associations. The associations, in turn, hired the company's broker to find buyers of the apartments. The contracts between the construction company and the associations included a clause whereby the construction company undertook to repurchase any apartment the associations – through the brokerage of the construction company's own employee – failed to sell. The construction company would then proceed to hire independent brokers to find buyers for those apartments.

The Board of Supervision of Estate Agents found that the employment as broker at a construction company was in breach of 14 § p. 2 and issued a warning. The Board referred to its statement of the 28 April, 2004¹⁵⁰ where it had announced its position that a broker may

¹⁵⁰ FMN 7/2004.

only be employed by a construction company if her job instructions were limited to brokerage activities initiated by tenant-ownership associations or other tenant-owner than the employer. Further, the construction company and its representatives may not have decisive influence in the said associations – e.g. through board majority – nor have an economic interest in the sales of the apartments. Under the circumstances, the Board found it evident that such an economic interest was at hand, and issued a warning. The broker appealed to the Administrative Court of First Instance of Stockholm. The court pointed out that it is not acceptable under the EAA for the broker to act as salesperson for a construction company. However, the court concluded that the broker could not be said to have acted as salesperson. As to the question whether her employment was such as to compromise her integrity as a broker, the court found that the economic interest of the employer in the sale of the apartment units – based on the repurchase clause – was not essentially different from the economic interest of regular brokerage firms in their employees' good performance. Thus, the court did not find any reason to suspect that the broker might act under undue influence, and consequently rescinded the warning. The Board appealed the ruling to the Appellate Administrative Court of Stockholm. The appellate court found that the employment – where the employer had economic interests in the sale of each apartment unit by virtue of the repurchase clause as well as the fact that repurchased units were sold through independent brokers – was such as to typically raise suspicions concerning the broker's impartial and independent position as broker. The appellate court reinstated the warning. The broker has appealed the ruling to the Supreme Administrative Court, who announced on 20 December, 2007 that it will not try the case in substance.¹⁵¹

The Appellate Administrative Court recently delivered its ruling in another highly interesting case, **RK 1948-07**.¹⁵² The case concerned a broker who, in the capacity of representative for a brokerage firm, had lent money to a client who sold their property and purchased another through another broker at the same firm. The money was transferred after the signing of the sales contract, and the completion of the sale was not conditional upon the loan. As described above (2.2.1) it is incompatible with the impartiality rule to extend loans to clients, even where the loan is extended by the broker's employer. In the present case, however, the question at hand was not the actions of the responsible broker, but rather of the employer who extended the loan.

The Board concluded that it is not compatible with sound estate agency practice to give loans or any sort of credit to either party in a transaction since doing so can be perceived as a commitment that raises doubts as to the broker's position as an impartial intermediary; the broker was given a warning based on 14 §. The broker appealed the decision and argued, firstly, that the short-term loan in question was extended in order to save the buyer from additional credit costs and the seller from unnecessary risks resulting from the seller's taking physical possession of the property a week before the payment of the purchase sum. Secondly, the broker argued that he had not acted in the capacity of broker, since the debtor was a client of his colleague, but rather in the capacity of representative for the firm. Therefore, the EAA was not applicable. Finally, the broker argued that the extension of the loan was an isolated incident and could not be construed as an *activity* within the meaning of 14 §. The Administrative Court of First Instance rejected the arguments and held that 14 § must be interpreted as prohibiting any behavior or action that *could* raise doubts among the parties as to the impartiality of the broker; therefore, to comply with the provision the broker must always seek to avoid such situations. The court found that the broker had put himself in

¹⁵¹ Case 1956-07.

¹⁵² Ruling of 15 October, 2007.

just such a position, and thus upheld the warning. The broker appealed the ruling to the Appellate Administrative Court, essentially maintaining the same arguments as in the lower instances. The court concluded that nothing had been presented that would give the court reason to reach any other decision than the lower instances; the warning was upheld.¹⁵³

The Administrative Court of First Instance of Stockholm delivered a stern ruling in case **9244-06**.¹⁵⁴ The background was a transaction where the employee of the defendant acted as broker. The buyer had approached broker and seller asking to take possession of the property a week earlier than stipulated in the sales contract. To avoid additional credit costs, however, the buyer did not wish to take “legal” possession until the stipulated date. The broker deemed the proposal too risky for the seller. At the request of the buyer, the defendant – employer of the responsible broker – extended a short-term loan to the buyer in the name of the brokerage firm. The loan was subsequently repaid and the contracting parties were satisfied. The Board of Supervision of Estate Agents, however, found the defendant in breach of 12 and 14 §§ of the EAA since extending a loan to buyer or seller could give rise to suspicions as to the impartiality of the broker. The broker was issued a warning. Appealing to the Administrative Court of First Instance, the broker argued that the request and the loan came subsequent to the signing of the sales contract, which proved that the loan was not instrumental for the completion of the transaction but merely an act of convenience to facilitate an earlier date of possession than had been stipulated. The broker further argued that, since extending credit to the firm’s customers was not a commonplace activity but rather an extraordinary solution to a problem, it fell outside the scope of 14 §. The court rejected these arguments and held that the broker had put himself and his brokerage firm in a position where their impartiality and credibility could be put in question. The court upheld the warning. The broker has appealed the judgment, however, and the outcome is as yet uncertain.¹⁵⁵

From the case law of the Board of Supervision of Estate Agents, the following is of note. In **2006-03-22:1**, the broker was given a warning for extending a loan to one of the parties. The Board cited not only 12 § but also 14 § while doing so, holding that extending loans to either party was such as to jeopardize the integrity of the broker in the eyes of the public.

2.2.4 Conclusions

The foregoing clearly demonstrates that the Swedish broker has several important roles in real estate conveyances. In sum, four key aspects of the broker profession can be distinguished. Firstly, there is the matchmaking function. This is hardly surprising, since matchmaking is the very core of brokering. This function is still considered the most important part of the broker’s work, which is demonstrated by the fact that the broker is only entitled to her commission once the contracting parties have reached a mutually binding agreement.

Secondly, there is the counseling function. By sharing with the contracting parties all relevant knowledge she has concerning the property and other factors surrounding the transaction, the broker acts as a counselor to both parties. This goes beyond the mere conveying of information; the broker is also required to give advice within her level of expertise. The

¹⁵³ The ruling has been appealed. As of 14 January, 2008, the Supreme Administrative Court has not yet decided whether to try the case in substance. However, the appeal has been assigned the case number 6587-07.

¹⁵⁴ Ruling of 14 February, 2007.

¹⁵⁵ The Appellate Administrative Court announced on 9 May, 2007 that it will try the case in substance.

required level of expertise is as yet not entirely clear, possibly related to the fact that many brokers acquired their registrations before the mandatory university education was introduced. It is clear, however, that the broker is liable for negligent counsel; both for damages incurred and disciplinary measures by the Board of Supervision of Estate Agents.

Thirdly, there is the contract-engineering function. The broker is required to strive to achieve agreements between the contracting parties on any and all important issues. She must also assist the parties in drawing up adequate documentation of the agreement(s). This has two sub-requirements. The broker must see to the proper documentation of the agreement(s), even of such agreements that are legally binding without the observance of a certain form. Further, she must ensure that the said documentation is adequate. For contracts, this means that all clauses must be clear and unambiguous and that no important issues are left unregulated. To a certain extent, the broker must ensure the equitability of the agreement. While the freedom of negotiation is left to the contracting parties, the broker must at least ensure that the obligations laid down in the contracts are practically feasible for the party to which they apply. The broker is required to be active and observant, and must present such contractual solutions to the parties as are likely necessary in the transaction at hand. The contract-engineering function has become increasingly important in latter years, and brokers failing to observe proper diligence are both liable for damages incurred and subject to disciplinary measures.

Finally, there is the impartiality of the broker. With few and isolated exceptions – e.g., notably, concerning the sales price - the broker is required to act impartially in relation to the contracting parties and refrain from taking sides or favoring one party to the detriment of the other. She is also prohibited from acting on behalf of either part. Further, the broker must ensure her independence and integrity by refraining from engaging in activities that may affect her impartiality. The law explicitly prohibits purchasing the property the sale of which one has been commissioned to negotiate, brokering to or from relatives, and trading in real estate. However, any activity that is likely to affect the broker's impartiality through undue influence – or raise suspicions among the public to that effect - is prohibited.

It is highly unclear what level of expertise the broker must possess. The law remains ambiguous on this point in that the broker is entitled to decline to answer a question if she feels it is beyond the scope of her expertise to do so while, at the same time, she has a number of highly qualified obligations with respect to the sales contract and other agreements the parties may need to reach. This provides for an unfortunate uncertainty in assessing the obligations of the broker.

3 The History of the Latin Notary

The previous chapter dealt with key aspects concerning the Swedish broker. It is now time to turn to the announced object of comparison, the Latin notary. Before proceeding to the legal analysis, however, it is appropriate to lay the foundation for understanding by studying, albeit briefly and admittedly somewhat superficially, the historical background of the profession. To forestall the inevitable objections, I am perfectly aware that historical accounts may seem superfluous, and that at times they seem to serve merely as testaments to the academic narcissism of the writer rather than as integral elements of the relevant subject matter. Indeed, it is oftentimes easy to concur with this. Nevertheless, as will hopefully be shown in the following, historical accounts can do so much more to bring perspective to the subject matter. This is especially so when dealing with comparative studies, or any study that concerns matters outside the cultural context of the writer and/or the intended readers. Indeed, attempting to examine, describe, or analyze a field of law from another country, with scant regard paid to its historical, social, and cultural context, is naïve at best.

That said, using the historical account as an integral part of the subject matter requires the writer to resist the urge to engage in storytelling, and instead focus on what binds history together with the present situation. Doing so has implications on how the subject is approached. A historical outlook conventionally takes the form of a linear account of a particular field beginning at the oldest possible era or date and ending in the present. This conveys a one-dimensional view of history of which I am not particularly fond, since it does not offer any more understanding or insight than the mere statement of facts. That, in turn, presupposes that the stated facts are clear and uncontested – something that rarely holds true in the case of history. History is the study of written sources such as journals, log books, notarial registers, letters, public documents, decrees, legislation, and so forth. Historians may also use findings in disciplines such as archaeology or religious studies to aid them in their research, although the extent to which this is in fact done seems to vary.¹⁵⁶ Whichever the sources, it is quite obvious that they have to be interpreted and tested before they can truly be considered the foundations of “facts”. Thus, critical analysis lies at the very heart of historical studies and is ultimately what binds different sources and findings together and give shape to what is then perceived as historical facts. For these reasons I will take the liberty to approach the subject in a more thematic fashion. I will first discuss how the *need* for notarial services arose, proceeding to how the *profession* of the notary emerged, and finally accounting for how the profession came to be *regulated*.

3.1. The Need Arises

It is fairly straightforward to find evidence *that* something – a tool, a weapon, a piece of technology – has existed in a certain time and place. Combined with other findings and theories, it is often possible to determine with a fair degree of accuracy *when* a certain invention has first seen the light of day. Another concept entirely is *why* or *how* something emerged. In the present context, the question is: why did the Latin notary profession emerge?

¹⁵⁶ Mankind has tendencies towards conservatism, and written sources are the conventional historical sources, however flawed some written sources may be with regard to accuracy.

This is a difficult question to answer by any standard. Nonetheless, it is certainly of interest and worth the attempt.

Intuitively, there are two contrary assumptions that can be made as to the why and the how. One is that historic events and developments were the result of such complex combinations of factors that it takes an entire volume to even broach the subject, let alone present plausible explanations. The contrary assumption is that historic events and developments are oftentimes quite straightforward and can, at least in part, be explained by simple reasoning. I tend to subscribe to the latter view.

It has been suggested by Malavet that the historical process leading to the notariat is 1) the meeting of the minds, 2) the written contract, and 3) the legal professional who drafts public documents.¹⁵⁷ This means that the notarial profession presupposes the existence of the written contract. While it is easy to subscribe to this argument it does not, however, offer proof of cause and effect; nor does it by itself completely explain the provenance of the notariat. How, then, should one go about gaining further understanding? One plausible way is to begin with the geographic and cultural context of the Latin notary, which is of course the Latin sphere in Europe and Latin America. The Latin countries belong to the civil law family, with its roots in Roman law. As all roads are said to do, this one leads to Rome. Let us therefore explore the historical factors giving rise to the notariat by looking at classical Rome, all the while focusing on the needs of individuals acting in the marketplace and the impetus of these needs upon the legal order as well as the marketplace itself.

It would seem reasonable to assume that, in a society that knows a written language but where literacy is low and the written language thus the concern of a privileged few, there will be a demand for the assistance of literate people in all sorts of transactions. If a transaction represents great values to the parties, such as real estate or large amounts of goods and/or rare and expensive goods, the parties will presumably want to reassure themselves that the bargain struck is indeed what they have intended and negotiated. Additionally they will want to make sure that they can support any future claims. For these reasons the contracting parties will seek proof of the deed, which may consist in either publicity or written evidence in the form of a contract. Further, where at least one of the contracting parties lacks the ability to read, the person drafting any written documents will have to be somebody they can trust. Finally, to safeguard future claims before a court, any written documents must at least bear the markings of authenticity.

So how does this line of reasoning apply to classical Rome? Let us first address the big picture. The Roman culture differs from other ancient cultures in that Roman culture emphasized the law and the legal system in an unprecedented way. It was, for instance, in Rome that the profession of jurists emerged.¹⁵⁸ This is perhaps not surprising given the complexity of Roman law. In pre-classical Rome, in 450 B.C., the Law of the Twelve Tables was introduced. This law evolved through the work of jurists – most notably, the praetors and the jurisconsults - into *ius civile*, the law of the Romans. This law applied only to Roman citizens, which would seem natural given that the Roman expansion and conquests had yet to take place. Romans sometimes referred to themselves as Quirites, making *ius civile* “the law of the Quirites”. As Rome expanded and entered its “classical” era sometime around 200-100 B.C., more and more non-Romans came under the jurisdiction of Rome. Though the conquering rulers were not prepared to grant Roman citizenship to the conquered peoples,

¹⁵⁷ Malavet, at p. 404.

¹⁵⁸ Malavet, at p. 405; Tamm, pp. 35-43; Greenidge, § 10.

these new subjects nonetheless needed the rule of law. Parallel to this development, trade between Romans and foreigners became ever more intense. Just as Roman law did not apply to foreign traders, those traders were oftentimes not interested in observing the rigorous demands of Roman law. For these reasons *ius civile* was gradually complemented by *ius gentium*, the law of all peoples.¹⁵⁹ The state-of-affairs involving two separate legal orders could not, however, satisfy the needs of a marketplace where Romans transacted with non-Romans on a daily basis. The difficulties can be illustrated by the legal forms concerning the conveyance of ownership. Here, the term “ownership” is used, whereas other writers would perhaps use the term “property”. “Property” is a complicated term because it encompasses two separate concepts – on the one hand, the rights conferred by law upon the rightful possessor of an object/good/estate and, on the other, the owned object/good/estate itself.¹⁶⁰ To simplify things, “ownership” in the present context refers to the *right* to an object.

Publicity was a key element in the conveyance of ownership according to the Law of the Twelve Tables. Roman law distinguished between different kinds of ownership pertaining to different kinds of property, as well as between Roman citizens and foreigners. The oldest, “truest” form of ownership was naturally the one laid down by *ius civile*, thus reserved for Roman citizens, namely *Dominium ex iure Quiriticum* - Quiritary ownership. Such ownership could only be acquired or conveyed by means of *mancipatio* or *in iure cessio*. *Mancipatio* was the oldest and most formal means of conveying Quiritary ownership. The prospective buyer would, in the presence of witnesses, measure the purchase sum in scales and declare “*this [thing] I claim as belonging to me by right Quiritary, and [it] is purchased to me by this ingot and this scale of bronze*”.¹⁶¹

The matter becomes even more complex when adding the fact that Quiritary ownership was defined not only by the means of its acquisition, but also by the object of ownership. Only *res Mancipi* could be the object of Quiritary ownership. This, in turn, simply means “thing acquired by means of *mancipatio*” which would seem like arguing in a circle. Luckily, the circle has an entry point as *res Mancipi* refers primarily to land in Italy as well as slaves and livestock.¹⁶² Gaius’ definition of *res Mancipi* is exhaustive, making all other things *res nec Mancipi*, “things not *mancipable*”. Gaius specifically asserts that *res nec Mancipi* include wild and semi-wild beasts, but it is clear that this list is not exhaustive.¹⁶³

In iure cessio was similar to *mancipatio* in that it resulted in the conveyance/acquisition of Quiritary ownership. This kind of conveyance was performed before the Praetor or, in the provinces, before the local magistrate. The buyer would declare “*this thing is mine by the Law of the Quirites*”. The Praetor would then proceed to inquire of the seller whether he had any counterclaim that had not previously been settled. If the seller answered no, or refrained from answering, the Praetor would give the property in question to the buyer.¹⁶⁴

It stands to reason that in a society as vibrant as that of classical Rome, with its bustling commerce involving both Roman citizens and foreigners, all daily transactions could not possibly be conducted by means of such rituals as were demanded by *mancipatio* and *in iure*

¹⁵⁹ Greenidge, § 13. *Ius gentium* should not be confused with *ius naturale*, the law given by the natural order. While both apply to all mankind, the latter is of a higher order in that it presents a higher ideal of society.

¹⁶⁰ . This ambiguity lies in the Roman word *res* and is discussed by Poste in his commentary of Gaius *Commentarius Secundus*, §§ 1-14.

¹⁶¹ Gaius, *Commentarius Primus*, § 119; Tamm, pp. 89-90; Ankarloo, pp. 34-35, 38.

¹⁶² Gaius, *Commentarius Secundus*, § 14 a; Tamm, p. 79.

¹⁶³ Gaius, *Commentarius Secundus*, § 16.

¹⁶⁴ Gaius, *Commentarius Secundus*, § 24; Tamm, pp. 90-91.

cessio. Indeed, most transactions in the marketplace could not possibly be completed in this way because Quiritary ownership, as well as the ways of conveying it, was reserved for Roman citizens – and certain types of objects. There was only one means of legal conveyance/acquisitions available to foreigners, as well as with respect to things not mancipable, and that was *traditio*. *Traditio* entailed simply handing over the object or deed.¹⁶⁵ This resulted in full ownership in the case of a Roman citizen acquiring *res nec mancipi*. To foreigners, however, *traditio* did not grant formal ownership but merely the right of possession, *possessio*.¹⁶⁶ *Possessio* was, however, protected by law in the sense that it was unlawful for any person to take the object from the possessor.¹⁶⁷ For instance, a cow might be sold by means of *traditio* with the intention of subsequently performing *mancipatio* or in *iure cessio*, granting the buyer Quiritary ownership. During the period after *traditio* but before *mancipatio* or in *iure cessio*, the buyer was protected by *possessio*.

It is not difficult to appreciate the importance of protecting the right of possession. Not only was it impossible for foreigners to acquire Quiritary ownership - Quiritary ownership could also only be acquired *from* a Roman citizen.¹⁶⁸ Many goods, such as slaves, were sold at markets by foreign traders. A buyer could therefore only acquire *possessio*. This problem was solved by *usucapio*, the right of prescription. The time of prescription was one year for movable property and two years for real estate.¹⁶⁹ Upon prescription, the right of possession was converted into Quiritary ownership.¹⁷⁰ Until *usucapio* was completed, the buyer had to rely on *possessio*.

Since *traditio* did not in itself entail any publicity, contracting parties wanting to reassure themselves had to seek other means, such as written contracts. Since a large number of transactions would necessarily have to be concluded by means of *traditio*, it seems logical to conclude that publicity alone could not meet the needs of contracting parties in the marketplace. This, in turn, would seem to follow to some extent from the inherent rigidity of Roman private law; a point that will not, however, be explored further here. More importantly, it is clear that there was indeed a need for written contracts.

There may be a simpler explanation to the need for written contracts. It has been suggested that the early Romans did not make use of written contracts to any large extent but relied, instead, on publicity and social control. As the population grew, social control decreased, giving rise to an increased need for written contracts as proof of transactions.¹⁷¹ While this explanation seems to complement the aforementioned rather than substitute it – the population grew in great part as a result of the expansion of Rome and the trade with foreigners to whom *ius civile* did not apply - it raises the interesting question to what extent legal formalities were

¹⁶⁵ Gaius, *Commentarius Secundus*, § 19.

¹⁶⁶ Gaius, *Commentarius Secundus*, § 19; Tamm, p. 88.

¹⁶⁷ Tamm, p. 89. This principle survives in the Swedish legal system of today. Should the rightful owner of a stolen object find the same object in the possession of another person, the owner may not, according to Chapter 8, Section 9 of the Penal Code (SFS 1962:700) take possession of the object themselves but must seek the aid of the authorities. The offence is punishable by a fine or up to six months in prison.

¹⁶⁸ It was a fundamental principle of Roman law that one could not give or sell that which one did not own. Therefore, a person who did not hold Quiritary ownership of the goods could consequently not convey such ownership to the buyer; Tamm, p. 131. This principle also survives today, *inter alia*, in the field of intellectual property license law.

¹⁶⁹ Ankarloo, p. 39.

¹⁷⁰ According to Justinian law, *usucapio* required five conditions to be met: *res habilis*, *titulus*, possession, good faith (*bona fide*), and *tempus*; Lesaffer, at p. 47.

¹⁷¹ Sander, Tatiana, *A Atividade Notarial e Sua Regulamentação*, Boletim Jurídico, Uberaba/MG, a. 3, nº 132 (2005), <http://www.boletimjuridico.com.br/doutrina/texto.asp?id=683> (2008-04-19).

in fact observed in most transactions. That, however, falls outside the scope of this study. At any rate, the suggestion seems well-founded given that Rome itself evolved from a rural, conservative, and formalistic society in around 400 B.C. to the most powerful nation in the Mediterranean around 100 A.D.¹⁷² The law simply had to evolve to meet the new needs.

A written contract does not, however, solve all problems in the marketplace. As indicated above, the contracting parties need to ensure that they can support any future claims in connection with the contract. This entails by necessity a need to ensure the authenticity of the document, or at least convey an air of authenticity, with respect to the provenance of the document as well as the identity and the will of the contracting parties. It follows that the contract must be written, or at least witnessed and sealed, by a person in whom the parties and society have enough faith. There is thus a need for public faith in the drafter of contracts.

Written contracts were by no means a Roman innovation. In Babylonia in 1760, B.C., the Code of Hammurabi provided for written documentation of agreements. Contracts were written down on small clay tablets and signed with a seal. Interestingly, § 37 of the Code provided that, in the case of the termination of a contract, the tablet must be broken into pieces.¹⁷³ The contract tablets were also instrumental when merchants did business via agents. § 104 stipulated that when a merchant gave the merchandise to the agent, the agent must place security in silver to the merchant, who would then hand over a receipt to the agent in the form of a clay tablet marked with a seal. § 105 further stipulated that the agent was not entitled to retrieve the previously pledged silver without presenting the tablet proving his claim.¹⁷⁴ The Code of Hammurabi clearly demonstrates that there was commerce based on written contracts that has probative value. There is little reason to assume that literacy was substantially higher in Babylon in the 18th century B.C. than in Rome two millennia later. Thus, there is reason to believe that there was need for assistance in writing the contracts. Taken into account that the § 9 of the Code addressed the need for testimonies to ensure the veracity of future claims, it does not seem far-fetched to suggest that there may have been a need to prove the authenticity of written contracts, as well.

In conclusion, there was already in classical Rome, and probably before that, the need in the marketplace for 1) written contracts, 2) ways of proving the authenticity of contracts and other documents, and 3) public faith in those drafting and sealing contracts.

3.2 The Profession Arises

While the previous section focused on classical Rome, the existence of a literate profession with a function similar to that of the notary of today can be traced back to pre-Roman civilizations. Pharaonic Egypt knew written legal documents written or at least sealed by a person of public importance. For instance, in the Old and Middle Kingdoms, between 3100 and 1770 B.C., the written will existed and was usually sealed by a priest or other functionary with a public character, the *scriba*. In the New Kingdom, between 1573 and 712 B.C., this evolved into scribe-priests and magistrates writing and witnessing documents, rendering them

¹⁷² Strömholm 1991, p. 45.

¹⁷³ Gonzáles, at p. 256; however, the English translation of the Code by L.W. King suggests that the expression “broken” may be metaphoric and mean simply “declared invalid”;

<http://www.yale.edu/lawweb/avalon/medieval/hamframe.htm> (2008-04-19).

¹⁷⁴ Ibid.

public status by the official seal.¹⁷⁵ However, there was no concept of public faith in the sense that would later develop, and the documents signed by the *scribae* held no probative value until ratified by a higher authority.¹⁷⁶ Royal scribes seem to have performed a similar function among the Old Testament Hebrews. While in both these examples there was an element of authentication there was, however, no distinct profession assigned with the task. Such a profession was to emerge in classical Greece where officials known as *singraphos* and *apographos* operated. These public officials were charged with drafting contracts on behalf of citizens.¹⁷⁷

It would seem that the needs of the marketplace identified in the previous section (3.1.1), i.e. written contracts, ways of proving their authenticity and public faith in the person drafting them, were met by the scribes and officials of these pre-Roman civilizations. As pointed out by Malavet, however, these scribes did not act as legal advisors to the contracting parties, nor were they custodians of the original documents. The notarial profession had therefore yet to take shape.¹⁷⁸ This would hardly seem surprising given that it was in Rome that a written law, practised and interpreted by professionals specialized in the field, first emerged. As has been said above (3.1.1), it was in Rome the profession of jurists first saw the light of day. Before the profession of jurists it was of course already possible to confer upon a single profession the power of authentication, and the charge of assisting the public with written contracts. It was just not possible to exercise these functions as legal professionals since there was no legal science.

Who, then, were the legal professionals in classical Rome? And were the tasks of drafting and authenticating contracts really connected to jurists? The picture is not clear since there were different professions tied to the drafting and keeping of legal documents, the common trait of which seems to have been literacy. It is difficult to ascertain whether these professionals were also versed in the law. The *praetors* acted as judges in addition to being elected legislators, and were thus in more than one way instrumental in steering Roman law from the stale mate of *ius civile* and *ius gentium* to a more pragmatic state-of-affairs (see above 3.1.1). The praetors were indeed legal professionals but did certainly not draft and authenticate contracts for citizens nor perform the task of keeping records of transactions. These tasks were instead assigned to the *scriba*, government employees who in also drafted official resolutions. Another profession was the *notarius*. The notarii took shorthand notes from oral dictation or discussions; hence the name. Further, the *tabularii*, originally public officials in charge of the census and the keeping of census documents, were custodians of legal documents such as wills and contracts. Finally, the *argentarii*, were responsible for drawing up financial contracts called *mutuum*; the name of the profession clearly indicating the type of contract at hand.¹⁷⁹

It seems the notarial functions were dispersed among several professions. This leads to the question when a single profession performing all these tasks emerged. As so often, the answer seems to be that it did not happen overnight but instead through a continuous process over the centuries. Indeed, it is astonishingly easy to fall into the trap of perceiving Roman law as something fixed, as though it represented one particular moment in time. Of course, nothing could be more erroneous since what authors today refer to as “ancient Rome” in reality covers

¹⁷⁵ Malavet, at p. 405.

¹⁷⁶ Sander, p. 1.

¹⁷⁷ Malavet, at. pp. 406-407.

¹⁷⁸ Malavet, at p. 408.

¹⁷⁹ Yaigre & Pillebout, at p. 15.

a period from the foundation of Rome around the 8th century B.C. to the fall of the Western Empire in the 5th century A.D. In fact, while the Western Empire crumbled under the onslaught of the barbarian peoples leaving for a long time nothing but shatters of the great Empire, Roman law survived in the Byzantine Empire. It was codified by the Byzantine emperor Justinian in 529 A.D, and Roman law as it has become known to later generations is in fact to a large extent the product of this codification, the *Corpus Iuris Civilis*. See further below (3.3). This is perhaps not surprising since it was not really a codification in the strictest sense of the word. It comprised four main elements; (1) the *Codex Justinianus*, where notably the role of the emperor as sovereign monarch was codified, (2) the *Digesta* (or *Pandectae*), which consisted of old treatises and legal opinions that were now given force of law, (3) the *Institutiones*, which was basically a students' textbook largely based on Gaius' work with the same title, and (4) the *Novellae*, which consisted of laws enacted after 534 (added later).¹⁸⁰

Over the years, the *tabelliones*, yet another profession, emerged. The tabelliones were private entrepreneurs who wrote and kept legal documents for a fee. They seem to have become increasingly instrumental in the legal aspects of commerce, and by the time of the *Corpus Juris Civilis* they were mandatory drafters of contracts in Byzantium.¹⁸¹ The idea of mandatory intervention by tabelliones may have emanated from the Church.¹⁸² In return they were supervised by the government and they were required to prepare records of all transactions. The tabellio produced two documents: the *scheda*, which consisted of notes reflecting the will of the parties, and the main document, the *protocolum*, which was handed over to the parties. The tabellio differed from the future notary in that he was not required to keep the *scheda* as records, nor did he possess the power to authenticate documents. However, a tabellio testifying in court to having drafted a document granted the document next to absolute probative value.

As is well-known, the 5th century saw the decline of the Western Empire as a result of the barbaric invasions. Whether this development was perceptible to Romans or rather, as has been suggested, a gradual de-romanization, falls outside the scope of this study. It is, however, a fact that there are radically fewer written sources from this time onward. There is also little evidence to support a continuous use and development of Roman law. For this reason, and since the *Corpus Juris Civilis* that regulated the notariat in its *Novellae* which was comprised of new legislation, it is safe to assume that the western lands did not see a development of the notary profession, such as that in Byzantium, between the 5th and 11th centuries. This does not, however, mean that the notarial function was moot. Indeed, given the low literacy rate among the barbarian peoples, the need for a literate class versed in the law in documenting transactions can only have been all the stronger.¹⁸³

By the mid-11th century the cities of Italy and many other parts of the former Western Empire in Europe had recuperated and indeed developed into important centers of commerce and culture. Cities like Genoa, Marseilles, Montpellier, Venice, Valencia, and Bruges prospered. It was, however, in Bologna that the perhaps most important development took place. Monks and scholars began studying Roman law. Through the combination of these studies and religious studies, they developed scholastics which gave rise to canon law and *ius commune*.

¹⁸⁰ Söllner, pp. 78-85; Tamm, p. 250

¹⁸¹ Malavet, at pp. 410-411; Sander, p. 2.

¹⁸² Brandelli, p. 3.

¹⁸³ Romero, p. 5.

Roman law was back in Western Europe.¹⁸⁴ From an economic perspective the new thriving of Roman law is not at all surprising. The cities were once again large enough, and the commerce once again intense enough, that there was a need for the legal institutions which were – at least partially – lost with the barbarian invasions. However, the needs of the marketplace were not the only, and perhaps not even the most important, cause of the general revival of Roman law in the 11th century. As pointed out by Reyerson, the revival was to a large extent a result of growing judicial and governmental institutions based on written law.¹⁸⁵

Just as in the classical Roman period once before, the increase in trade and commerce gave rise to an increased need for written contracts. Thus the need for the notarial profession grew. The existence of notaries can be traced to the mid-twelfth century in Italy, with the minutes of notary Giovanni Scriba in Genoa. The oldest surviving notarial register in Montpellier dates to 1293, which supports the notion that the movement started in northern Italy and proliferated from there to the Languedoc.¹⁸⁶ In northern France, King Louis IX (“Saint Louis”) created sixty notary positions in 1270, to be stationed in Paris.¹⁸⁷ And so the notary was back in Western Europe as well. It is notable that the profession was considered highly qualified, which is attested to by the emergence in 1228 of the Scuola di Notariato in Bologna.¹⁸⁸

Medieval notaries could hold different kinds of authority – local, royal, imperial, or ecclesiastical – a fact that testifies to the mosaic of government of the time as well as the struggle between different factions over power.¹⁸⁹ However, since notaries would ultimately practice their profession in a specific town or region, they had to satisfy several requirements laid down by local regulations. Aside from being literate, which was uncommon enough at the time, notaries were generally expected to have a law degree or at least some sort of legal instruction from the university. Most cities also had a residency requirement, in the case of Montpellier ten years residency, and an age requirement of 30 years. These requirements amounted to a general rule that a notary be a “mature and distinguished member of the town”. As a result, notaries enjoyed relatively high status and marriages to members of a notary’s family were sought after.¹⁹⁰

Notaries were sought out by merchants to write legal documents. They usually had fixed places of business (“ateliers”) but would also move from venue to venue in the town in order to be close to the centers of business. Along with innkeepers and brokers, notaries were crucial players in medieval trade. They had more than one function and played different roles in different transactions. The most important role was of course that of drafting and authenticating legal documents and keeping records of transactions. The notarial phase of transactions was especially important to all parties since contracts were not considered valid and binding until sealed by the notary. This meant sellers and brokers had no right to get paid

¹⁸⁴ As is perhaps to be expected, there has been debate over whether the new upswing of Roman law was a renaissance or an expression of continuity. This debate, however, was mainly a product of 19th century ideas and has few followers today; Tamm, p. 255.

¹⁸⁵ Reyerson, p. 79.

¹⁸⁶ Reyerson, p. 80.

¹⁸⁷ Yaigre & Pillebout, p. 16.

¹⁸⁸ Malavet, at pp. 418-419; Sander, p. 3.

¹⁸⁹ This struggle has connections to the Investiture Controversy of the 11th and 12th centuries between the Holy Roman Emperor and the Papacy. Overall, the Ecclesiastical and worldly leaders struggled over dominion on many fronts. One of these fronts was the law; Harrison, pp. 6, 148-149, and <http://www.britannica.com/eb/article-9105947/canon-law#216815.hook> (2008-04-19).

¹⁹⁰ Reyerson, pp. 79-83.

until the work of the notary was finished. Since virtually all transactions at some point had to pass through the notary, notaries became knowledgeable in the local and/or regional market. This led some notaries to use information gained while carrying out their notarial duties, and pass it on to interested parties in the marketplace. It is clear that there was, already in the Middle Ages, a conflict between confidentiality and the need for public information.¹⁹¹

A question that remains to be addressed is when the uniform notary profession came into being. That question is not easy to answer, and the answer will vary over Europe. In France, there were quite clearly “notaries” in the 13th and 14th, as is attested to by legislation enacted by King Philip in 1300, 1302, and 1304. Even so, as late as 1539 the different notarial functions were dispersed among professionals with different titles; the *notaires* drew up minutes, the *tabellions* made engrossments and copies, the *garde scels* affixed the seal to bestow executory power on the documents, and the *garde notes* saw to the conservation of the documents. In 1597, King Henry IV imposed the reunion of these different functions in one single profession; the process was later repeated in 1706 by King Louis XIV.¹⁹²

The process in France seems to indicate that the unification of the profession was not self-evident. What makes the assessment difficult is the variety of terms used to denote different professions who may or may not correspond to the “notary” of today. In his work *Summa Artis Notarie*, published in 1234, the famous notary Rolandino used the terms *notarius* and *tabellio* in a way that suggests that the terms had become synonymous.¹⁹³ Indeed, there is a confusion of terms even today – within countries and between them. While Brazilian writers generally refer to the profession as *notary* (“notário”), both statutes and the books and articles of the said writers mention other categories, such as “tabellion” (tabelião) and *registrar* (registrador). In that context, the different terms seem to denote different functions, much like the aforementioned categories in 14th century France. However, in Argentina the commonly used term is *escribano*. The term *escribano* is used synonymously with *notario*, with the small difference that the Argentinean notarial law distinguishes between the “notarial function” and the “profession of *escribano*”.¹⁹⁴ A plausible explanation for this is that *escribano* was the commonly used Spanish word for notary before the Notarial law of 1862 replaced it with *notario*.¹⁹⁵ The change in terminology does not seem to have been fully effective in all former colonies.

Steering through the fog of linguistic uncertainty, it is still quite clear that the notarial profession that took form in the Middle Ages is the same that survives to this day. As will be seen in the following section, subsequent legislation has of course changed the profession over the centuries, but the essential function remains, as do the basics of the legal context in which it was created.

3.3 The Profession Is Regulated

There are two kinds of possible regulations concerning notaries. Firstly, there are the rules governing the entering of contracts, their probative value, and the conservation of documents.

¹⁹¹ Reyerson, pp. 83-84, 143-144, 147-152.

¹⁹² Yaigre & Pillebout, p. 16.

¹⁹³ Malavet, at p. 419.

¹⁹⁴ Ley 404, Art. 1.

¹⁹⁵ Malavet, at p. 423.

Such rules may or may not provide for the mandatory or voluntary intervention of a notary. In some countries and ages, the intervention of the notary has been made mandatory for certain types of contracts. These rules seem to indicate that the notarial intervention serve a purpose in society, whether to ensure the certainty of facts – that is, to ensure the veracity of claims and prevent falsifications – or to ensure legal certainty in the sense that legal requirements are observed. Secondly, there are the rules governing the work of the notary. Such rules include the tasks of the notary and the manner of their execution. Since, as has been shown in the foregoing, the need for the notary profession precedes the profession itself, it is only natural that the oldest laws fall under the former category, and that the second category has evolved in (comparatively) more recent times.

Regulating the notary profession – or at least regulating areas closely linked to the notary - seems to be almost as old a concept as the profession itself. The aforementioned Corpus Juris Civilis contained, in its Novellae, provisions regarding the notariat. One of the most notable new rules was that which made the intervention of the notary mandatory. Also introduced by Justinian was the notarial protocol, stipulating that any instruments drawn up by the notary must specify the name and signature of the notary, as well as the date. The protocol was introduced in great part as a means to prevent falsifications, or at least to make falsifications more difficult.¹⁹⁶

Spain seems to have retained much of its Roman heritage even during the Visigoth kingdom. In 600 A.D. the “46 formulas” were issued, stipulating the necessary elements for public contracts: the contracting parties, witnesses, and a notary to confirm the contract legally. In these times, reading and writing laws was only permissible in the presence of notaries; this measure was taken in order to prevent falsifications.¹⁹⁷ In 654 A.D., the *Fuero Juzgo*, a compilation of the laws of the Visigoth people, was issued under the Latin title *Liber Iudicorum*. It captured legal institutions and principles from Roman law as well as those of the barbarian invaders, and contained some interesting provisions with respect to written contracts and notaries. For instance, the law of King Citasuindo stipulated that where a written contract was contradicted by an oral testimony, the former held more probative value. The law of King Flavio Rescindo, further, upheld the prohibition for others than notaries (escribanos) to write the laws of the King, with severe punishments for transgressors.¹⁹⁸

During the centuries of the Córdoba Cahiphate, no new notarial legislation seems to have been enacted¹⁹⁹, but soon after the Reconquista, in 1255, the *Fuero Real* (Royal Privilege) of King Alfonso the Wise was promulgated in Castile. The Code stipulated, *inter alia*, that notarial intervention was mandatory in drawing up wills. The notaries were further required to take minutes of the transactions in which they intervened.²⁰⁰ In its Book II, Title IX, was a provision that contracts were only valid if drawn up by notaries or, in the absence of notarial intervention, with a minimum of three witnesses. To promote the effective execution of these rules, the *Fuero Real* also provided for the establishment of royal notaries in all cities and major towns:

¹⁹⁶ Sander, p. 2.

¹⁹⁷ Romero, p. 6-7.

¹⁹⁸ Gonzáles, at p. 266.

¹⁹⁹ The Qur'an does, however, mention the witnessing of contracts and their documentation by scribes; Gonzáles, p. 264.

²⁰⁰ Romero, p. 7.

“*[For the purpose] that the legal disputes that are settled, or the sales or purchases that are made, or the business that is conducted between Men (...) shall not fall into doubt on account of contest or discord between Men, We provide that in the cities and in the major towns shall be appointed [notaries], available to the public and sworn by mandate of the King or whomever he decrees and by no other (...).*”²⁰¹

Further, and perhaps even more importantly, the Fuero Real introduced, or at least captured, the concept of (almost) full probative value:

“*All [contracts] entered between men, bearing the seal of the King, the Archbishop, or the Bishop (...) shall be valid; unless he, towards whom the [claim] is directed, can legally refute it.*”²⁰²

We arrive, here, at the perhaps most distinguishing trait of the notary, compared to all other similar professions - the power to authenticate documents. A contract drafted and/or supervised by the notary had full probative value by the 12th century.²⁰³ Thus, it is possible that the Fuero Real did not introduce a legal novelty in 1255 but rather codified for Castile a principle already in use. The principle of full probative value meant that a contract drawn up and/or supervised by the notary was considered valid and authentic per se, simply because it was drafted by the notary who was vested with *publica fides*, public faith. It is easy to appreciate the power derived from *publica fides*, as well as the importance for legislators, governments and society at large to ensure that this power was not abused by faithless notaries.

Whether as a result of a fear of legal uncertainty or for other reasons, there were indeed in medieval Europe concerns and suspicions among the populace that notaries did not honor the public faith vested in them. For instance, notaries were frequently suspected of drafting false documents. While there is little evidence to support to the notion that notaries were generally dishonest, it is perhaps not surprising that notaries were at times viewed with suspicion. Since notaries were literate in several languages and vernaculars and versed in the law they possessed knowledge the public did not. For this reason, and because the very nature of the notary’s work required thoroughness, it became important for notaries to work under a certain professional code. The writer Saliatele of Bologna asserted in his work *Ars Notarie* that forgers and infamous persons should be thrown out of the profession to preserve the *integra fama* of notaries. In the case of Montpellier, only laymen of good reputation with ten years of residence in the town could be appointed as notaries. Interestingly, through statutes in 1223 and 1231, members of the clergy were barred from the notariat in the town.²⁰⁴

The Fuero Real addressed the fear of perjury and falsifications, under Title XII *De los falsarios, e de las escrituras falsas*. Ley I provided that a notary issuing false documentation was to lose his hand and his office; in grave cases, the penalty for perjury or falsifications was death.²⁰⁵ The statute also contained provisions concerning the remuneration to the notary, as well as the performance of the notarial services. Among the latter kind were three particularly interesting provisions. Firstly, the notary was prohibited from hiring another person to write documents in his place. This may be seen as an expression of the particular faith vested in

²⁰¹ Gonzáles, p. 267 (unofficial translation Jingryd).

²⁰² Gonzáles, at p. 267.

²⁰³ The fact is evident in the case of Spain; however, see also Reyerson, pp. 183-185, and Malavet, at p. 420.

²⁰⁴ Reyerson, pp. 82-83; the term “laymen” refers to non-clergy, and not non-lawyers.

²⁰⁵ Gonzáles, at p. 268.

notaries. Secondly, the notary was required to ascertain the identity of the contracting parties before he was allowed to fix his seal on the documents. If a contracting party was a foreigner, the deed could not be finished unless witnesses from the land vouched for the identity of the foreigner. Thirdly, the notary was required to keep notes of all transactions in which he intervened.²⁰⁶

Between 1256 and 1263, the *Siete Partidas* of King Alfonso X were promulgated. The *Siete Partidas* were a compilation of laws issued in seven parts, the third part of which, *Tercera Partida*, concerned (among other things) notaries. Continuing the legislative work begun in the *Fuero Real*, the *Tercera Partida* contained various provisions that defined the notary profession and the notarial services. The mandatory intervention of the notary in certain legal transactions was established and/or confirmed, as was the principle of full probative value. The notary was further required to keep permanent registers of his notes, *imbreviaturas*. The *Siete Partidas* would form the base of notarial regulation in Spain and its colonies until the 19th century.²⁰⁷

After the exponential development in the 13th century, the notary profession evolved largely unperturbed by major legislative changes. This may in part be attributed to the excellent groundwork laid out by the medieval laws. However, there was of course in the following centuries some legislation of note. In 1400, Count Amadeus VIII issued a statute containing two very interesting novelties. Firstly, the *imbreviaturas* were replaced by the notarial protocol, modernizing the notarial registers. Secondly, the *audiencia*, where the notary met with the contracting parties, was regulated, requiring the notary to give the parties such advice as was necessary for them to properly conclude the transaction. In 1512, the constitution issued by Emperor Maximilian I of Austria contained a provision that established that the notarial protocol belonged to the state and not the notary.²⁰⁸ The public function of the notary was thus further emphasized.

Apart from the aforementioned, notarial law saw no great substantive changes until the 1803 French law, *Loi Ventôse* (16 March), issued by Napoleon. That statute, which was to form the basis of virtually all modern notarial legislation, was part of the codification policy of Napoleon. Thus, the *Loi Ventôse* codified centuries of customary law, and produced the first uniform definition of the notary;

*“Notaries are public functionaries designated to receive all acts and contracts to which the parties must or wish to impart the authentic character of a public act and to guarantee the date, keep it deposited and issue copies and testimonies”.*²⁰⁹

Spain modernized its notarial legislation with its Notarial Law in 1862, whereas Italy did the same in 1913. Both were similar to the *Loi Ventôse*, making the notary profession completely regulated, from the definition of the profession, through education requirements, to the way the notarial work is to be performed.²¹⁰ As will become apparent in the next chapter, this model was to influence notarial legislation in the whole Latin world.

²⁰⁶ *Ibid.*, at pp. 267-269.

²⁰⁷ González, at pp. 271-277; Malavet, at pp. 420-421.

²⁰⁸ Malavet, at pp. 421-422.

²⁰⁹ *Ibid.*, at p. 422; the provision is still in force and is currently Art. 1 of the 1945 Ordonnance.

²¹⁰ *Ibid.*, at p. 423-424.

3.4 Conclusions

The notary profession has ancient origins. First came the need to secure proof of entered agreements. One manner to achieve this was publicity, but as society grew larger and more complex publicity could simply not satisfy the needs of the marketplace. Written evidence proved a good alternative, but since literacy was low writing became the work of scribes. To guarantee the authenticity of written contracts, the scribe needed to be a person of good faith, somebody people knew to be trustworthy. This function, associated both with clergy and lay rulers, became associated with jurists in Rome, where the foundation was laid for the profession that would become the notary. However, in classical Rome the functions we associate with the notary were still dispersed among several professions. The first known laws regulating the notary as a single profession, mandatory recorders of contracts, were found in 6th century Corpus Juris Civilis, which was brought to the Latin West early on but proliferated in earnest in the 11th century, beginning in Rome. In the Middle Ages the profession was even more regulated, and the well-known rule of full probative value dates from around this time. As is perhaps to be expected, this procedural rule was complemented by harsh laws against dishonest notaries, as well as the idea that notaries must be people of good faith (*bona fides*). The profession evolved, legally and in practice, interdependently in Latin Europe as well as Germany/Austria. The Revolutionary French Loi Ventôse from 1803 gave the modern notariat its “classic” shape and was emulated throughout the civil law world.

4 The Contemporary Latin Notary

This chapter deals with the Latin notary as a legal character of today. Keeping in mind that the objective is ultimately to relate the notary to the Swedish real estate broker, it would seem appropriate to limit the account to rules and principles concerning the notary's relation towards the contracting parties in a real estate transaction. Such an approach would not lack merits; apart from considerations of space it is virtually impossible to give a full account of all aspects of the notary within the context of the present study. However, all comparative studies must take into account not only the *prima facie* points of interest but also surrounding areas and, perhaps most importantly, the historical and legal context of the object of study. A classic example offered by Bogdan illustrates the point. Suppose one would wish to compare government incentives and support to facilitate for families to have children. One possible method, employed in Sweden, is to grant parents subsidies in the form of a child allowance. Suppose further that one would wish to compare Sweden and France. The French system does not know a child allowance as the Swedish does, which may give the impression that there is no French policy supporting parents with children. However, this is merely the result of bias and lack of a proper knowledge of the French system. The French subsidy simply takes the form of a tax deduction.²¹¹ It is thus of utmost importance to consider more than the *prima facie* points of interest.

In view of the foregoing, it seems prudent to present an overview of the key aspects of the notarial profession. This should not present a major problem of scope as long as the accounts are kept at a suitable level. The chapter is therefore organized as follows. Immediately below (4.1) follows a presentation of what I choose to regard as the foundations of the notariat: the international proliferation of the Latin notary system, the relevant notarial legislation in the nine examined countries, and the public and private character of the profession. This is followed by an account of the chief functions of the notary, namely the drawing up of the necessary documents, authentication, and counseling (4.2), the impartiality of the notary (4.3), and finally a short account of the current economical and political discussions surrounding the profession (4.4).

4.1 The Foundations

4.1.1 The International Notariat

As the Spain and Portugal discovered the New World and founded colonies in South, Central, And North America, they brought their bureaucracy and legal system with them. Thus, Brazil inherited the laws and customs of Portugal whereas the rest of Latin America inherited those of Spain. In the case of Brazil, the nominally applicable law until 1981 was the ordinances of king Afonso V from 1445, as revised in 1521 and 1603!²¹² Quite naturally, this included the notariat. Even after the independence of Latin American countries from their former masters, the cultural heritage prevailed, as did the notary profession. The American state of Louisiana

²¹¹ Bogdan, pp. 46-48; the specific contents of the French rules have not been investigated, but the point is valid all the same.

²¹² Formicolla, p. 2.

presents an interesting case, owing to its particular history. Founded around 1700 by the French, it inherited the bureaucratic tradition from France, as did Québec in Canada. Ceded to Spain in 1763, it remained safe in the civil law family. Despite subsequently being sold to the United States (after being ceded back to France from Spain) by Napoleon in the Louisiana Purchase for \$ 15,000,000, it has retained parts of its civil law tradition. Thus, there are Latin notaries in Louisiana.²¹³ Since then, the notarial has evolved interdependently in Europe and the former colonies, not least through the work of the Colegio de Escribanos de la Ciudad de Buenos Aires.²¹⁴

Figure 1 The prevalence of the Latin notariat worldwide



Source: <http://uinl.org/>

In 1948 representatives from the Notary Chambers in nineteen countries²¹⁵ met in Buenos Aires, invited by the Colegio de Escribanos, and founded the International Union of Latin Notaries, aptly denoted UINL from French and Spanish; Union Internationale du Notariat Latin and Unión Internacional del Notariado Latino, respectively. The 1948 Congress adopted a statute that was officially adopted in Madrid in 1950.

The UINL is a non-governmental organization whose members are the Chambers of Notaries in the nineteen original countries as well as those of subsequently joined countries, today amounting to 75 members.²¹⁶ The UINL interacts with governments, international and supranational organizations such as the UN, the EU Commission, and the European Parliament, as well as other non-governmental organizations and professional societies, including the International Union of Lawyers and the International Bar Association. In its interaction with governments, the UINL draws up and submits concrete proposals for legislation. The general aim of the UINL is to promote the Latin notarial system throughout the world, developing and promoting the application of its fundamental principles as well as principles of notarial ethics. To that end, the organization is engaged in the study of law in the

²¹³ <http://www.pclna.org/>, <http://www.notarialarchives.org/civil.htm>, <http://www.louisianahistory.org/timelines/index.html> (all 2008-04-19).

²¹⁴ <https://www.colegio-escribanos.org.ar/> (2008-04-19).

²¹⁵ Argentina, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Cuba, Chile, Ecuador, Spain, France, Italy, Mexico, Paraguay, Peru, Puerto Rico, Switzerland, and Uruguay.

²¹⁶ <http://uinl.net/presentacion.asp?idioma=ing&submenu=MEMBRES> (2008-04-19).

field of notarial practice, including the study and compilation of legislation relating to notaries. It also holds and promotes international congresses.

The notary profession is also organized on a European level by the Council of the Notariats of the European Union, abbreviated CNUE from the French name, Conseil des Notariats de l'Union Europeenne. The CNUE was founded in 1993 following the introduction of the single market in the EU. It is a non-profit organization advocating the interests of notaries in the EU, and is the official organization representing the notarial profession in and before EU institutions. Its members are the national notary organizations in all EU countries where the notary system prevails; Austria, Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.²¹⁷ The express mission of the CNUE is to promote the notariat and its active contribution to all decision-making in the EU. The view taken by the CNUE is that this serves the purpose of developing a legal Europe. The CNUE's internal service to its members is to keep them updated on relevant legal and political news from the EU institutions, and assists in training notaries in community law.²¹⁸

4.1.2 The Legal Basis of the Notariat

4.1.2.1 The Notarial Laws

One of the fundamental principles of law, recognized as early as by the Romans (see above Chapter 3), is that laws are only applicable within the jurisdiction of the lawgiver. Consequently, a statute from one country is only applicable in that country and cannot be used as a direct source of law in another country. The present study addresses the Latin notary as a (quasi-) uniform legal character that exists in many countries. Given that the law of one country does not prove that the same rule exists in another, it could be argued that in order to prove that the Latin notary is indeed (virtually) the same legal character in a number of countries, one would have to present identical, or at least very similar, provisions from the laws of all those countries, governing central aspects of the notary. Therefore, in order to forestall any and all objections, let us go about presenting such provisions in the simplest possible fashion.

Let us first find a common denominator. The UINL, on its webpage, defines the notary in the following way.

Notaries are professional lawyers and public officials appointed by the State to confer authenticity on legal deeds and contracts contained in documents drafted by them and to advise persons who call upon their services.²¹⁹

A bit further down on the same page is the following statement.

To achieve the balance needed in order to conclude a contract on an equal footing, a Notary's impartiality can also take the form of lending adequate assistance to whichever of the parties might be in a position of inferiority.²²⁰

²¹⁷ <http://www.cnue-nouvelles.be/en/001/index.html> (2008-04-19).

²¹⁸ <http://www.cnue-nouvelles.be/en/001/002.html> (2008-04-19).

²¹⁹ http://uinl.net/notariado_mundo.asp?idioma=ing&submenu=NOTAIRE (2008-04-19).

²²⁰ Ibid.

It seems safe to conclude, already, that two key aspects of the Latin notary is the public faith to authenticate documents, as well as acting impartially. However, in a legal study only proper sources of law can ever satisfy the reader that it is so. The following table demonstrates the notarial laws of all nine countries selected for the present study, as well as references to provisions concerning either authentication or impartiality. It serves two purposes. Firstly, the laws presented in the table will be referred to in the rest of the chapter. All references to legal provisions hereinafter concern these laws. Secondly, it gives a decently clear indication that the chief traits of the notarial profession are the same in all examined countries.

Figure 2 Comparison of notarial laws with respect to authentication and impartiality

Country	Legislation	Comment
Argentina	<i>Ley orgánica notarial n° 404</i> , Buenos Aires 15 de junio de 2000	Art. 17° a) Impartiality (independence)
Belgium	<ul style="list-style-type: none"> • <i>Coordination Officieuse de la Loi du 25 Ventose An XI</i>, Contenant organisation du notariat telle que modifiée par les lois du 4 mai 1999 • <i>Code de déontologie</i>, 2004-06-22/44 	Art. 1 Give authentic character to acts Art. 9 Intervene and counsel the parties in all impartiality
Brazil	<i>Lei dos cartórios</i> , Lei n° 8.935, de 18 de novembro de 1994	Art. 1 Publicity, authenticity Art. 2 Legal professional vested with publica fides Art. 6 Formalize will of the parties legally, grant authenticity
France	<ul style="list-style-type: none"> • <i>Loi du 25 Ventôse an XI</i>, Loi contenant organisation du notariat • <i>Ordonnance n° 45-2590</i> du 2 novembre 1945 relative au statut du notariat • <i>Ordonnance n° 45-1418</i> du 28 juin 1945, relative à la discipline des notaries et de certains officiers ministériels • <i>Décret no 45-117</i> du 19 décembre 1945 portant règlement d'administration publique pour l'application du statut du notariat 	Art. 1 Public officials, give authentic character to acts
Germany	<ul style="list-style-type: none"> • <i>Bundesnotarordnung (BNotO)</i> vom 24. Februar 1961 (BGBl. I S. 98) • <i>Beurkundungsgesetz</i> 	§ 1 Independent public office, authentication § 14 Impartiality and counselling, independence and incompatible undertakings

	(<i>BeurkG</i>) vom 28. August 1969 (BGBl. I S. 1513)	
Mexico	<i>Ley del notariado para el Distrito Federal</i> de 28 de marzo del 2000	Art. 3 Impartiality Art. 42 Publica fides
Portugal	<i>Estatuto do Notariado</i> , Decreto-Lei n.º 36/2004 de 4 de Fevereiro	Art. 1 Publica fides, give legal form to acts Art. 13 Impartiality and independence
Puerto Rico	<ul style="list-style-type: none"> • <i>Ley notarial de Puerto Rico de 1987</i>, Ley Núm. 75 de Julio de 1987 • <i>Reglamento Notarial de Puerto Rico</i>, Tribunal Supremo de Puerto Rico²²¹ 	Art. 2 Publica fides, authenticity, give legal form to the will of the parties Art. 3 Independence and impartiality
Spain	<ul style="list-style-type: none"> • <i>Ley del Notariado</i>, Ley de 28 de mayo de 1862 • <i>Reglamento Notarial</i>, aprobado por decreto de 2 de junio de 1944 	Art. 1 Publica fides

4.1.2.2 Mandatory Notarial Intervention in Real Estate Transactions

It has been asserted that real estate transactions in the countries where the Latin notary prevails include the intervention of a notary. This is hardly to be contested. It has also been asserted that the notarial intervention is mandatory in most, though not all, civil law countries. It seems appropriate, here, to address the mandatory nature of notarial intervention and examine it more closely. In legal terms, what does “mandatory” really mean? More precisely, what are the legal consequences if the contracting parties do not seek the intervention of the notary? Scratching the surface reveals a legal reality that is more complex than is often assumed, and the quest soon turns into one of accounting for the different reasons why notarial intervention is sought in real estate transactions.

First and foremost, the legal implications of the mandatory notarial intervention lie at the heart of contract law. In most Latin-German countries, it is an essential and necessary component of the real estate sales contract; according to the contract law of those countries, the sales contract simply does not become valid and binding until authenticated by the notary. It is not difficult to trace the rationale behind this rule to the problems of the marketplace discussed in the previous chapter: what documents are to be trusted in the court of law (and, consequently, in the marketplace)? That question has been answered in many countries by granting notaries exclusive power to authenticate, and to validate, contracts.

The following table demonstrates which of the examined countries have made notarial intervention mandatory in the sense that it is necessary for a binding sales contract. As can be

²²¹ The *Reglamento* has been enacted by the Supreme Court of Puerto Rico in accordance with Art. 62 of the *Ley Notarial*.

seen, France and Belgium constitute a minority in that in those countries sales contracts are valid without notarial intervention. It should be noted, however, that this applies between the buyer and seller only. In order to make the purchase opposable to third parties, it must be registered. In order to be registered, in turn, the contract must be confirmed by a notary; Art. 2 of the Law 18/12/1851 (Belgium), and Art. 4 of the Décret 55-22 of Jan 4, 1955 (France).

Figure 3 Mandatory notarial intervention for valid real estate sales contracts

Country	Legislation	Comment
Argentina	<i>Código Civil</i> , Ley 340 de 25 de setiembre de 1869	Art. 1184 Mandatory
Belgium	<i>Code Civil Belge</i>	Art 1582 Voluntary
Brazil	<i>Código Civil</i> , Lei nº 10.406, de 10 de janeiro de 2002	Art. 108 Mandatory
France	<i>Code Civil</i>	Art. 1589 Voluntary
Germany	BGB, Bürgerliches Gesetzbuch	§ 311b Mandatory ²²²
Mexico	<i>Código Civil</i> para El Distrito Federal en Materia Comun y para toda La Republica en Materia Federal	Art. 2316-2322 Mandatory (with exceptions)
Portugal	<i>Código Civil</i> , Decreto-Lei No 47344 de 25 de novembro de 1966	Art. 875 Mandatory
Puerto Rico	<i>Código Civil</i> de Puerto Rico de 1930	Art. 1232 Mandatory
Spain	<i>Código Civil</i> español	Art. 1280 Mandatory

Even where the notarial intervention is not made instrumental for the validity of the sales contract itself, notarial intervention can become practically mandatory all the same. As a general rule, most buyers of real estate finance the purchase by means of a loan, for which a mortgage on the property is commonly used as security. Creditors will typically not grant loans without a mortgage. Since mortgages are rights *in rem* with respect to real estate, thus representing huge values to individuals as well as society at large, practically all countries have deemed it necessary to make the validity of mortgages conditional upon registration. This holds true for countries outside the Latin-German family as well; in Sweden, mortgages are registered in the Land Register. The register itself is administered by the National Land Survey, whereas the registration of rights such as mortgages are administered by seven government bodies, allocated to seven district courts.²²³ In the Latin-German family, the extent to which notarial intervention is mandatory by law varies, as does the formal consequence of the intervention. For instance, in Germany the setting up of mortgages requires first the consent of the owner or the property. The consent itself is valid without any particular form. However, according to § 873 of the BGB the mortgage right comes into existence only upon registration in the Grundbuch. Registration, in turn, requires the signature of the owner to be notarized (§ 29 BGO).²²⁴

²²² A contract entered without notarial intervention becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected.

²²³ Land Register Code (2000:224) and 19:3 of the Land Code (1970:1994), respectively.

²²⁴ Hertel & Wicke, p. 36-37.

The following table demonstrates that all of the examined countries have made notarial intervention mandatory with respect to mortgages. This means that in these countries, notarial intervention is a prerequisite for a valid mortgage.

Figure 4 C Mandatory notarial intervention with respect to mortgages

Country	Legislation	Comment
Argentina	<i>Código Civil</i> , Ley 340 de 25 de setiembre de 1869	Art. 1184 Mandatory
Belgium	<i>Code Civil Livre III Titre XVIII : Des privilèges et hypothèques</i> , 16 décembre 1851. - Loi hypothécaire -	Art. 81-82 Mandatory
Brazil	<i>Código Civil</i> , Lei nº 10.406, de 10 de janeiro de 2002	Art. 1492 Mandatory
France	<i>Code Civil</i>	Art. 2416 Mandatory
Germany	<i>BGB</i> , Bürgerliches Gesetzbuch <i>GBO</i> , Grundbuchordnung	§ 29 BGO, § 873 BGB Mandatory
Mexico	<i>Código Civil</i> para El Distrito Federal en Materia Comun y para toda La Republica en Materia Federal	Art. 2917, 2317 Mandatory (with exceptions)
Portugal	<i>Código Civil</i> , Decreto-Lei No 47344 de 25 de novembro de 1966	Art. 875 Mandatory
Puerto Rico	<i>Código Civil</i> de Puerto Rico de 1930	Art. 1232 Mandatory
Spain	<i>Código Civil</i> español	Art. 1280 Mandatory

It follows from the foregoing that, in the examined countries, the parties to a real estate transaction must seek out the notary at some point in order to achieve a valid sales contract, or a valid mortgage, or both. However, as the German example demonstrates, there may be parts of the process that do not necessarily involve a notary. The question, then, is whether there are other implications of notarial intervention that would make the parties avail themselves of it even where it is strictly not required. The answer is that there are. Firstly, as will become apparent below (4.2.2), notarial deeds have full evidentiary value, and executory force, by virtue of the notary's power to authenticate. Therefore, they have the obvious advantage that the parties will not have to obtain a court order to enforce them. Secondly, through a combination of law and tradition, the notary is an established institution in Latin-German countries. It is highly likely that most people do not know the extent to which notarial intervention is a legal prerequisite for a valid transaction. Also, the practice is so widespread, and so rooted in the culture, that the overall impression is that the notarial intervention is mandatory.²²⁵

4.1.3 A Public and Private Profession

The legal nature of the Latin Notary is often summarized as “a liberal professional vested with publica fides and performing public functions”.²²⁶ This encompasses two separate issues.

²²⁵ Ferreira & Weizenmann, at p. 60; Murray, p. 30.

²²⁶ Malavet, at p. 434.

First, there is the question of the notary's employment status. Is he employed by the government or does he act in his own capacity? Second, there is the question of *publica fides*. What does the term mean? The literal translation from Latin is "public trust" or "public faith", which taken together with performing public functions suggests that the public has a special faith in the notary to perform an important duty for the benefit of the law and of society.

The term "liberal profession" applies to highly qualified professions with restricted entry. Access to such professions normally requires some degree of formal university training. Lawyers, doctors, pharmacists, and accountants are examples of liberal professions.²²⁷ Intuitively, the term would seem to imply that the profession is pursued within a private framework, either completely within the private sphere, or at least independently from government institutions. However, since notaries perform public functions this definition does not fit the profession perfectly. It is of course possible to ignore this perceived imperfection; indeed, the law is so full of legal terms for which there are by necessity detailed definitions that terminological discussions concerning non-legal terms seem superfluous. However, whatever one's stance on terminology, the legal status of the notary must be addressed. On the one hand, notaries perform public functions with the full power of the state behind them. On the other hand, they give legal counsel to the transacting parties and often engage in legal services that are not ordained by law. It is therefore of interest to address the status of notaries as expressed in the notarial laws.

In France (Art. 1 of the *1945 Ordonnance*), the notary is defined as an "officier public", which means "public official". This would normally denote a person employed by the government to perform public functions, but Art. 1bis proceeds to stipulate that the notary may exercise his profession in his own name or within a private enterprise. Similarly, the Belgian law (Art. 1) defines the notary as a "fonctionnaire public" but provides, equally, that the notary may exercise the profession alone or in a private enterprise (Art. 50). In the case of Spain, the law (Art. 1) defines the notary as a civil servant²²⁸, whereas the Reglamento (Art. 1) defines them as legal professionals as well as civil servants, explicitly recognizing that the profession has a dual character. Portuguese notaries were formerly public employees, but the profession was privatized in 2004 when the current notarial law was introduced. The current law (art. 1.2) provides that the notary is at once a public officer and a liberal professional. The German BNotO (§ 1) refers to the notariat as an "independent public office". The Puerto Rican law (Art. 2) explicitly refers to the notary as a "legal professional who performs a public function, *authorized* [italics added] to give faith and authenticity (...)".²²⁹ The word "authorized" is the key: the notary is not employed by the government but rather a private professional authorized to perform some of its functions. The Brazilian law (Art. 3) refers to "legal professionals vested with *publica fides* to whom is delegated the practice of the notarial activity". The Mexican notarial law has a similar wording; "[t]he notary is a legal professional vested with *publica fides* (...)" (Art. 42). Finally, the wording of the Argentinean law focuses on the notarial *function* (Art. 1), while providing that this function is the "exclusive competence" of notaries (Art. 20), and that in order to perform this function one must receive a notarial investiture (Art. 12). The provisions vary from country to country, but bit by bit the picture emerges of a common legal character. The notary is indeed a legal professional *vested* with faith and the power of the government but not necessarily *employed* by the government.

²²⁷ van den Bergh & Montangie, p. 5.

²²⁸ "Funcionário público".

²²⁹ "El notario es el profesional del Derecho que ejerce una función pública, autorizado para dar fe y autenticidad (...).

It is usually left to the discretion – and the responsibility – of the notary to choose and run the operations of his office.²³⁰

It is hardly to be contested that being vested with the full authority of the government without being a government employee is far-reaching indeed. The question is, on what grounds is such authority granted? This brings us to the question of *publica fides*. The literal meaning, “public faith”, gives a clear indication of the general idea: the public has entrusted the notary to perform important functions in its name. However, merely performing “important functions” in the name of the public does not distinguish the notary from a number of other professions, including fire fighters, para-medics, or school teachers. Professionals of those categories certainly perform functions deemed important by the public. As is the case with notaries, whether they are public employees or not may vary but does not change the public interest in their work. The essence of *publica fides* lies elsewhere and is twofold: first, the notary performs functions that are not only public but also *functions of the state* and carry its seal. Second, as will be accounted for below (4.2.1), notarized deeds have a special evidentiary value. Thus, *publica fides* is inextricably linked to rules of procedure, which is rather fitting given its Roman origins.

Among the examined notarial laws, those explicitly mentioning *publica fides* are the laws of Brazil (Art. 3), Mexico (Art. 42), Portugal (Art. 1), and Puerto Rico (Art. 2), as well as the Spanish Reglamento (Art. 1-2). However, the omission of the phrase in the notarial laws of the other examined countries should not be interpreted as a substantive deviation from the principle; the concept of *publica fides* is embedded in all countries’ notarial laws since they describe the public functions the notary performs, and the implications of those functions.²³¹

4.2 The Chief Notarial Functions

The notarial area of activity can be summarized as the notarization of legal transactions, providing neutral advice, and the execution of the notarized transaction, i.e. making the entry into the Land Register or Commercial Register.²³² The latter activity, while admittedly important, falls outside the scope of the present study. The following account will therefore cover the functions that are at the very core of the transaction itself: the drawing up of the necessary documents, their authentication, and counseling.

4.2.1 Drawing up the Necessary Documents

Given the notary profession’s origins as a scribe, it is hardly surprising that drawing up any and all documents necessary or convenient for the transaction remains a notarial function of paramount significance. Indeed, as has been mentioned, the Argentinean word for notary remains *escribano*, a testament to the original purpose of the profession. Drawing up the necessary documents is at times described as giving legal form to the will of the contracting parties, and is explicitly provided for in the notarial laws of Argentina (Art. 20.a), Brazil (Art.

²³⁰ Yaigre & Pillebout (2006), at p. 8.

²³¹ The fact that the Spanish law (Art. 1) describes the notary as authorized to “give faith” to contracts and other deeds supports the view that the differences in this respect are superficial and a mere question of wording.

²³² Geimer, p. 8.

6.II), Mexico (Art. 26), Portugal (Art. 4), Puerto Rico (Art. 2), and Spain (Art. 17). While the Belgian (Art. 1) and French (Art. 1 of the 1945 Ordonnance) notarial laws do not explicitly mention the actual composing of documents but rather “receiving” them, it is clear that these countries form no exception. German law does not have one single provision but rather an entire law, the Notarization Act (BeurkG).

The extent to which the notary must draw up all documents in practice may, and must, of course vary. It is no rare occurrence, for instance, that real estate brokers provide sales contracts that the parties have already signed but wish authenticated. Depending on the quality of the contracts, the notary’s work may in some – perhaps many – instances resemble a mere pro forma operation. However, as will be demonstrated below (4.2.3), the notary is by no means at liberty to notarize documents without controlling them in substance.

4.2.2 Authentication

The arguably single most important function of the notary is to authenticate, or “give authenticity” to contracts and other deeds. Indeed, it is the very reason the state confers upon the notary some of its powers.²³³ What, then, constitutes “authenticity” and what are its implications? The word “authentic” has its roots in the Greek word *αυθεντικός*, meaning “real”, and “genuine”. To authenticate, then, is to validate, to establish the truth or genuineness.²³⁴ In the legal context, the principle of authentication has been held to “[signify] the confirmation, by the authority vested in the notary, of the existence and the circumstances that characterize the fact (...)”. It has further been said that authentication entails the idea of certainty of the existence of a fact or legal act, attested to by the notary.²³⁵ While this is of course true, attesting to the veracity of stated facts is in itself nothing unique for the Latin notary.

Rather, the most important characteristic of authentication lies in the principles of *full probative value* and *immediate enforceability*. That is, once the notary has attested as to the veracity of a deed and signed it with the notarial seal, that deed is considered full proof in the court of law.²³⁶ It is also enforceable without any requirement of subsequent confirmation by a court. The French notarial law (Art. 19 of the *Loi du 25 Ventôse*) stipulates that all “notarized” acts shall “have the faith of the court of law”²³⁷ and “shall be executory within the borders of the Republic”. It can only be suspended by judicial order. Art. 1319 of the Code Civil further provides that a party in possession of a notarized act need not prove its truthfulness; rather, it is the counterpart who must disprove it. The Belgian notarial law (Art. 19) has a provision identical to its French equivalent, with the exception that “Republic” is replaced by “Kingdom”. The term “executory” means that the instrument is immediately enforceable. The Brazilian notary law lacks such a provision; instead, Art. 364 of the Code of Civil Procedure²³⁸ stipulates that “public documents are proof not only of its origin, but also of the facts that [the notary] has declared to have occurred in his presence”. Together with Art 6.III of the notarial law, stating that the notarial competence encompasses “authenticating

²³³ Yaigre & Pillebout, at p. 2

²³⁴ Illustrated Oxford Dictionary.

²³⁵ Antunes, p. 9.

²³⁶ Malavet, at pp. 443-445.

²³⁷ “(...) feront foi en justice”.

²³⁸ Código de Processo Civil, Lei n.º 5.869, de 11 de janeiro de 1973.

facts”, it is clear that the Brazilian rules are no different in substance. Germany has chosen the equivalent solution, providing in § 415 et. seq. of the Code of Civil Procedure (ZPO)²³⁹ that the notarial deed gives full evidence of the operation that has been notarized. The Mexican law (Art. 26) provides that the authenticating function means that that which the notary has attested to in the notarial acts or public register shall be deemed certain *save where the contrary is proven*. The Mexican provision summarizes perfectly the evidentiary value of notarial authentication: it results in a strong presumption of truthfulness that can only be invalidated by judicial order.²⁴⁰ The party wishing to contest the authenticity bears the full burden of proof.²⁴¹ There are, however, limitations; the principle of full probative value applies only to facts that have occurred before the notary. If, for instance, the notary attests that a down-payment has been made before his office, the principle applies. In contrast, the principle does not apply where the notary merely indicates in the notarial act that the parties are in agreement that payment has been made in private.²⁴²

As to the question of immediate enforceability, a simple recapitulation of Swedish law serves to highlight its importance. Suppose a creditor does not receive payment from the debtor as stipulated in their contract. Since Swedish law has no immediate enforceability, the creditor cannot enforce the contract before obtaining an executory title in accordance with Chapter 3 of the Enforcement Code, such as a court order.²⁴³ The immediate enforceability of notarized deeds means that no such steps are necessary.²⁴⁴ For instance, § 794 of the ZPO provides that execution takes place on the basis of deeds that have been received by a German notary within the limits of his professional competences.²⁴⁵ As indicated above (4.1.2.2), this makes it highly interesting for private persons as well as companies to obtain notarized deeds even where notarial intervention is not strictly mandatory.

4.2.3 Counseling

Counseling the contracting parties is an essential notarial task, second in importance to none except, perhaps, authentication. Counseling/advice is explicitly provided for in the notarial laws of Argentina (Art. 20.a and 22), Belgium (Art. 9), Germany (§ 24 (1) BNotO), Mexico (Art. 6), Portugal (Art. 4), and Spain (Art. 1 of the Reglamento).²⁴⁶ The Brazilian law (Art. 7) all but explicitly stipulates a counseling function; it requires the notary to “perform all necessary steps and diligences necessary or convenient for the preparation of notarial acts”. The Puerto Rican law does not explicitly provide for counseling, but it is hard to conceive complying with the requirement in Art. 2 to interpret the will of the parties and give it legal form, without giving counsel as an integrated part of the work. As for France, it is clear that French law has a counseling requirement, first voiced in the *exposé des motifs* of the Loi

²³⁹ Zivilprozessordnung, 12.09.1950.

²⁴⁰ Art. 156 of the Mexican notarial law repeats, seemingly needlessly, the principle of full probative value, and adds the rule that the probative value can only be reversed through judicial order.

²⁴¹ Malavet, at pp. 443-444; see also “Fundamental Principles of the Latin Notariat” at the UINL webpage, http://uinl.net/notariado_mundo.ap?idioma=ing&submenu=NOTAIRE (2008-04-19).

²⁴² Yaigre & Pillebout, pp. 74-75.

²⁴³ SFS 1981:774.

²⁴⁴ Yaigre & Pillebout, p. 75.

²⁴⁵ Geimer, p. 24.

²⁴⁶ The Portuguese provision, if interpreted conservatively, only explicitly requires the notary to explain to the parties the legal implications of the transaction.

Ventôse and subsequently developed through case law.²⁴⁷ In a landmark 1921 ruling, the Cour de cassation declared that “[n]otaries, instituted to give to the contracts of the parties legal form and the authenticity which is its consequence, are equally charged with educating the parties as to the consequences of the commitments to which they pledge themselves; responsible under (...) the Code civil they cannot declare themselves immune with respect to their faults and thus decline responsibility by alleging that that they are bound only to give authentic form to the will of the parties”.

It is established that the notary is required to provide counsel to the contracting parties. A question that remains to be answered, however, is the extent of this obligation. Is the counseling requirement limited to such advice as is strictly necessary for the notary to draw up legally valid contracts? Such advice often takes the shape of pure information, i.e. explaining to the parties the legal implications of the different contract clauses and inquiring whether they satisfactorily mirror their intentions. Or is the notary required to give legal advice on any and all issues the parties may request? Of course, the conservative interpretation speaks for the former suggestion while a more liberal interpretation speaks for the latter. But which is more correct?

It is hardly to be contested that advice in the form of explaining the implications of the transaction, and of different contract clauses, to the parties, is an absolute requirement. This obligation is not mitigated even where the client is well-informed and does not seem to be in need of counseling. French case law from the Cour de cassation is particularly clear on this point. The case law of the Cour de cassation has removed all but the smallest limitations to the counseling obligation, to the point where the obligation has become virtually absolute. Formerly, it was deemed acceptable in France for notaries to refrain from giving legal advice where the clients were well-informed, perhaps even well versed in the relevant field of law; whether through experience, university degree, or both. The counseling obligation was also mitigated where the role of the notary was limited, for instance where the one of the parties was represented by an advocate or a notary of their own. One might argue that it is rather harsh to demand the notary to give counsel in a situation where the client already has legal representation. Indeed, such instances may often occur due to a lack of confidence in the notary from the part of the client. It could be argued that it is pointless to demand that the notary give counsel in such cases, since the client is not likely to heed it anyway. Nevertheless, the case law is clear: under the current law, such circumstances do not relieve the notary from his counseling obligation.²⁴⁸

However, while it is indisputable that there is an obligation to give counsel at least to such extent as is necessary to keep the client well-informed as to the implications and consequences of the legal act which they are undertaking, it is by no means self-evident that the notary must, in addition, provide counsel on any number of legal issues. This is particularly so in the case of notaries who also operate as advocates (in the jurisdictions where this is possible); in such cases it does not seem unreasonable to hold that the notarial function – remunerated as it is by fees fixed by law or the government – only encompasses the bare necessity of advice, whereas the notary/advocate will want to sell legal advice in the capacity of advocate.

In the case of Argentina, it seems safe to conclude that the more liberal interpretation – or, perhaps, the harsher one, depending on one’s perspective - is the correct one. Whereas Art.

²⁴⁷ de Poulpiquet, p. 61; Yaigre & Pillebout, pp. 98-99, 110-111.

²⁴⁸ de Poulpiquet, pp. 63-66.

20.a provides for counseling regarding the legal effects of the transaction as well as giving legal form to the expressed will of the parties, Art. 22.a stipulates that the notary profession, additionally, entails providing advice and information concerning notarial-related law in general. German law requires the notary to give advice in the notarizing process under § 17 BeUrkG and in other situations under § 24 (1) BNotO.²⁴⁹ § 17 BeUrkG, for its part, stipulates that the notary must ascertain the will of the contracting parties, clarify the subject matter, inform the parties of the legal significance of the transaction, and write down the declaration in the minutes. In consumer cases, the notary must take special care and make sure that the consumer is afforded adequate opportunity to inform his-/herself of the subject matter at hand (§ 17 (2a)). The provision clearly lays down a counseling obligation, but it seems limited to making sure the parties understand the subject matter at hand, that their choices are informed, and that the contract clauses adequately reflect their wishes. It does not require the notary to go further and provide general advice. However, § 24 (1) BNotO requires the notary to give advice to the concerned parties *within the scope of the administration of precautionary justice*. Such advice must be in accordance with the impartiality requirements (see below 4.3), which requires a lawyer operating as both notary and lawyer to explain to the parties clearly in advance in which capacity he is giving advice.²⁵⁰ As for France, the *exposé des motifs* to the Loi Ventôse contained a declaration from counselor Real, asserting that notaries are the “disinterested counsel of the parties as well as the impartial recorder of their will, informing them of the whole extent of the obligations to which they are agreeing”. French courts have steadfastly affirmed the obligation to give counsel; the Cour de Cassation asserting in a 1989 ruling that the counseling obligation applies even where the notary is only charged with authenticating acts in which the terms have been laid down without his participation.²⁵¹ Art. 1 paragraph 3 of the Spanish Reglamento stipulates that the notary must give counsel those who seek his intervention, and *advise them about the most adequate legal means to accomplish the desired result*.

From the foregoing, seems safe to conclude that, in addition to explaining to the parties the legal implications of the transaction at hand, the notary must also advise them on the adequate course of action. It cannot be concluded that there is a legal requirement to give general legal advice on any issue whatsoever, just because one or more of the parties request it. For instance, although German law classifies preventive advice in the interest of avoiding conflicts as an official notarial function (§ 24 (1) BNotO), the notary is entitled to deny a request to give such advice. If the notary accepts the request, the scope of the preventive advice depends on what is agreed.²⁵² However, in no way should this be interpreted as rendering all advice optional. Explaining the legal implications of the transaction and of different contract clauses, ascertaining the informed will of the parties, and advising on the adequate means to accomplish the desired results is of course giving advice beyond the pro forma. Also, it is hardly a sustainable position that the notary can remain passive where he realizes that a proposed contract clause is likely to cause future disputes, or where one of the parties is being unduly prejudiced. In such instances, the reasonable conclusion is that the notary must intervene in some manner. French law suggests as much, and even derives the counseling obligation from the concept of *publica fides*: the notary is required, for the sake of the public interest in legal certainty, to produce acts that reflect the will of the parties. To accomplish that, the notary must give the parties appropriate counsel so that the result not

²⁴⁹ Wagner, pp. 33-34.

²⁵⁰ Wagner, p. 34.

²⁵¹ Yaigre & Pillebout, pp. 6-7.

²⁵² Wagner, p. 39.

only is legally valid but is also the most favorable solution to them.²⁵³ Finally, as will be seen below (4.3), the impartiality rules may at times force the notary to intervene in substance to promote an equitable agreement. Such intervention is of course a form of advice.

It seems there is no easy way to delimit the notary's counseling obligation. In practice, that limit may often be strictly academic. The notary's work entails counseling on a daily basis, be it to resolve cases that need advice or in the preparation of a contract to be notarized.²⁵⁴ It may prove impractical to establish strict lines between mandatory and optional counseling, unless of course the latter should take on large proportions. In such instances, the notary is of course free to offer his counseling services for an agreed fee, taking into account that the rules of impartiality still apply. Interestingly, tax advice seems to fall clearly outside the scope of the notary's obligation. It is of course permissible to give tax advice, but when doing so the notary must be aware that if he does not clarify from the outset that he is not assuming liability, lest he be liable for negative fiscal consequences for the interested party.²⁵⁵

4.3 Impartiality

The notary is required to maintain impartiality in all situations. As is the case of Swedish real estate brokers, impartiality for notaries has two dimensions. The first dimension concerns the notary's relation towards the contracting parties. The second concerns the notary's independence and integrity, and centers on ensuring that the notary is not subject to undue influence whilst carrying out the notarial function, as well as maintaining the public's faith in the impartiality of the notary. This section deals with these two dimensions separately in the following.

4.3.1 Relation to the Parties

Some countries have chosen to make the impartiality requirement expressly manifest in their notarial laws; Argentina (Art. 10), Belgium (Art. 9), Germany (§ 14), Mexico (Art. 3, 14), Portugal (Art. 13), and Puerto Rico (Art. 4). Notably, § 14 (4) of the German BNotO expressly refers to the notary acting as an intermediary. In contrast, the notarial laws in Brazil, France, and Spain lack explicit provisions stipulating impartiality but must be interpreted as providing for impartiality "between the lines". In the Brazilian case, the wording of Art. 6 implies impartiality; the provision requires the notary to formalize legally the will of *the parties*, and intervene in legal acts and transactions which *the parties* need or wish to give legal form. It is clear that the notarial function is performed on behalf of both parties equally. Further, legal writers, as well as the Brazilian Notary Association, unanimously stress the existence and importance of the principle of impartiality.²⁵⁶ Thus, there is no doubt as to the existence of an impartiality requirement in Brazilian notarial law. As for French law, the impartiality of the notary has always been embedded in the Loi Ventôse. In the exposé of the motives behind the Loi Ventôse, counselor Real called the notaries "the counsel without

²⁵³ Yaigre & Pillebout, p. 99.

²⁵⁴ San Martín, at p. 776.

²⁵⁵ Geimer, p 9.

²⁵⁶ Antunes, p. 3 (with further references to Brandelli); Ferreira, p. 1; <http://www.notariado.org.br/#/2> (2008-04-19).

interests in either of the parties” as well as “the impartial editors or their will”.²⁵⁷ Finally, the lack of express mention of impartiality in the Spanish notarial law does not mean the same does not apply there; it is referred to, *inter alia*, on the website of the Spanish Notary Association.²⁵⁸ As to the CNUE Code, art. 1.2.2 requires the notary to give counsel and draw up documents in all impartiality.

It is established, then, that there is in all studied countries a legal requirement for notaries to observe impartiality towards the contracting parties. Next, this impartiality must be defined. What specific rules of conduct does it impose on the notary?

Firstly, the notary must treat all parties to a transaction equally and without favoritism. In no place is this more plainly worded than in art. 13 and 14 of the Mexican notarial law. Art. 14 stipulates that the notary may not treat one party as his client and not the other; rather, the consideration given must be personal and professionally competent in equal measure. The notary must further give impartial advice to all parties who request his services. A very similar definition is found in § 14 of the German BNotO: “[the notary] is not the representative of a single party but the independent and impartial advisor of the interested parties”. The Portuguese law, for its part, stipulates that the notary must keep distance from any particular interests (art. 13). The cited articles seem contradictory; where the former two imply an active notary who gives counsel to the contracting parties, the latter stresses the importance of remaining aloof from their interests. One interpretation is that there is no real conflict between being active in relation to the parties *themselves*, and still remain unaffected by their *interests*. Indeed, the very nature of the notary is such that his obligations are not directed towards the parties but rather towards honoring the *publica fides*. It is in that capacity the notary addresses the needs of the parties; not for their own sake but for the sake of the law itself.²⁵⁹ It is worth mentioning, here, that the principle of impartiality is in no way conditioned by which of the parties pays the notarial fee. In contrast to the impartiality obligation of the Swedish broker (see above 2.2), the notarial impartiality provisions leave no room for interpretation or exceptions.

However, this duality raises the important question of how the notary is expected to deal with different levels of knowledge, education, or expertise between the contracting parties. Suppose, for instance, that the notary is requested to intervene in a real estate conveyance where the seller is knowledgeable, well educated, and an expert in real estate law and ditto economics; whereas the buyer has no higher education and no knowledge whatsoever in either discipline. Suppose, further, that the notary perceives that the negotiated agreement is clearly in favor of the seller and that it is unlikely that the buyer would agree to the same terms had he been better informed. How should the notary act? Should he act in the spirit of the cited Mexican and German provisions, and educate the buyer about the terms of the agreement? Or should he merely ask, as a purely *pro forma* procedure, if the terms of the agreement in fact represent the will of both parties? The latter suggestion seems, *prima facie*, to be more in line with the Portuguese provision.

The answer is that the notary is required to act according to the first suggestion. In line with the obligation to counsel the parties, the notary cannot sit idly by where he perceives that the agreement at hand does not represent the *informed* will of all parties. As a direct consequence of the fact that the allegiance of the notary is first and foremost towards the law and the

²⁵⁷ Yaigre & Pillebout, p. 6.

²⁵⁸ <http://www.notariado.org/> (2008-04-19).

²⁵⁹ Malavet, at p. 485.

publica fides, the notary is required to counsel all parties who are not well informed in order to ascertain their will with the aim of accomplishing a result that is balanced and well-informed.²⁶⁰ This, in consequence, could be interpreted as a duty for the notary to intervene in substance in the interest of achieving equitable agreements. Such a view seems to be supported by Art. 5 of the Model Law issued by the Permanent Council of the UINL in 2005. The notary is not a mere witness but rather a professional who intervenes actively in the transactions at hand, exerting legal control on the content of the business.²⁶¹ The conclusions adopted by the UNIL at the 2004 International Congress in Mexico City hold that impartiality demands *active intervention*, going beyond the simple recordation of the wishes of the parties.²⁶² In the case of Germany, § 17 of the Notarization Act explicitly requires the notary to explain the legal implications of the transaction at hand to the parties, taking special care that inexperienced parties not be disadvantaged.

The obligation to ensure that all parties to the transaction have equal relevant information became evident in the ruling of the Supreme Court of Puerto Rico in *In re Colon Ramery* (1993). An important question before the court was to what extent the notary is required to disclose to the contracting parties information from a prior transaction that he deems relevant to the transaction at hand. In the Colon Ramery case, the information obtained from the prior transaction involved some, but not all, of the parties. The court held that since there is no attorney-client privilege in notarial intervention, and given the notary's obligation to ensure that all parties were well-informed, the notary was required to disclose the information.²⁶³ The Colon Ramery case can be seen as an example of the notary's *equalizing role*; in a transaction where there is an imbalance between the parties with respect to economic status, education, and/or other factors that may affect the transaction, the notary must ascertain that the weaker party is not unduly prejudiced. This may involve giving special attention to their needs and to ascertaining that they understand the legal context and implications. The equalizing function is perceived as a cornerstone of the notary's impartiality, and an instrument in the pursuit of consumer protection.²⁶⁴

Secondly, it is clear that the notary is prohibited from acting as authenticating notary where his own interests, are involved; Argentina (Art. 17.b) Brazil (Art. 27), Belgium (art. 8), France (Art. 2 1971 Decree), Germany (§ 3 BeurkG), Mexico (Art. 45.III), Portugal (Art. 13.2.a), Puerto Rico (Art. 5.a), and Spain (Art. 27). The French prohibition applies not only to acts whereby the notary receives gratuitous advantages, but to any case where the notary may ameliorate his legal position towards one of the contracting parties.²⁶⁵ The cited provisions apply not only to conflicts of interest due to the notary's own involvement, but also to those resulting from that of their spouses or other relatives.²⁶⁶ The motive behind this rule is intuitive: the notary cannot be expected to perform his duty and honor *publica fides* where his own interests are at stake.

Notably, German law has a particular law, the Beurkundungsgesetz (BeurkG), which governs the authenticating activities of the notary. § 3 lays down several prohibitions against

²⁶⁰ Malavet, at p. 486.

²⁶¹ Collantes, p. 6; the Model Law is available in Portuguese at <http://www.mundonotarial.org/deonto.html> (2007-04-19).

²⁶² XXIV International Congress of the Latin Notariat, Mexico City, October 2004, *THEME I: Impartiality of the Notary; Ensuring Certainty in Contractual Relationships*, at 1.

²⁶³ Malavet, at p. 487.

²⁶⁴ Sevilla et al., at 3.

²⁶⁵ Yaigre & Pillebout, p. 58.

²⁶⁶ The degree of kinship that triggers the prohibition varies.

authenticating acts in which the notary's own interests, or those of someone affiliated to him, are involved. Thus, the notary is precluded from authenticating acts to which he himself, a spouse, child, or other close relative, or other persons close to the notary, is a party. §§ 6 and 7 further provide that such acts are invalid.

4.3.2 Independence and Integrity

The prohibitions described in the previous subsection have the common trait that they concern the performance of the notarial functions proper. That is one very important aspect of impartiality. However, an equally important aspect remains to be addressed, namely the independence and integrity of the notarial profession. This aspect differs from the former in two ways. Firstly, it concerns matters outside the scope of the notary's legally defined function and asks the question: what commissions outside the legally defined notarial function may the notary undertake? What lines of business, if any, may he pursue? Secondly, in contrast to the provisions described in the previous subsections, the independence and integrity of the notary do not primarily address situations where the notary *actually* fails to observe strict impartiality. Here, the important issue is whether performing certain services outside the legally defined notarial tasks *may raise suspicions among the public* that the notary is not impartial. This sort of incompatibility provision is based on the assumption that the profession may be harmed when an individual notary engages in these activities.

In the case of Germany, § 14(3) of the German BNot O requires the notary to always act, both within and without the framework of his notarial functions, in a way that pays proper respect to the trust vested in the notarial function. The provision also requires the notary to avoid any behavior that may give the appearance of a violation of the notary's obligations; any appearance of dependence or partiality is particularly to be avoided. § 14(4) explicitly forbids the notary from brokering real estate or mortgages (or, indeed, any credits). § 14(5) lays down limitations on the notary's right to purchase shares. § 28 requires the notary to take the necessary precautions to ensure that the impartiality and independence requirements are met.

In contrast, French law allows notaries to engage in real estate brokerage and real estate management. Indeed, counseling the parties may well give rise to services that go beyond the scope of the notarial function, and the French lawgiver has not seen fit to prohibit all such services. Some services, such as financial services, are strictly regulated and the notary's adherence to existing rules is deemed enough.²⁶⁷ However, there are also in French law activities from which notaries are barred. Thus, although it is permissible to own and manage real estate, the notary may not engage in speculations with respect to the purchase and resale of real estate (Art. 13 of the 1945 Decree). The speculation restriction applies equally to the sale of debts, shares, and other incorporeal rights.²⁶⁸ Belgian law takes a similar stance to that of France, allowing notaries to engage in real estate brokerage with some limitations. Art. 6 of the Notarial Act (Ventôse) bars notaries from engaging in commercial activities. However, real estate brokerage is permissible where and to the extent that the brokerage activity is secondary to the principal notarial mission.²⁶⁹ In such instances, it is enough that the notary abides by the rules laid down by the Notarial Chamber (Art. 36 of the Deontological Code).

²⁶⁷ Yaigre & Pillebout, p. 57, 100.

²⁶⁸ Yaigre & Pillebout, p. 57.

²⁶⁹ Cour de Cassation de Belgique, Arrêt du 31 janvier 2002, *Institut Professionnel des Agents Immobiliers et al v. Notarishuis van het Arrondissement Leuven*.

It is abundantly clear that a key aspect of the notary profession lies in its distinction from that of the attorney/solicitor/advocate. The importance of that distinction has resulted in regulation; in some of the examined countries it is considered incompatible to practice both professions. Thus, notaries are barred from acting as attorney/solicitor/advocate in Brazil (art. 25), Portugal (art. 15), and Mexico (art. 32). The cited provisions also bar notaries from engaging in any other remunerated functions, whether private or public (including, thus, real estate brokerage). In contrast, Puerto Rico has no prohibition concerning private enterprises, but rather public functions (art. 4). Argentinean law prohibits notaries from taking on any commission or employment that may affect their impartiality; advocacy is not, however, considered one of them (art. 17).²⁷⁰ Belgian law provides that notary firms may not pursue any other activity than notarial services (art. 50.c). Where there is no general prohibition for notaries to practice advocacy, the latter activity may still be impermissible under the incompatibility rules on the ground that it may affect the notary's impartiality. Thus, the notary may not participate as advocate in a legal action related to a notarial transaction subscribed before him. The question was addressed by the Supreme Court of Puerto Rico in the aforementioned Colon Ramery case, where the court held that any conclusion that did not characterize such participation as incompatible with the notariat would allow the appearance of impropriety to exist.²⁷¹ In the absence of a blanket prohibition, each case would of course need to be assessed individually, but the conclusion of the Puerto Rico Supreme Court does not seem far-fetched; just as the notary is precluded from authenticating acts to which he is a party or in transactions where he is legally involved, he is equally precluded from getting legally involved in transactions where he is the authenticating notary. From this point of view, it is pure symmetry.

The limitations laid down on the notary are considered crucial in order to guarantee the profession's *integra fama*, which is a prerequisite for impartiality. The rationale is that some types of activities or relations result in conflicts of interest that are detrimental to the impartiality of the notary.²⁷²

4.4 The Responsibility of the Notary

The previous sections have dealt with the key substantive rules and principles governing the notary profession. These rules are of course "binding" in the sense that they have been enacted in a constitutionally legitimate manner and are in force in their respective jurisdictions, therefore constituting "the law". However, it can be argued that binding rules of law would not be worth more than the ink in which they are written (or perhaps more accurately, the ones and zeroes they represent on a government hard drive) if it were not for rules of enforcement. While it falls outside the scope of this study to engage in a philosophic discussion about what actually constitutes binding rules of law, it is safe to assert that rules may be rendered practically useless unless backed up by sanctions for cases of non-compliance.

The inevitable objection to these arguments is that the mere existence of rules providing for sanctions does not in itself constitute full enforcement. After all, legislation alone cannot

²⁷⁰ Art. 17.b prohibits all notaries *except those with the title of advocate* to practice a liberal profession in cases where the interest of the notary or the notary's family members are involved.

²⁷¹ Malavet, at p. 487.

²⁷² Sevilla et al., at 4.

guarantee that those breaking the law are actually punished. However, if one accepts such a hands-on view of the law, then no legal argument will ever be enough. The law can never guarantee that it is followed nor enforced; nevertheless, this does not in any way make the existing rules any less binding.

In the case of notaries, there are three different categories of enforcement rules. Firstly, there is criminal responsibility for different cases of intentional or negligent malpractice. Secondly, there is civil liability; that is, the obligation to indemnify others for damages incurred as a result of negligent malpractice on the part of the notary. Thirdly, there is the disciplinary responsibility. In the following, a brief overview of these three categories of enforcement will be presented. The subsection on criminal responsibility (4.4.1) will be limited to one particular crime, namely the forgery of notarial acts. Similarly, the subsection on disciplinary responsibility (4.4.2) will focus on French law.

4.4.1 Criminal Responsibility

A notary may commit crimes just like any other person, and will be liable for criminal prosecution for any committed offence just like any other person. It is tempting to leave it at that and not make an issue of such cases simply because somebody from a particular profession, namely the notary profession, is the culprit. After all, if all crimes were to be related to the line of work of the criminal, then not many professions would be left immaculate. However, it can be argued that certain professions are such that they require a higher degree of honesty, integrity, and character than others. Intuitively, such professions are those that involve the trust of third parties. For instance, people depositing money in a bank will expect the bank not to embezzle the money. Real estate brokers are another example since they have incentives, inherent in the client-broker-counterpart constellation, to exploit any existing information asymmetry.

In the case of such “sensitive” professions, criminal responsibility – as well as the effective use of the same – serves at least two important purposes. Firstly, the threat of criminal prosecution acts as a deterrent against offences. Secondly, the existence of such rules – and the idea that this existence acts as a deterrent – can function as an important safeguard of the *integra fama* of the profession. In other words, if people know that any member of the profession who steps out of line will be dealt with accordingly, it is plausible - and hopefully probable - that the public’s view of the profession will not be shadowed by suspicions.

The *integra fama* of the notary profession is particularly important due to its intrinsic connection through *publica fides* to important parts of people’s legal and economic interests. This is all the more so since the key notarial functions are considered functions of the state, i.e. official functions. Naturally, the principles of full probative value and immediate enforceability make it of paramount importance that notaries be honest, since a false notarial act will not only be considered truthful per se, but also enforceable right away without further measures. A person wishing to contest the veracity of a notarial act may therefore incur substantial damages – and be forced to litigate – before correcting the situation. Forgery of notarial acts would therefore seem a particularly serious offence due not only to the dishonesty on the part of the notary, but also to the considerable damage it may cause the affected parties. It is not surprising, therefore, that forgery of notarial acts is criminalized in

all nine examined countries. Indeed, it is apparent from Chapter 3 that lawgivers have historically struck down quite vehemently upon dishonest notaries.

On the technical level, two main approaches are conceivable when criminalizing an act. Firstly, the lawgiver might introduce one or several statutory provisions that apply particularly to forgery committed by notaries. Or, secondly, it is possible to make use of a common provision criminalizing forgery that applies to everybody or a larger group of people, including notaries. Such an approach may include a harsher penalty for notaries than other groups, on account of the notary's position and the principle of public faith. In other words, the position as notary is then deemed an aggravating factor. It is clear that, in the examined countries, both methods have been used in different ways. In the case of France, Art. 441-4 of the Code Pénal provides that forgery in an authentic or public document or a record prescribed by a public authority is punishable by ten years' imprisonment and a fine of € 150,000. However, the third paragraph of the same article provides a penalty of fifteen years imprisonment and a fine of € 225,000 where the forgery or the use of forgery is committed by a person holding public authority or to discharge a public service mission whilst acting in the exercise of his office or mission. Thus, while forgery in public documents is prohibited for all, committing it whilst acting in the capacity of notary is deemed an aggravating factor. Belgian law takes a similarly strict stance, Art. 194 of the Code Pénal providing a penalty of 10-15 years imprisonment for the same offence. The German StGB, for its part, distinguishes between forgery committed by notaries and other officers authorized to record public documents whilst carrying out their duty (*Falschbeurkundung in Amt*), § 348, and forgery committed by others or by notaries acting outside the capacity of notary (*Mittelbare Falschbeurkundung*), § 271. The former is punishable by up to five years imprisonment or a fine, whereas the penalty for the latter is up to three years imprisonment or a fine. The contrast between the French and Belgian penalties on the one hand – 10-15 years – and the German penalties on the other is remarkable. It should be borne in mind, however, that maximum statutory penalties are by no means always used and that the differences may well be far less poignant in the case law of the different countries. For instance, Art. 441-1 of the French Code Pénal provides that common forgery – that is, forgery of documents other than authenticated or public documents – is punishable by up to three years imprisonment and a fine of € 45,000. In practice, most forgeries committed by private persons are punished in accordance with this, more lenient, rule.²⁷³ It is fairly evident that French law looks more seriously upon forgeries that entail an abuse of the *publica fides* and that result in a usurpation of the principle of full probative value. Further exploits into criminal case law would, however, fall outside the scope of the present study.

The laws of the rest of the examined countries follow much the same pattern. Forgery is in itself criminalized, and forgeries entailing a notary and/or an abuse of the *publica fides* and a usurpation of the principle of full probative value are especially serious. The combination of the two – that is, where a notary commits forgery whilst authenticating a document – is without exception deemed the most serious offence, and the statutory penalties have been set accordingly. Figure 5 lists the relevant statutory articles criminalizing forgery in public documents in the nine examined countries.

²⁷³ de Poulpiquet, p. 289.

Figure 5 Relevant provisions criminalizing forgery of public documents

Country	Statute	Provisions
Argentina	Código Penal (Ley 11.179)	Art. 292-297
Belgium	Code Pénal	Art. 194-197
Brazil	Código Penal (Decreto-Lei N° 2.848 de 07.12.1940)	Art. 312-359
France	Code Pénal	Art. 441-4
Germany	StGB –Strafgesetzbuch (vom 13.11.98 - BGBl. I S. 3322)	§ 348 § 271
Mexico	Código Penal	Art. 243-246
Portugal	Código Penal Português	255-261
Puerto Rico	Código Penal (Ley N° 149 de 18.6.2004)	Art. 218-227
Spain	Código Penal	Art. 390-394

4.4.2 Civil Liability

It is a basic principle of law, well-established in all legal orders, that a party suffering damages as a result of negligent behavior from the part of others is entitled to compensation from the injuring party. This is the foundation of the law of torts. The extent of civil liability will of course vary over different sectors of society, not only depending on the legislators' different policies which may give rise to different sets of rules, but also as a result of the very key requirement for liability: culpability through negligence. Negligence essentially means that the injuring party causes the damage by non-observance of a legal and/or social rule governing her conduct. In a nutshell, a negligent party has either done something the law expects them not to do, or not done something the law expects them to do. The underlying principle is that the *bonus pater familias* will do everything in their power (within reasonable limits) to prevent such damages as can be foreseen in a particular situation. This is intuitive: for instance, when I drive my car outside a school I can expect children to come running across the street at any moment. Therefore, I will and must drive more carefully than would perhaps be the case in other places.

The main question in determining negligence is what standard society, and thus the law, should hold people to. What can be expected of a given individual at a given time and place? One important factor bearing weight here is vocation and duty. For instance, at a beach there is no general legal obligation for people to rescue a fellow person from drowning (though morally it seems fitting). A lifeguard, however, has that obligation since it is their job to see to people's safety at the beach. A lifeguard on duty is expressly obligated to prevent accidents. Even off duty, a lifeguard is trained to observe the waves, people's behavior, and other factors, and to foresee accidents, in a way that other people are not. Therefore, the lifeguard off duty is arguably, while not directly obligated to act, required to observe a stricter code of conduct and will likely be found negligent by a court upon failure to act to save a person from drowning – or at least more likely than other people.

In some instances, legislators have deemed it necessary to regulate the civil liability of certain profession through statutory law. This is the case with Swedish real estate brokers, who are liable under 20 § EAA for any damages incurred by the buyer or seller as a result of negligent behavior on the part of the broker. Under the EAA, negligence is primarily tied to the non-

compliance with express provisions, in the sense that failing to comply with an express provision will virtually automatically be deemed negligent, triggering the liability rule. Where the provision in question is not entirely clear, however, the assessment becomes a more traditional negligence assessment, and the question is whether the broker has performed with the diligence one could demand of her.²⁷⁴

In sum, civil liability can be incurred by all persons. The degree of care and diligence required of a person may vary, where belonging to a certain profession is often an aggravating factor when determining negligence. Some professions have express statutory provisions governing their civil liability. How, then, does all of this relate to notaries?

It is apparent from the examined countries that the civil liability of notaries has its foundation in the general law of torts, governed by the civil codes. In addition thereto, statutory provisions, case law and/or jurisprudence to a varying degree give more shape to the liability of the notarial profession specifically. The case of Portugal is especially interesting, insofar as that Portuguese law distinguishes between torts committed whilst carrying out notarial functions and torts committed when acting as a private person. In the latter case, the common provisions in Art. 500-501 of the Código Civil are applicable; whereas in the former, Decreto-Lei n^o 48 051 applies.²⁷⁵ Art. 2 of the Decreto-Lei provides that the state and other public collective persons answer civilly before third parties for the infringements upon their rights or the legal dispositions intended to protect their interests, resulting from illicit acts negligently committed by public authorities or their agents while carrying out their functions and because of their functions. In other words, where a public official or agent acts negligently whilst carrying out their duty, the state is liable. Art. 3 further provides that the officials or agents themselves are liable if they have exceeded the limits of their functions, or if, while carrying out their functions, they have acted in bad faith. In the latter case, the government and the official are equally liable.

As for France, notaries may incur civil liability from both the general law of torts, based on Art. 1382 and onwards of the Code Civil, and from the failure to comply with notarial duties. The general law of torts, in turn, distinguishes between liability incurred from one's own acts or omissions and liability incurred from the acts or omissions of others.²⁷⁶ This is by no means unique. Under Swedish law, for instance, employers are liable for negligent acts or omissions committed by their employees, as are dog owners for the damages caused by their dogs.²⁷⁷ Further, the civil codes of several countries, though not all, hold parents liable for damages caused by their children. Thus, the core of the civil liability of notaries follows the usual pattern, requiring 1) fault, 2) damage, and 3) causality between the two.²⁷⁸ As for the non-compliance with notarial duties, French courts have adopted a quite strict view, as testified by their case law, due to the profession's special character. Not only are notaries entrusted to carry out official functions, but those functions are of a particularly sensitive nature. Firstly, there is the principle of full probative value, which has bearing not only on penal law but naturally also on the law of torts. Secondly, the notary is an expert who is required to give impartial counseling to the parties, a person the parties must be able to trust. The parties therefore are entitled to demand a high degree of diligence and accuracy from the

²⁷⁴ The diligence requirement laid down in 12 § EAA provides for an active and observant broker; the standard is therefore fairly high.

²⁷⁵ Rodrigues, pp. 22-23.

²⁷⁶ de Poulpiquet, p. 93.

²⁷⁷ 3:1 Torts Act (1972:207); 6 § Supervision of Dogs and Cats Act (1943:459).

²⁷⁸ de Poulpiquet, pp. 95, 105, 117.

notary. In other words, it is of paramount importance that notaries carry out their work diligently and with a minimum of mistakes. French courts have tended to subscribe relatively strictly to this principle, awarding damages simply based on professional mistakes made by the notary. Thus, where the notary has failed to comply with a legal requirement, courts have deemed the act or omission as all but automatically negligent.²⁷⁹ To the extent that this strict interpretation is applied to the non-compliance of express statutory provisions or otherwise commonly known and accepted legal requirements, it is not difficult to sympathize with the French case law. Indeed, it is very similar to the liability of Swedish brokers as described above. Interestingly, there is a difference insofar as Swedish brokers are usually not automatically considered negligent simply for not knowing a particular legal provision. Instead, as described above (2.1.2), it may sometimes be advisable for the broker not to give advice on a matter where she is not completely competent. Should she accept to give advice, however, she will be liable for negligent counsel. By contrast, notaries are required to know the applicable substantive law. A fault resulting from poor knowledge of the law constitutes negligence.²⁸⁰

Brazilian law, for its part, while following the same pattern in substance as those of the other countries, distinguishes itself by including the liability provisions in the notarial law (art. 22-23). Art. 22 provides that notaries are liable for damages suffered by third parties as a result of acts or omissions on the part of the notary or their employees. Where the employee has acted in bad faith and the notary has been forced to indemnify the injured party under Art. 22, the latter is entitled to compensation from the employee.

Figure 6 lists the relevant provisions governing the notary's civil liability in all nine examined countries.

Figure 6 *Relevant provisions governing the civil liability of notaries*

Country	Statute	Provisions
Argentina	Código Civil	Art. 1109
Belgium	Code Civil	Art. 1382
Brazil	Lei dos cartórios	Art. 22-23
France	Code Civil	Art. 1382
Germany	BGB	§§ 823, 839
Mexico	Código Civil	Art. 1910-1934
Portugal	Código Civil Decreto-Lei n° 48 051	Art. 500-501 Art 2-3
Puerto Rico	Código Civil	Art. 1802-1810
Spain	Código Civil	Art. 1902

4.4.3 Disciplinary Responsibility

In addition to civil and penal sanctions, notaries are subject to a self-regulatory disciplinary system of supervision, proceedings, and sanctions. This disciplinary responsibility of the notary is very similar to the system of supervision and sanctions under which Swedish brokers operate. The disciplinary sanctions are of a nature fundamentally different from that of the

²⁷⁹ Ibid., pp. 95-97.

²⁸⁰ Ibid., p 71-73.

civil liability in that, whereas the civil sanction is designed to compensate third parties from actual injury – most notably economic loss – disciplinary responsibility rather addresses the *integra fama* of the profession. The rationale, hinted at above, is simple: the public’s faith in the profession is safeguarded by supervision and sanctions. Thus, disciplinary rules are not bound by the same requirements as the civil and penal systems, such as the requirement of injury (civil) or bad faith/intention (penal). Rather, disciplinary sanctions are tied directly to the non-compliance of substantive rules. In other words, if a notary fails to comply with the requirement to ascertain the identity of all parties to a transaction, he will be subject to disciplinary proceedings and sanctions irrespective of good or bad faith.

Compared to penal sanctions, the disciplinary sanctions share the repressive nature. The underlying purpose and rationale are also similar to those of penal sanctions: exemplarity, etc. The main difference is that disciplinary sanctions do not include the loss of personal freedom or damages, but rather centered on reprimands and exclusions. They are thus totally adapted to the professional sphere.²⁸¹

Naturally, there are some variations between the different countries with regard to the exact scope and legal provisions concerning the disciplinary responsibility. Nevertheless, the main features are similar if not identical. Thus, it seems appropriate to use one country as an illustrative example rather than give a full account of all countries. Let us therefore briefly examine the disciplinary law of France. French law regulates the disciplinary responsibility of the notary, as well as that of other public officials, in Ordonnance n° 45-1418 of 28 June 1945, hereinafter referred to as the Discipline Ordinance or DO. Art 2 DO provides that all infractions of laws, regulations, or professional rules, all acts contrary to moral integrity, honor, or scrupulousness committed by a public official, even where committed outside the profession, may give rise to disciplinary sanctions. In other words, the notary may face disciplinary sanctions not only for faults committed whilst carrying out notarial duties, such as the non-observance of specific obligations, but also acts committed as a private person. If such acts may harm the *integra fama* of the profession, the disciplinary responsibility applies.²⁸²

The disciplinary sanctions, laid down in Art. 3 DO, are the following: 1) *rappel à l’ordre* (reminder or mild warning), 2) simple censure, 3) censure before the assembled Chamber, 4) prohibition to engage in a particular activity, 5) suspension, and 6) destitution (disbarment). Sanctions 1-4 are of a less grave nature and may be issued by the disciplinary committee. Suspension and destitution are of course of a far more serious nature since they involve the revocation of notarial powers, as well as barring the notary from their profession: Art. 24 DO provides that disbarred notaries are immediately and definitively barred from the exercise of their professional activity; Art. 24 DO. Since these sanctions have such far-reaching consequences, the legislator has deemed it prudent to give the courts exclusive competence in issuing them (Art. 33). There is no explicit guidance in the DO as to what kind of infraction merit what kind of sanction. However, the gravest sanction, destitution, is of course reserved for the most blatant infractions. In practice, destitution is used in combination with a penal sanction.²⁸³

As for the disciplinary *proceedings*, they may take two forms, laid down in Art. 5 DO. Firstly, there are the self-regulatory proceedings before the disciplinary committee of the competent

²⁸¹ Ibid., p. 217.

²⁸² Ibid., p. 205.

²⁸³ Ibid., p. 238.

Chamber of Notaries. Secondly, the notary may answer before a high court. Art. 6 DO provides that the *syndic* of the disciplinary committee receives complaints against notaries from the public prosecutor, a member of the Chamber of Notaries, or from an interested party. Art. 6-1 further provides that if the disciplinary committee fails to pursue the matter at the behest of the public prosecutor, the latter may take action before a high court. The disciplinary chamber is then precluded from taking action. The public prosecutor, the president of the Chamber of Notaries, and third parties claiming injury from faults committed by the notary, may also choose to take the matter directly to the high court (Art. 10). Under Art. 37 DO, the decisions of the disciplinary committee, and the rulings of the high court, are susceptible to appeal to the court of appeals by the prosecutor or the notary. An injured third party (e.g. a buyer or seller in a transaction before the notary) may be a party to the appeal, but only with respect to those questions which concern their damages.

Again, the laws of the other examined countries follow much the same pattern. Figure 7 demonstrates the relevant provisions governing the disciplinary responsibility of notaries.

Figure 7 Relevant provisions governing the discipline of notaries²⁸⁴

Country	Statute	Provisions
Argentina	Ley orgánica notarial	Art. 117, 133-160
Belgium	Coordination Officieuse	Art. 95-113
Brazil	Lei dos cartórios	Art. 22-23
France	Ordonnance 28 juin de 1945 “ <i>Discipline Ordinance (DO)</i> ”	The whole ordinance
Germany	BNotO	§§ 92-110
Mexico	Ley del notariado	Art. 222-229
Portugal	Estatuto do Notariado	Art. 60-74
Puerto Rico	Ley notarial Reglamento notarial	Art. 65 Art. 82
Spain	Ley del notariado Reglamento notarial	Art. 41-44

²⁸⁴ For the complete titles of the statutes, see figure 2 above.

4.5 An Economic View of the Notary

It is an old tradition to regulate the number of notaries in relation to the population. These so called *numerus clausus* rules vary in their specific content from country to country, but the common feature is a restriction on the free establishment of notaries. For instance, in France the number of notaries is fixed for each district of a court of first instance. The rationale is ostensibly to preserve the freedom of choice of inhabitants in relation to notaries and ensure a minimum income for notaries.²⁸⁵ In other words, the public must be guaranteed access to a notary, which serves as an argument to keep the number of notaries per capita relatively high. However, each notary must also be guaranteed a minimum income for their public function, which conversely speaks for keeping the number of notaries low. Further, the notary profession is subject to entry barriers in the form of formal requirements with respect to education, residence, and so forth. As stated before, the notary is required to have a law degree and oftentimes to pass special exams before they are eligible for a notariat.²⁸⁶ Finally, the notarial fees are fixed in many countries. This applies to all services for which the notarial intervention is mandatory. There are variations: fixed, minimum, maximum, and advised fees.²⁸⁷

It does not require too much pondering to realize that there is bound to be tension between such restrictive rules on the one hand, and economic theory on the other. The following subsections describe the basic economic issues associated with the notary profession (4.4.1), and the yet-to-be-settled clash between the EU and the European notariat (4.4.2).

4.5.1 The Notary and Economic Theory

In simple terms, regulation as such can be said to manipulate both supply and demand, as well as overtly hampering the price mechanism. On the *supply* side, the *numerus clausus* rules and barriers of entry limit the number of players on the market who could supply notary services. On the *demand* side, the mandatory notarial intervention in some types of transactions can be viewed as tantamount to an artificial demand for those services, mitigated but certainly not eliminated by the freedom to choose notary: notaries are generally barred from practicing outside their designated district.²⁸⁸ Meanwhile, the regulation of fees does nothing to alleviate these problems in the eyes of the economist.²⁸⁹ Rather, mandatory notarial intervention in combination with *numerus clausus* rules and entry barriers can be construed as a monopoly in areas such as real estate conveyancing. Monopolies are associated with loss of welfare through inefficiency. The monopolist faces no competition and can therefore become a “price giver” and restrict supply while raising prices in order to achieve higher rents.²⁹⁰

On the other hand, regulation can sometimes produce desirable results, or at least alleviate the undesirable results of *market failures*, i.e. situations where a free market falls short or efficiency. With respect to the services of liberal professions – again, highly qualified

²⁸⁵ Malavet, at p. 472.

²⁸⁶ Malavet, at pp. 464-472.

²⁸⁷ Van den Bergh & Montangie 2006a, pp. 21-22.

²⁸⁸ See e.g. Art 5 of the Belgian notarial law.

²⁸⁹ Arruñada 1996, p. 3.

²⁹⁰ Kreps, p. 299-302; van den Bergh & Montangie 2006a, p. 41.

professions with specific competences for which a university degree is often a prerequisite – three kinds of market failure are generally discussed. First, there is the problem of asymmetric information. Second, notarial services generate substantial positive externalities. Third, notarial services can be seen as public goods.

As to the question of *asymmetric information*, it is a common trait of all liberal professions that the services are highly qualified. As a result, there is a substantial information gap between the professional and the client. Professional services thus have attributes of credence goods, meaning that consumers cannot easily – or not at all – measure its quality either before or after the purchase. Since consumers cannot measure quality, they will not be willing to pay more to receive a high quality service. This leads to what is described as a market for lemons, also known as adverse selection: assuming that there is a causal relation between quality and price – meaning that professionals will only be willing to provide high quality for a higher price – service providers will be disinclined to provide high quality since consumers are not willing to pay for it. Consequently, high quality providers are driven out of the market.

Since quality is an important factor, it needs to be defined. In the case of notarial services, it can be divided in three dimensions: integrity (impartiality and trustworthiness), legal quality (quality of notarial deeds and advice), and commercial quality (treatment of consumers). Of these dimensions, only the latter is observable for most consumers.²⁹¹ This could of course be problematic since it means the professional could offer poor legal quality as long as the (perceived) commercial quality is good enough. Concerning legal quality, it is difficult – indeed, often impossible – for the consumer to assess, for instance, how well the preferences of the parties have been laid down in the authenticated document. Because of the substantial obstacles to control legal quality, a free market will provide sub-optimal quality.²⁹²

Legal quality, in turn, can be analyzed with respect to the different activities of the notary. Nahuis and Noailly describe three basic, abstracted, notarial activities: (i) advice to clients, (ii) legal transactions (planning, contracts, and practicalities), and (iii) services to third parties.²⁹³ As for advice to clients, it is interesting to see that the Hammerstein Commission concluded that many Dutch notaries spent less time on advice after the introduction of competition. The quality of the legal advice is a typical example of credence goods; the consumer cannot measure the legal expertise of the notary, nor measure the amount of time spent analyzing the case hand. The findings of the Hammerstein Commission therefore appear to be a good example of how credence goods are under-supplied in an unregulated market.

Positive externalities mean that a given activity, in addition to the value it brings to the contracting parties, also generates positive effects for third parties and society as a whole.²⁹⁴ In the case of notarial services, the most important externality consists of the legal certainty they bring to transactions. This legal certainty, in turn, has several aspects. The evidentiary value of the notarized acts, and their immediate enforceability, save time and money for the courts as well as the marketplace, and is thus transaction cost saving. Legal certainty also reduces transaction costs with respect to mortgages since creditors know they can trust information concerning ownership to property. Legal certainty also seems to reduce litigiousness; to what extent this is due to the legal quality of the deeds, or is the result of their evidentiary value (which means that anyone wanting to contest the contents of a notarial deed

²⁹¹ van den Bergh & Montangie 2006b, p. 6.

²⁹² Ibid.

²⁹³ Nahuis & Noailly, pp. 29-31.

²⁹⁴ Milgrom & Roberts, p. 75.

must prove it false), is not clear. Another externality is the notary's function as "gatekeeper"; in checking the legality of the acts, while being prohibited by law to authenticate illicit acts, the notary performs an important preventive function on behalf of the public. Finally, notaries are often used to collect taxes in the transactions they supervise, thus providing assistance to the tax authorities.²⁹⁵

Public goods are goods that can be consumed by all individuals, independent of each other. One individual's consumption of the public good does not exclude another individual from consuming the good.²⁹⁶ Perhaps most importantly, the public good can be consumed even by those who have not asked for it, as well as those who do not pay for it (which is not necessarily the same thing). Since producers of public goods cannot exclude non-paying individuals, the incentive to produce such goods will typically be low, which in turn means that public goods will typically be under-supplied.²⁹⁷ In the case of notaries, the legal certainty created by their work has the characteristics of a public good: they create benefits not only for their clients but also for their counterparties and society as a whole.²⁹⁸

4.5.2 EU: The Competition-Regulation Controversy

In view of the foregoing, it is perhaps not surprising that the notary profession ranks among the professions that have received special attention from the EU institutions. In short, the controversy concerning notaries and other liberal professions has progressed as follows. In 2000, the Lisbon European Council adopted an economic reform program with the aim of strengthening the competitiveness of the European knowledge-based economy. The EU Commission followed up by undertaking research to ascertain the need for, and implications of, deregulating certain liberal professions such as notaries and other lawyers, pharmacists, etc. The Institut für Höhere Studien (IHS) in Vienna carried out a study on the subject and presented its report in 2003. The report was in large part critical towards the regulated notary system, claiming regulations were inadequate and in parts unnecessary. In February 2004, the EU Commission issued a Communication, announcing that it would take action against several kinds of restrictions in liberal professions; (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements, and (v) regulations governing business structure and multi-disciplinary practices. The Commission concluded that a proportionality test should be used to assess to what extent anti-competitive professional regulations truly serve the public interest.²⁹⁹ The communication was followed up with another communication in 2005, in which the Commission reported on the progress of member states in eliminating disproportionate restrictions as well as its own efforts. It also announced that it would continue to strive for more deregulation.³⁰⁰ In October 2006, the Commission sent reasoned opinions to several member states requesting them to remove nationality requirements restricting access to the notarial profession, claiming they were in violation of the freedom of movement laid down in Article 45 of the EU Treaty. The Council of the Notariats of the European Union (CNUE) naturally did not react well to this; their position was, and is, that civil law notaries carry out a public function and therefore fall under the exception to the

²⁹⁵ van den Bergh & Montangie 2006a, p. 25-29, van den Bergh & Montangie 2006b, p. 7-8.

²⁹⁶ Kreps, p. 168.

²⁹⁷ van den Bergh & Montangie 2006a, p. 8.

²⁹⁸ van den Bergh & Montangie 2006b, p. 18-19.

²⁹⁹ COM(2004) 83 final; especially at 30 and 88.

³⁰⁰ COM(2005) 405 final.

freedom of establishment. However, due to pressure from the Commission, Spain, Portugal, and Italy have abolished their formal nationality requirements.³⁰¹

In addition to the political arena, there has been some – albeit politically related – scientific discussion concerning the economics of notaries and the desirability of regulation. In short, the discussion centers on two (seemingly) conflicting theories/phenomena – competition theory (the cartel argument) and market failures.³⁰² At a glance, the former seems to speak in favor of deregulating the notarial system whereas the latter seem to speak against it.

While little empirical work has been done by economists to assess the effects of monopoly rights³⁰³, there are two examples of *deregulation* related to real estate conveyances. First, there is the deregulation of conveyancing services in England and Wales in 1987. Conveyancing services are legal services related to real estate conveyances, such as the investigation and transfer of title and fulfilling requirements for mortgages. Since 1804, solicitors had held a monopoly right over conveyancing services in those countries. Due to growing criticism from growing numbers of home-owning consumers, the government introduced “licensed conveyancers” who entered the market on 1 May, 1987 and were allowed to offer conveyancing services alongside solicitors.³⁰⁴

Different studies on this deregulation have been conducted, with different results. Surveys in 1986 - after the law had been changed but before the actual entry of the new profession – indicated that solicitors lowered their prices in anticipation of competition. Surveys in 1989 indicated that solicitors’ fees were lower in districts where licensed conveyancers had entered than in districts without licensed conveyancers. However, surveys in 1992 – covering the same locations - indicated that both solicitors in markets where there were licensed conveyancers, *and* licensed conveyancers in the same markets, had raised their fees between 1989 and 1992 more than in markets where there were no licensed conveyancers. A plausible explanation for the high prices among licensed conveyancers is that these professionals offer a limited range of services, limiting their ability to mitigate risk. The greater risk seems to have provided incentive for licensed conveyancers to maintain high fees.³⁰⁵

Second, there is the deregulation of the Dutch notarial profession in 1999, the objective of which was to increase competition and improve the quality of the notarial services. The reform was ambitious and introduced two major changes: (i) the abolishment of the *numerus clausus* provisions (the only remaining entry restriction being that junior notaries must submit business plans to a supervisory committee), and (ii) the change from fixed to unregulated fees. Two separate evaluation reports were published in 2005. The Hammerstein Commission³⁰⁶ found benefits resulting from the newly introduced competition, in the form of increased cost efficiency, innovation, cost-oriented fees, and price differentiation. However, the Commission also found that many notaries tried to save costs by spending less time on advice to clients, and found that the information providing role of the notary was particularly at risk.³⁰⁷

³⁰¹ <http://www.euractiv.com/en/competition/commission-notaries-open-foreigners/article-158768> (2008-04-19).

³⁰² Stephen & Love, at p. 987.

³⁰³ Stephen & Love, at p. 995; van den Bergh & Montangie 2006a, p. 42-43.

³⁰⁴ van den Bergh & Montangie 2006a, p. 42-43.

³⁰⁵ Stephen & Love, at p. 995-996.

³⁰⁶ Commission on Evaluation of the 1999 Notary Act.

³⁰⁷ van den Bergh & Montangie 2006a, p. 71.

The other report was written by the Netherlands Bureau for Economic Policy Analysis.³⁰⁸ The report was critical on several points. Firstly, it found no significant difference in competition between 1996 and 2002 on local markets for family services and small scale real estate transactions. Secondly, it found evidence of quality deterioration. The researchers investigated two aspects of quality: service satisfaction and the only quality aspect that is not observable by the consumer but still measurable, namely corrections registered in acts passed at the Land Registry. They found clear evidence through consumer surveys that consumer satisfaction had decreased. As to mistakes, they found “some support” for the fear of quality deterioration.³⁰⁹

4.6 Conclusions

The Latin notary profession prevails in large parts of the world, particularly the Latin-German parts of continental Europe, and Latin America. While there are divergences in the notarial laws of all countries, the similarities are greater still, and it is correct to speak of a single profession throughout all these countries. The notary carries out several important functions, the nexus of which is the authentication of legal documents. In the preparation of these documents, the notary is required to provide impartial counseling in order to tailor the transaction at hand to fit the will and needs of the parties. To uphold the *integra fama* of the profession, and to safeguard the proper performance of the notarial functions, lawgivers in all countries emphasize the importance of impartiality and integrity. There are national divergences as to the specific rules of conduct related to impartiality, particularly those concerning incompatibilities, but they rest on common principles. Most importantly, not only must the *publica fides* be honored, it must be seen in the eyes of the public to be honored.

The organization and regulation of the notary profession raises important economic issues, particularly with regard to competition/monopoly and market failures. As has been demonstrated above, the discussion of the regulation or deregulation of the notariat is by no means settled. It will be discussed to some extent in the following chapter.

³⁰⁸ Nahuis & Noailly (2005).

³⁰⁹ Nahuis & Noailly, p. 57-58.

5 Comparative Analysis and Discussion

The previous chapters have dealt with the Swedish real estate broker and the Latin notary. It has been established that both professions have distinct legal obligations towards the contracting parties in real estate transactions, obligations that seem very similar. It has likewise been established that the laws of the countries where the Latin notary prevails are similar enough – indeed, in many respects identical – that it is correct to speak in terms of a single profession. It is time, now, to recall the purpose of this study, which is ultimately to compare the legal framework of the Swedish broker to the Latin notary and their respective functions on the real estate market. What remains to be done, then, is to perform the actual comparative analysis. This will be done in two steps. First (5.1), the common legal traits will be discussed. From the previous chapters, it is clear that the three most striking common legal traits are contract-engineering, counseling and impartiality. Second (5.2), the respective functions on the real estate market – or, more precisely, in real estate transactions – will be analyzed.

5.1 Common Legal Traits

This section deals with the common legal traits of the Swedish real estate broker and the Latin notary. Naturally, the scope of this comparative analysis is defined by the scope of the previous chapters. As pointed out in Chapter 1, there are interesting aspects to compare that fall outside the scope of this study entirely. One such aspect is the regulation and supervision of the two professions. The previous chapters have not dealt with questions such as the modes of supervision – self-regulation or supervision by a government body – or the disciplinary systems. Those are interesting issues indeed, but they will nevertheless have to be addressed in another study. In the present study, the principal legal aspects of the two professions that have been examined are contract-engineering, counseling, and impartiality. In the following, the distinguishing traits of these aspects will be analyzed.

5.1.1 Contract Engineering

5.1.1.1 *The Swedish Broker*

Recapitulating, 19 § EAA requires the Swedish real estate broker to strive to enable the buyer and seller to reach agreement with respect to issues that must be resolved in connection to the transaction. In that respect, the broker must be active and observant as to the needs of the parties and cannot remain passive where her expertise and experience indicate that either party would be in need of a certain type of contract or contract clause. Rather, the broker has an important obligation to *tailor the contractual relation to the transaction at hand*, with the aim of preventing future disputes. It is important to keep in mind, here, that consumer protection is a key policy-making interest, if not behind every aspect of the real estate broker regulations then at least a guiding star for the Board of Supervision of Estate Agents and the courts. In a consumer protection perspective, the broker takes on the role of expert in relation to both buyer and seller who cannot be expected to possess any knowledge whatsoever with respect to real estate, legal or other. As a result, tailoring the contractual relation has several dimensions.

Firstly, the broker must suggest and present adequate solutions to the parties, in the form of contracts and contract clauses. Naturally, the parties enjoy the freedom of entering contracts on whatever conditions they see fit, and the broker is neither required nor authorized to force contract clauses on the parties that they do not wish. However, the broker is indisputably required to present the options to them, and to recommend the option or options she deems adequate. The most important, and most frequently discussed, situations are those where either party needs a certain type of contract clause to prevent or mitigate an otherwise substantial legal or economic risk. Two commonly known such clauses are mortgage clauses and inspection clauses. Mortgage clauses may become necessary where it is uncertain whether the buyer will be granted a loan to finance the purchase. By default, if the buyer fails to make payment on time the seller is entitled to terminate the contract and receive indemnification from the buyer – a right that may prove difficult indeed to enforce given that the whole problem is that the buyer lacks money. The mortgage clause gives the buyer the right to rescind the contract without damages. Inspection clauses are helpful where the buyer has had no opportunity to perform a proper inspection of the property before signing the sales contract. The clause gives the buyer the right, with or without certain conditions, to rescind the contract after a post-contractual inspection. The two types of clauses favor the buyer and may not be acceptable to sellers. Again, the broker cannot force any contract clause upon an unwilling party. Indeed, the broker is not even party to the sales contract and cannot bargain for a contract clause. Nonetheless, it is her obligation to present the clause as a possible solution to a situation that may give rise to problems for either contracting party or both.

Secondly, the broker must ensure that all relevant issues are regulated. This goes beyond merely presenting a particular solution, e.g. an inspection clause. The clause encompasses several issues that need to be resolved: what type of defects on the property should trigger the buyer's right to rescind, what quantity of defects, how those defects should be defined and measured, deadlines, etc. Failure to regulate these issues within the inspection clause is likely to cause future disputes, which is the exact opposite of what the broker's work is meant to do. Admittedly, writing inspection clauses and the like is a highly qualified task, and writing them well is no mean feat even for a legal professional. Nonetheless, the broker is required to do so.

Thirdly, the broker must ensure that the wording of all contract clauses is clear and unambiguous. Brokers are responsible for the wording of the contracts no matter from where or whom the wording originates. The fact that an unclearly worded clause was authored by the broker's legal counsel does not mitigate the liability; the broker's legal obligations are personal and failure to live up to them cannot be blamed on third parties. In particular, the broker's obligation to write clear contract clauses corresponds to a right on the part of the consumers to contracts that properly reflect their will. That right cannot be circumvented simply because the broker has hired negligent counsel. Further, the fact that the contracting parties have read and accepted an unclear clause has no significance; to hold otherwise would place undue burden on the parties, which is hardly acceptable at least where they are consumers. Thus, it is clear that the broker is charged with drawing up contracts that are clear enough that their most likely interpretation reflects the will of the parties.

Fourthly, the broker must ensure that all agreements in connection to the transaction are properly documented. Naturally, there will often be simple agreements that need not be formalized in a written contract. However, the general rule for brokers must be to urge the parties to agree in writing unless it is obviously unnecessary. The broker will be liable if she fails to at least urge the parties to agree in writing and promote that end by providing a written contract.

Fifthly, the broker is required to educate the parties as to the significance of the transaction and all contract clauses. While there is no formal requirement to read the contract out loud with the parties, it may be advisable to do so since the broker is responsible for educating the parties. This requirement seems self-evident, since it cannot possibly be in accordance with sound estate agency practice to persuade the parties to agree upon something at least one party does not understand.

Finally, the broker must actively pursue an acceptable agreement, which may involve intervening in substance in negotiations. This is arguably the most difficult, and perhaps the most doubtful, requirement; the broker is, after all, not a party to the sales contract. Nor is she authorized to force a solution upon the parties. Nonetheless, the broker is required to intervene in substance where it is necessary in order to prevent disputes.

5.1.1.2 *The Latin Notary*

As for the Latin notary's obligations with respect to contract-engineering, drawing up contracts has been the first and foremost task of the notary since the very beginning. It is arguably the very reason the profession came to be in the first place. Since there are still today areas where notarial intervention is a prerequisite for a valid contract – real estate conveyances being one of them – it seems self-evident that there must be an obligation to draw up the necessary contracts. However, it could be argued that in this day and age the parties could be entrusted to draw up their own contracts, reducing the notarial role to validating them. Indeed, this is often the case in real estate transactions since brokers and other players on the market are increasingly making use of their own contracts, which they provide to the parties. Nonetheless, the notary's contract-engineering obligation persists, as is proper.

The statutory basis for the notary's contract-engineering obligation is the requirement to give legal form to the will of the contracting parties and draw up all necessary documents. Naturally, doing so involves translating it to the proper vernacular, as well as observing any formalities that may exist. As has been asserted, however, the notary is no mere witness, nor a passive recorder of agreements. On the contrary, he must ensure

- 1) that the contracting parties have understood the significance of the transaction,
- 2) that the contract is adequate in the sense all necessary contract clauses are present,
- 3) that all parties understand and agree to all clauses, and
- 4) that the contract is substantively adequate.

As to the first requirement, it is of course a prerequisite that all parties involved understand the nature of the transaction. It is perhaps not as self-evident that all parties understand all legal implications. Here lies the duty of the notary: to inform the parties of the legal consequences of the transaction, the choices to be made, etc. That information is of course tantamount to counseling; as in the case of the Swedish broker, it is difficult if not impossible to draw a clear line between contract-engineering and counseling. However, this first requirement is not an obligation to give advice, but rather to *provide information*. The nature of the information is bound to be mainly legal and fiscal, but could of course be of another nature as well. The crucial factor concerning this requirement is that the parties understand what kind of transaction they are enacting, and its consequences. It is not difficult to see the connection to contract law: a valid contract presupposes the consent of all parties, consent in

its turn presupposing awareness of the consequences. However, the notarial obligation goes beyond merely ascertaining that the contracting parties are legally capable. It must be established that they understand the legal implications and are aware of the choices to be made and their consequences.

As for the second requirement, the notary must of course ensure that the contract and all other documents comply with any existing formal rules, but giving legal form to the will of the contracting parties also entails applying the necessary means to achieve the desired end. In a nutshell, the sales contract in a real estate transaction must contain all clauses necessary to realize the will of the parties. As in the case of the Swedish broker, the notary cannot remain passive and merely provide the parties with a standardized document. The notary must also be active and observant, informing the parties of the different options, and thus extracting from them their *informed* will. This is of course a natural extension of the first requirement: after informing the parties of the general nature of the transaction, the notary presents them the different options, and bit by bit tailors the contract to fit the informed will of the parties.

The third requirement is fairly straightforward and by no means separate from the first two. Given that the notary must inform the parties of the general implications of the transaction, it is only natural that he also be obliged to ascertain that they understand the detailed consequences of the choices they have made. Since the contract is tailored to fit their needs and desires, they have to properly understand it. In some jurisdictions, this involves reading the contract out loud.

Finally, the notary must make sure the contract is substantively adequate. Just as the Swedish broker, the notary is not a party to the transaction and is of course neither required nor authorized to force any solution upon the parties. However, the notary's main allegiance lies not with the parties but rather with the law and the *publica fides*. The former requires that the notary refrains from participating in, or in any way promoting, illicit acts. The latter of course requires as much but goes further. Honoring the public faith vested in him means acting for the benefit of everyone. In terms of contract-engineering, this may entail intervening in substance in the interest of preventing further disputes. Preventing disputes is beneficial not only to the contracting parties but to society as a whole, since legal disputes burden the judicial system and therefore the taxpayers.

5.1.1.3 Comparison

From the foregoing, it is evident that the contract-engineering roles of the Swedish broker and the Latin notary are similar indeed. Both are required to inform the contracting parties of the legal implications of the transaction, i.e. their respective rights and obligations, present solutions that are tailored to the situation, execute those solutions in adequate contracts and, finally, making sure the contract is acceptable and does not lead to unnecessary legal disputes. If possible, both must tailor the contract in a fashion that reduces the risk of legal disputes.

There are of course variations in the way the two professions' obligations have been shaped and discussed. For instance, in the case of the Swedish broker, many cases concern the way contract clauses are *worded*, an issue that concerns the contract-engineering handiwork. That type of discussion does not appear to have been discussed much concerning notaries, but that is hardly to be expected. Whereas the Swedish broker has a two-year college degree encompassing a handful of subjects of which law is one, the notary has a full university

degree in law, in some jurisdictions with specialization beyond the law degree. It is natural that it is simply expected that the notary's work is qualified.

5.1.2 Counseling

5.1.2.1 *The Swedish Broker*

Recalling chapter 2, The Swedish broker is required by 16 § EAA to provide the parties with advice and information with respect to the property and other issues that can be assumed to be of importance. The broker must also strive to ensure that the seller provides the buyer with information that may be of importance concerning the property. Finally, the broker must strive to ensure that the buyer inspects the property prior to the sale. The provision encompasses quite a few obligations, both explicit and implicit, as is evident from the cited case law.

Much attention is of course given to the obligation to provide *information*, above all concerning the property itself. This is only natural given the information asymmetry inherent in the three-party constellation seller-broker-buyer. The seller is of course in possession of much vital information about the property. The broker is often less informed than the seller in some issues, such as when the kitchen was last renovated, and the like, but is also often more informed in other issues. For instance, the broker's experience may tell her that houses such as the one for sale, built during a certain period and constructed in a certain way, often suffer defects of a certain type. The broker's expertise may further help her identify defects that neither seller nor buyer is competent to detect. The buyer, for their part, is typically the least informed party. It seems both rational and equitable to counteract this information asymmetry, which is why the broker must divulge any information she may have concerning the property – even where she only *suspects* that there may be a defect. The information asymmetry is similar concerning other matters relevant to the sale, the difference being that in those cases the seller is typically no more well informed than the buyer. In those issues, it is the broker who has the information advantage. Of course, the broker's obligation is still the same: to inform the parties of anything and everything that could be of importance.

Important though it is, providing information concerning the property is not necessarily counseling. In many instances, the broker serves as a mere conduit of facts the law requires her to provide to prospective buyers (under 16, 17, and 18 §§ EAA). However, it has been established that the broker is sometimes required to control the veracity of information she has received from the seller. That is especially the case where the information seems odd or unusual, where the information can be controlled without placing undue burden on the broker, and/or where the information is of particular importance to the buyer. Failing to ascertain the veracity of the information, the broker must at least inform the buyer of her misgivings. In these cases, where the broker must do more than passively convey information, it is appropriate to speak of counseling.

The broker's obligation to strive to ensure that the buyer inspects the property is fairly straightforward and serves to prevent further disputes between the parties. However, it is not enough to merely urge the buyer to inspect; the broker is required to explain the significance of the buyer's legal inspection obligation. The requirement to explain the inspection obligation to the buyer is not explicitly mentioned in 16 §, and must therefore fall into the

category “advice and information (...) with respect to other matters relevant to the sale”. This is quite evidently a form of counseling, in the form of legal information. In this context, it is an implicit requisite that the buyer must understand the information provided by the broker. The common practice of providing all prospective buyers with written information is therefore, while of course desirable, not always enough. The reasonable position is that the broker must ascertain that the buyer has understood at least the legal information. To hold otherwise would be incompatible with the explicit obligation to advise the parties on important issues.

An issue that is arguably more problematic than it seems is the broker’s obligation to strive to ensure that the seller provides the buyer with important information about the property. While *prima facie* a rational and uncontroversial rule, it may upset the balance between buyer and seller laid down by property law and contract law. The general rule is that it is not the seller who is required to inform, it is the buyer who is required to inspect. As might be expected, that principle has its exceptions, notably attested to by the Supreme Court ruling NJA 2007 s. 86. Whatever the merits of the balance laid down by property law, it is not completely unproblematic to require the broker to extract from the seller information the seller is under no obligation to reveal. The situation gets even worse since the EAA provision does not apply only to “defects” in the meaning of Chapter 4 of the Land Code, but to any information that may interest the buyer. On the other hand, one might of course suggest that revealing information may be beneficial to the seller. For instance, if the seller informs the buyer of a defect, that defect will not be considered “hidden” under 4:19 of the Land Code and therefore not relevant after the purchase. In sum, it seems no exaggeration to assert that the broker must be careful when urging the seller to provide information. Carrying out this statutory task should be accompanied by all necessary advice. As is the case with the broker providing information, this task is no mere formality but rather one that involves counseling.

Apart from the aforementioned tasks, it is not entirely clear what kind of counseling the law requires the broker to provide. While it is clear that the broker must offer advice of a legal, technological, or economic nature, it is by no means clear to what extent and with which level of expertise. The 2-year college education requirement that has been in force since 1999 has as yet not had any visible substantive impact on case law. It is apparently still acceptable for a broker to decline to answer questions she feels exceed her expertise. Meanwhile, if she should attempt to answer and the answer should prove incorrect, she will be liable for damages suffered by the buyer/seller. Needless to say, the situation is sub-optimal since it gives the broker double incentives to refrain from providing advice and information; in other words, the prevailing position completely undermines the purpose of the provision. A more appropriate interpretation of the provision would be that the broker is required to provide advice, which includes answering questions, within the fields that closely concern the real estate transaction. For instance, there are a number of fiscal issues the broker comes across continually, such as the eligibility for respite with the capital gains tax. The reasonable interpretation of 16 § EAA is that the broker is required to be able to answer such questions correctly, and that it is not acceptable to simply refrain from answering on the ground that the question exceeds her expertise. If there is a gap between the broker’s expertise and such frequently recurrent yet important questions, then it is the broker’s expertise that should be improved and not the other way around.

A question that remains to be answered is in what respects the broker is, or should be, required to give advice. The question is especially relevant if one takes the suggestion to heart, that simply refraining from giving advice is not compatible with the counseling

obligation. On the one hand, frequently recurrent questions within tax law or other areas must by any standards be answered by a diligent broker; on the other hand, rare and/or very complex issues may not be suitable for a real estate broker to deal with. It must be pointed out that the broker is a generalist in the sense that her expertise lies within several fields: law, construction technology, economics, psychology, etc. It is therefore hardly equitable to demand that she be able to answer every conceivable rare and complex question within all those fields. There are, after all, in all disciplines issues that only a few experts are familiar with, and oftentimes even they cannot agree on how the problem should be solved. It is therefore of vital import to define the scope of the broker's counseling obligation. The question is how that should be done. Fortunately, the law already provides many answers.

Firstly, already in 16 § EAA there are explicit obligations that the broker must simply carry out: to provide information, to urge the seller to provide information, and to urge the buyer to inspect the property prior to the sale. It is evident that these tasks cannot be carried out without educating and counseling the parties; again, providing information is worthless if the consumer does not understand the information. This is definitely a form of counseling.

Secondly, the tasks laid down in 19 § EAA are similar to those in 16 §. As stated above, that provision requires the broker to suggest and present adequate contract solutions, ensure that all relevant issues are regulated, ensure that the parties understand the contract clauses and their implications, and ensure – to some extent – that the contract is substantively adequate. Making sure the parties understand the different contract clauses is nothing but counseling, and the other requirements also involve counseling; what is the point in suggesting a contract clause without educating the parties as to its legal implications, as well as the general legal context? It should be noted that these are no *lex ferenda* arguments: they simply reflect the existing case law presented in chapter 2.

Clearly, the broker is charged with several explicit tasks the performance of which requires some kind of counseling. It is therefore established that *the broker must provide such counsel as is necessary to effectively perform the explicit tasks laid down in the EAA*. However, establishing that something lies within the limits of the broker's obligations is not the same as determining those limits. Moving on, therefore, there is in 16 § an explicit, if vague, obligation to provide advice and information concerning matters that are relevant to the sale. It is of course impossible to construct a general rule that explicitly covers all contingencies. Thus, since all transactions are unique on some level, there will always be a need to fall back on the general definition "matters that are relevant to the sale". As has been asserted, however, there are a number of frequently recurrent issues and questions where consumers will typically need assistance; the aforementioned fiscal issue is a perfect example. It is hardly satisfactory that the broker be entitled to refrain from answering a legitimate, important, and *foreseeable* question from the buyer or the seller, when the law explicitly provides that she must offer advice on matters that are relevant to the sale. Again, this is no *lex ferenda* argument, but rather an interpretation of the existing provision in the light of case law. The opposing position, that brokers are free to refrain from answering questions (and that it is perhaps best if they do) has no support other than a passage in the legislative history of the 1984 EAA, a passage written in 1983 – roughly 24 years ago today and 16 years before the 2 year education requirement was introduced! In the name of reason, the broker of today must be held to a higher standard. Thus, it is established that *the broker must provide counsel regarding issues whose recurrence in real estate transactions is foreseeable*.

Admittedly, the suggested rule is not perfect. It does not plan for all plausible contingencies, and can therefore not give an explicit solution to every imaginable interpretation problem. Nor does it solve the yet existing problem of brokers on the market with different education levels. However, it does provide an effective tool: *foreseeability*. Foreseeability is widely used in Swedish law, particularly in tort law where it is used as a tool to determine negligence. It is also helpful in producing equitable solutions, since it sets the liability limit at factors that the individual can reasonably perceive and use as a basis for decisions. A rule thus constructed should be able to balance the contracting parties' right to assistance from the broker with the broker's limited possibility to plan for every plausible contingency and prepare answers to every question imaginable. The suggested rule also counterbalances the present incentives for the broker to provide as little assistance as possible. And, finally, the best part is that it is not even a *lex ferenda* rule but a perfectly valid interpretation of the existing provisions.

5.1.2.2 The Latin Notary

All the examined countries have laid down a counseling obligation on the notary, whether through an explicit statutory provision or through other sources of law. What is not clear, however, is the extent to which the notary is obliged to give legal advice. It seems clear that the notary has an obligation to provide counsel to the extent that it may be necessary in order to properly perform the explicit task of giving legal form to the will of the parties. For instance, the notarizing process demands that the parties understand the legal implications of their choices; otherwise the produced acts cannot be deemed to reflect their will. To that end, the notary must provide whatever counsel the task requires. The public interest in legal certainty, including the prevention of future disputes, also gives rise to a need for counseling. For instance, it is no rare occurrence that the contracting parties want to add contract clauses that are inappropriate in the sense that they give rise to difficult interpretation problems. Such problems need not always be caused by either party's lack of legal experience; bad contract clauses can often be the result of tough negotiations. Notwithstanding the cause, the notary must act where the proposed clause is likely to cause future disputes. Finally, there may be a need for equalizing counseling where there is an unbalance between the parties with respect to education level, economic power, etc. Therefore, the notary may have to act to avoid obviously inequitable results.

In the end, determining the scope of the counseling obligation depends largely on one's definition of counseling. Is providing legal information a form of counseling? Or does counseling presuppose the act of giving advice as to the appropriate course of action? It should be noted that these questions are no mere semantics, since the laws of many countries explicitly stipulate that the notary provide "counsel" or "advice". Ascertaining the scope of the counseling obligation is therefore an important legal issue. To summarize what has been asserted, the notary is required to provide counsel to the extent it is required:

- 1) in the interest of *publica fides*, to ascertain the *informed* will of the parties,
- 2) in the interest of legal certainty and legal peace, to prevent future disputes, and
- 3) in the name of impartiality and consumer protection, to prevent inequitable contracts.

5.1.2.3 Comparison

Since the notary and the broker are completely different professions, with different competences, experiences, and education levels, it is astonishing to see the similarities in their respective legal obligations. An important difference between the two professions can easily

be traced to the difference in education level and competence: whereas the notary is a specialized legal professional, the broker has a multi-disciplinary competence that includes – but in no way is limited to – legal and economic issues. Even the contemporary Swedish broker, with a college education requirement, is not on an equal footing with the notary when it comes to complex legal matters.

Another, perhaps less obvious, difference is the way the two professions are remunerated. Whereas the broker is free to charge any commission fee she chooses, notaries have some sort of regulated fees that cannot be deviated from. This difference affects the discussion on whether a task like counseling should be a mandatory part of the service. In the case of the broker, since she is free to charge any price, she is free to charge more to compensate for the extra work of diligently performing the task of counseling. In the case of the notary, however, he is not at liberty to charge any price and can therefore not compensate himself for the higher level of service. Indeed, to the extent that notarization is mandatory, it would hardly be equitable if the costs of legal access differed depending on the notary. That is all the more so due to the *numerus clausus* rules: although the parties are free to choose any notary, the prohibition for notaries to practice outside their assigned district substantially decreases the value of that freedom. In practice, therefore, it is not sustainable to deregulate the notarial fees completely. Consequently, issues concerning the service level of the notary, which includes the question of counseling, will be affected by the fact that notaries will not be able to charge more for mandatory tasks.

With all respect to the aforementioned, the obvious and perhaps greatest difference between the broker and the notary is that, whereas the notary has deep knowledge in property law, he cannot match the broker's knowledge about the property itself. Needless to say, this difference constitutes fundamentally different bases for the two professionals in their respective counseling roles. The broker may not be as legally qualified as the notary – though experience with the legal aspects of real estate transactions can often yield solid competence within the field, which may counterbalance the education difference – but she has actual information concerning the property itself and other factors surrounding the sale. Her counsel therefore has potential to be more specific to the transaction at hand. She should also be in a better position to tailor her counsel to the situation; for instance, where the property is old and has many defects there will often be a strong need for counseling, whereas the need may not be as strong where the property is new and/or has fewer or no defects.³¹⁰ The notary, for his part, may counterbalance this by virtue of his legal skills. The notary is also likely to have greater experience in giving legal advice, making him more suitable in that sense to tailor the service to the transaction at hand. There is no scale to measure the relative suitability of one or the other in giving advice to the parties; all that can be concluded is that the broker has more information concerning the property, whereas the notary has a more solid legal competence.

That said, there are remarkable similarities. Both professions are charged with the explicit task of drawing up the necessary contracts. While doing so, both are required to educate the parties and to discuss the transaction with them in order to extract their informed will and record it in the contract. Both are required to give counsel to some extent. In both cases, the exact scope of the counseling obligation is not entirely clear, but it is safe to conclude that they must both provide such counsel as may be necessary to perform the explicit tasks assigned to them by law. In both cases, there will be borderline cases where it is not clear

³¹⁰ Colleagues at Malmö University who teach construction engineering tend to take on a slightly more pessimistic view as to the flawlessness of new buildings.

whether the professional is required by law to give counsel or whether it is a voluntary service. The guiding star in both instances is, and must be, the needs of the contracting parties, especially in consumer cases, as well as the prevention of future disputes.

5.1.3 Impartiality

5.1.3.1 *The Swedish Broker*

As asserted above, the impartiality principle, currently embodied in 12-15 §§ EAA, can be divided into two main categories: the broker's relation to the contracting parties and the broker's independence and integrity. The former is given by 12 § (safeguarding the interests of both parties), and 15 § (prohibited from representing either party). The latter is given by 13 § (prohibited from purchasing the property, and from brokering to and from related persons), 14 § (prohibited from trading in real estate, and from engaging in activities that may affect the broker's trustworthiness). The obligation to safeguard the interests of both parties, and the prohibition to represent either party, concern the broker's relation to the contracting parties themselves. These rules can be referred to as the broker's *internal impartiality*, since it is limited to the three-party constellation seller-broker-buyer. The prohibitions from trading in real estate and from engaging in activities that may affect the broker's trustworthiness do not primarily concern the broker's relation to the parties but rather to third parties, though some instances of integrity-detrimental activities are internal (for instance, where the broker has business activities with either party). The impartiality rules that concern the broker's relation to third parties can be referred to as the *external impartiality*. The prohibition to purchase the property, and from brokering to closely related persons, are hybrids, since they concern both the internal and the external relation; while purchasing the property entails becoming the seller's counterpart and thus not acting as an impartial intermediary, it also has implications for the credibility of the broker *in the eyes of third parties*. The same applies to brokering to third parties: it is likely that doing so will be detrimental to the broker's trustworthiness in the eyes of the public.

It is quite evident that the distinction between internal and external impartiality is not enough. While intuitively it seems reasonable enough to distinguish between the relation to buyer and seller on the one hand, and to third parties on the other, it can hardly be a complete model since there are clearly rules that fall into both categories simultaneously. There must therefore be another dimension. That other dimension is found in the case law of the BSEA and the administrative courts, and is best expressed by means of the different behaviors and activities that constitute infractions of the rules (impartiality being, after all, an abstract principle whereas the infractions are specific). For instance, an infraction of the impartiality rule in 12 § presupposes that the broker has *actually* failed to safeguard the interests of both parties. Similarly, an infraction of 15 § presupposes actually representing one of the parties by means of power of attorney or other such agreement. In contrast, acting in breach of the prohibition in 14 § to trade in real estate does not require that the broker fail to be impartial between buyer and seller: that principle doesn't apply in those cases since when trading in real estate, the broker isn't brokering and there is no pair of contracting parties in relation to whom the broker can/must be impartial. Similarly, an impermissible activity that may affect the broker's trustworthiness does not presuppose any actual partial behavior from the broker. For instance, it is currently impermissible to broker mortgages. The rationale behind the prohibition is that the broker's impartiality may be affected since she has incentives to favor prospective buyers

who are willing to sign a mortgage contract with her over buyers who are not willing to do so. The broker does not have to *actually* favor such buyers for the prohibition to apply: it is enough that the activity be such that it will typically raise suspicions among the public that the broker is not entirely impartial. It is the *risk* that the broker will not act impartially that triggers the rule. The same principle applies to the prohibitions to broker to or from related persons. It is of course conceivable that the broker's sister could give the highest bid on a house and purchase it, without the broker favoring her over other bidders. As for the ensuing contract phase, it is likewise possible that the broker could act in all impartiality and provide assistance and counsel to the seller despite the fact that her sister is the buyer. In short, it is possible to avoid acting partially. The rule, however, is not concerned with what *actually* happens but what *could* happen, and – perhaps more importantly – what the public may *suspect* may happen. Not many are going to believe that the broker did not in any way unduly favor her sister!

We have, therefore, two dimensions by which the impartiality principle is divided. The first dimension is *internal/external* as described here above. The second dimension is whether an infraction of the rules presupposes *actually* failing to act impartially, or if it is enough that the impartiality is at risk in the sense that third parties will typically have suspicions as to the *integrity* of the broker

Figure 8 Two Dimensions of Broker Impartiality: What Constitutes Infractions?

	Actual	Integrity
Internal	<ul style="list-style-type: none"> • 12 § Acting partially • 13 § Purchasing the property • 15 § Representing a party 	<ul style="list-style-type: none"> • 13 § Brokering for related persons • 14 § Business relations with a party
External	<ul style="list-style-type: none"> • 12 § Acting partially 	<ul style="list-style-type: none"> • 14 § Trading in real estate • 14 § Integrity-detrimental activities

5.1.3.2 The Latin Notary

The impartiality principle governing the notary is surprisingly similar to that governing the Swedish broker. First and foremost, the notary must be impartial in relation to the contracting parties, in the sense that he cannot treat one party as client and not the other. Thus, for notaries also operating as advocates it is imperative that they keep the two functions separate and ensure that the parties understand in which capacity he is acting. The impartiality principle applies to all activities where an official notarial function is being carried out. Further, the notary is not entitled to notarize acts to which he himself is a party or that in any way involves rights and obligations between him and one of the parties.

The notary's impartiality demands active intervention. The notary cannot sit idle where it is evident that there is an unbalance between the parties due to differences in knowledge, education, information, or expertise, and/or where one of the parties is being unduly prejudiced. In such instances, it is incumbent upon the notary to take special measures to ensure that the weaker party fully understands the implications of the transaction and, if need be, counsel that party in order to promote an equitable solution. This is understood as the

notary's *equalizing* function, and it is a cornerstone of the notary's impartiality. Quite naturally, this requires the notary to exercise due care when intervening, since impartiality also demands that he not take sides. The equalizing principle is therefore an interesting exception to the rule: there are instances when the broker is required to actively intervene, not only to ascertain the will of the parties, but also in substance. In practice, intervening in substance can be seen as a natural extension of ascertaining the will of the parties. The notary must ascertain the *informed* will of all parties, meaning that all parties have understood the transaction and its consequences. This may mean devoting special time to counsel a weaker party. The aim is primarily to educate that party; the notary has no authority to force a solution upon the parties, and contracts that seem unreasonable to one party may be perfectly acceptable to another. However, not many people willingly enter obviously inequitable agreements.³¹¹ Further, even contractual unbalances of a lower degree may be cause for special counseling if the seemingly prejudiced party seems oblivious as to the consequences while ostensibly accepting them. For instance, suppose that the contract is a real estate sale and that the agreed sales price is €280,000. Suppose, further, that the notary knows by experience that this is a very high price and that a more reasonable price would be around €150,000. Suppose, finally, that the buyer seems completely oblivious and seems to think the agreed price is a bargain. Now the notary is not entitled to override the will of the parties. Nor can it be called impartial to pursue an amendment of the contract, to the detriment of the seller, simply because the notary feels the agreed price is too high. Indeed, in most cases the right course of action is probably to leave well enough alone. However, in some cases irregular conditions, such as a conspicuously high sales price, can be a signal that there is an unbalance between the parties. In such cases, the notary must give special counsel to the weaker party.

The equalizing function fits the rationale behind consumer protection like a glove: the idea that there are unbalances in the marketplace and that it is both equitable and rational to eliminate, or at least mitigate, those unbalances. The means to achieve that end vary, from information to legislation, but the goal remains the same: to protect the weaker party. It is no wonder, then, that notaries are keen on emphasizing consumer protection in connection to impartiality.³¹² However, the idea to counteract existing unbalances between the parties may not need consumer protection as an explicit rationale. As has been asserted, the notary derives his authority from *publica fides*, and it is therefore to the law and the *publica fides* he owes his allegiance. In honor of the public trust vested in him, therefore, it could be construed as the notary's duty to pursue transactions that are on some level equitable. Also, since an unbalance may often result from the weak position of one party, giving special assistance to that party and balancing the scales could be viewed as a positive side effect of the notary's obligation to counsel all parties to ensure that the transaction reflects everybody's informed will.

Recalling chapter 3, safeguarding the *integra fama* of the notary was perceived as crucial as early as the Middle Ages. It is no wonder, then, that independence and integrity has a prominent position in notarial law. The limitations laid down on notaries vary from country to country, one of the most important issues being whether it is permissible to practice advocacy while at the same time being a notary. In some places it is permissible to practice real estate brokerage, whereas some countries prohibit that combination; the same applies to trading in real estate. However, the principle of integrity as a cornerstone of impartiality remains. In jurisdictions where it is permissible for notaries to act as advocates, the law demands that they keep the two functions separate and make it clear to all parties involved in which capacity

³¹¹ The fact that people tend to complain about prices does not count!

³¹² See for instance Sevilla et al., at 3.

they are acting. Similarly, where it is permissible to trade in real estate or practice brokerage, the broker is prohibited from notarizing acts where he is involved in some manner. Thus, while the exact provisions vary from country to country, it is safe to conclude that there is a strong principle of integrity in notarial law, and that the notary is required to act so as not to compromise that integrity.

Here, as well as in the case of the Swedish broker, there are two dimensions that constitute the impartiality principle: the internal/external (relation to the contracting parties/relation to third parties) and the actual partiality/suspected partiality (active partiality/integrity). For the definitions of these dimensions, see above (5.1.3.1). Figure 6 illustrates the impartiality of the notary.

Figure 9 *Two Dimensions of Notary Impartiality: What Constitutes Infractions?*

	Actual	Integrity
Internal	<ul style="list-style-type: none"> • Treating one party as client and not the other • Representing a party when performing notarial function • Notarizing for oneself • Failing to counteract unbalances between parties 	<ul style="list-style-type: none"> • Notarizing for related persons • Business relations with a party • Notarizing for oneself
External	<ul style="list-style-type: none"> • Acting partially • Granting favors to third parties 	<ul style="list-style-type: none"> • Trading in real estate • Integrity-detrimental activities • Some places: advocacy

5.1.3.3 Comparison

Merely looking at figures 5 and 6 gives a good idea of how strikingly similar the impartiality rules governing the two professions are. The fact that both can be divided into the same dimensions, and be illustrated in identical tables, speaks for itself. This is not only an analytical similarity, resulting from pressing two separate entities into the same model. Rather, it is the result of lawgivers' similar – at times identical – rationales behind specific rules. For instance, it is perhaps not self-evident that impartiality presupposes integrity in the sense that the professional is prohibited from engaging in certain activities. The fact that some countries have limitations against operating as both notary and advocate, whereas others do not, attests to this. Yet lawgivers in both Sweden and the Latin-German countries have deemed the professional's integrity as important, on the ground that commitments to third parties may affect the professional's incentive to act impartially – or at least raise suspicions to that effect. The most astonishing part is the similarities in the legislative motives: after all, we are dealing with two completely separate professions with separate backgrounds and purposes!

The one noteworthy difference between the two professions is that the consumer perspective is more explicitly used to explain and advocate the impartiality principle when it comes to notaries than is the case with the Swedish broker. Given the focus on consumer protection in

the Swedish legislation, this is quite frankly surprising. Indeed, the legislative history, case law, and literature concerning the Swedish broker do not lack for references to consumer protection! The difference is that in Sweden, consumer protection has not been explicitly linked to impartiality in the same manner. The notary's obligation to observe impartiality entails an obligation to actively counterbalance any unbalances between the parties, so as to strengthen the weaker party. While doing so is by all means in line with sound estate agency practice as laid down in the EAA, it is not explicitly mentioned. Nor are the rationale behind, and the practical consequences of, impartiality as elaborated in Swedish law. One may of course speculate as to the cause of this, but it is interesting indeed to find such similarities – and in some respects more elaborate equivalents.

5.1.4 Conclusions

The two professions have been analyzed with respect to three distinguishing features: counseling, contract-engineering, and impartiality. While these three features in no way cover either profession completely, it is evident that there are highly interesting similarities. Bit by bit, the picture emerges of an impartial counselor with a duty to tailor the transaction in the interest of consumer protection, legal certainty, and the prevention of future disputes. Granted, there are irreconcilable differences between the Swedish broker and the Latin notary. Where the former is multi-disciplinary, trained and experienced in several fields including but not limited to law, economics, and construction engineering, the latter is a lawyer/jurist with a legal competence that far surpasses that of the broker, but no formal competence in other disciplines related to the real estate transaction. Where the chief purpose of the former is to find a suitable counterpart for her principal, the latter exists to formalize transactions, authenticate documents, and keep public records. Indeed, the common denominators can be construed as incidental. Yet they exist notwithstanding, and with good reason.

Perhaps it is more appropriate to speak, not of similarities in the features of different professions, but rather of a single *function*. After all, the similarities consist in appointed tasks and rules of conduct, laid down by law to serve similar, in some respects even identical, interests. Such a terminology is by no means alien; for instance, Art. 1 of the Argentinean notarial law distinguishes between the *profession* escribano and the notarial *function*. The question is, what is the nature of this common function? The next section will analyze the two professions with respect to the function they perform in real estate transactions and market.

5.2 Two Professions – One Function?

In the previous section it was suggested that the Swedish broker and the Latin notary may be performing the same function on the real estate market. Granted, the two professions differ from each other in many respects, but that is on the concrete, manifest level. On a more abstract level, beyond the statutes and provisions, there are tasks that are performed for a reason, because they are meaningful in some respect – because they constitute functions on the market and/or in society. This section discusses the functional aspects of the broker's and notary's counseling, contract-engineering, and impartiality.

5.2.1 Contact, contract, control

While it is in no way the intention of this writer to wade deep into economics, transaction cost economics (TCE) have produced a model that may be borrowed and used as a helpful tool. When assessing, analyzing, and discussing transaction costs (with the aim of minimizing those costs in the name of efficiency), the TCE divides the transaction into three separate phases: 1) contact, 2) contract, and 3) control.³¹³

- 1) *Contact* is the phase where the parties find each other on the market. There are of course costs associated with this, such as the buyer's search and the seller's marketing. If an intermediary such as a broker is hired, that represents a cost as well.
- 2) *Contract* is the phase where the parties negotiate the terms of the deal and puts those terms in a contract. The contract terms can of course be tacit as well as explicit. Another denomination for the costs associated with this phase is "bargaining costs". The costs of tailoring the transaction to fit the will and needs of the contracting parties are contract, or bargaining, costs. In this connection, standard contracts are an example of transaction cost saving contracts, since the specific terms do not need to be negotiated in every individual transaction.³¹⁴
- 3) *Control* is the phase where the contract has been entered and it is up for the parties to live up to it. In simple sales contracts, such as sales of commodities in supermarkets, this phase is an abstraction at best. In more long-term contracts, such as employment contracts or service contracts, there is always the issue of whether and to what extent the parties live up to the agreement. Costs associated with monitoring behavior or in any other way ascertaining that the other party is honoring the deal, are called control costs.

Now, the point here is not to measure transaction costs or whether brokers or notaries increase or decrease transaction costs. The only point is to borrow the three-step model of the transaction. Having done so, let us look at the model and conclude in which of these steps the respective professionals are involved.

In the case of the Swedish broker, she is obviously involved in the contact phase. Indeed, the matchmaking function is the core function of all brokerage. In this phase, after entering a brokerage agreement with the buyer or seller, she either searches for a property (where working for the buyer) or markets the seller's property. Moving on to the contract phase, she is involved in that phase too. Since real estate brokers traditionally have not had high competence in the field of law, this part of the broker's work has not typically received very much attention. However, as this study clearly attests to, the broker has extensive obligations with respect to bargaining and contract-engineering. Lastly, the control phase usually does not involve the broker. It is of course conceivable that the parties involve the broker in the case of a dispute, but it does not belong to the brokerage obligations and it is usually advisable that brokers decline to participate in disputes, referring instead to legal counsel in the form of an advocate.³¹⁵

³¹³ Kreps, pp. 743-769, Nooteboom, pp. 2-4.

³¹⁴ The fact that those standard contracts may sometimes be of a poor quality and therefore lead to future costs in the form of disputes, does not alter this since those costs are not "contract" costs but rather *ex post* costs.

³¹⁵ The problem for the broker is that she will still be subject to the impartiality requirement, and it is difficult indeed to navigate between that requirement and properly assisting the parties in case of dispute.

The notary, for his part, is not involved in the contact phase. In countries where it is permissible to act as broker, it is prohibited to act as authenticating notary in such transaction. Thus, he does not participate in matchmaking in the capacity of notary. The contract phase, on the other hand, is the notary's main arena, counseling the parties, ascertaining their informed will, and recording in it in a contract. As in the case of the broker, the control phase does not involve the notary. It is permissible for notaries to assist the parties *ex post*, as long as he observes the impartiality principle. Such assistance may be beneficial, especially in leveling the situation between strong and weak parties.³¹⁶ However, as yet such participation is a service and not a notarial function.

With respect to the three transaction phases in TCE, then, the parties' involvement can be summarized as follows. As can be seen, the common denominator is that assisting the parties in the contract phase are core functions of both professions.

Figure 10 *The involvement of the broker and notary in the transaction phases*

	Contact	Contract	Control
Broker	Core function	Core function	<i>Not involved</i>
Notary	<i>Not involved</i>	Core function	Not official function

5.2.2 Real Estate Functions

The previous section applied the TCE model of contact, contract, and control on the two professions. While the connection may prove fruitful for the purpose of assessing and analyzing transaction costs, it is not the only plausible way to explain the broker's and notary's respective functions. Where the TCE model focuses on the transaction, it is possible to focus instead on the real estate market as a whole. Limiting the scope to the residential real estate market, the functions are roughly the following (in no particular order). Firstly, there is matchmaking, or contact. This is accomplished by brokers, and constitutes the very heart of brokerage. However, contact could be accomplished by other means. There are various sites on the internet where buyers and sellers can meet. Secondly, there is bargaining and contract. As stated above, both the broker and the notary are involved here. However, this is not self-evident and it is of course possible to accomplish this in another way. Thirdly, there is the registration of land, titles, and other rights with respect to real estate. The broker is in no way involved in any of those activities, whereas the notary is; the degree of involvement varies from country to country depending on the countries' systems for real estate information.

In connection to the economic discourse concerning the regulation of notaries (see above 4.4), Arrañuda has published various articles on the economics of notaries. Among other things, he has contested the assertion that regulation of notarial services is needed to prevent adverse selection and guarantee quality. Firstly, the age-old notarial task of keeping records, and therefore also land titles, is being replaced by ever better recording and/or registration systems. Such systems, holds Arrañuda, can be entrusted to government agencies rather than

³¹⁶ Wagner, pp. 44-46.

notaries. Secondly, the growing presence in the market of repeat players such as lenders, real estate developers, and brokers, reach economies of scale in the preparation and safeguarding of contracts, reducing the demand for professional conveyancers. Further, the reputation mechanism produces enough incentives for those players to act fairly.³¹⁷

In the context of the aforementioned functions contact-contract-registration, Arrañuda seems to question the necessity of notarial services for the operation of any of these functions. There is, however, fault to be found with Arrañuda's arguments. It is certainly true that it is not self-evident that any of the presented functions be accomplished through a notary, or indeed a broker. As stated above, the parties can of course negotiate the terms themselves and draw up the contracts. However, there is a factor missing in the equation, owing to the incompleteness of the model. The problem with the model is that it is one-dimensional in the sense that it takes into account only the easily observable dimensions of the market. It fails to take note of the quality of the performance, particularly legal quality and fairness. Legal quality is of course hard to measure, especially for consumers, especially the intrinsic quality that comes from the expertise of the professional. For instance, a para-legal performing a few appointed tasks cannot be expected to give legal advice of the same quality as a trained legal professional. It is not only a matter of getting a few frequently recurrent items right, for which there are routines and standardized contracts. The quality of the service also consists in adapting to specific circumstances and tailoring a solution that fits the needs of the parties at hand. Such dimensions cannot be measured, especially not through consumer surveys since consumers typically cannot tell the difference between good and bad advice, much less between average and very good advice. Secondly, and this is connected to the foregoing, Arrañuda's view of the notary's tasks and role is too narrow. Even though a modern registration system can probably replace the notary with respect to land titles, and repeat players on the market can replace some of the notary's standard contract-drafting work, there is still the matter of impartial counseling. Para-legals at a government agency cannot offer this service. Construction/development companies, who act as buyers' counterparts, will certainly not.

Ironically, it seems that by contesting the arguments for deregulating the notary profession, the common function of the Swedish broker and the Latin notary is finally found: the unique combination of services/functions that these two professionals carry out and that will hardly be performed by others, namely *impartial counseling and contract-engineering*, aimed at *tailoring the transaction to fit the will and needs of the parties*, always *striving to prevent future disputes*. All other functions and services performed by the broker and notary can be performed by others, but this function is unique.

The extent to which impartial counseling and contract-engineering is desirable is naturally another matter entirely. Intuitively, it seems the following arguments can be used to advocate this function: 1) equitability, 2) consumer protection, and 3) prevention of future disputes.

- 1) *Equitability* – Where the professional sees that a party is being unduly prejudiced, he/she must act, at least giving special counsel to that party. This promotes equitable contracts especially where there is an unbalance between the parties with respect to education, means, and/or expertise.

³¹⁷ Arrañuda 2007, pp. 13-14.

- 2) *Consumer protection* – As stated above (chapter 1), there is no uniform definition of consumer protection, and therefore no one single explicit purpose. However, it is not hard to trace both an equitability argument and an economic argument behind such rules. The equitability argument is intuitive: the consumer is less informed than the producer and is therefore in a weaker position. The consumer is also disadvantaged by an unbalance in economic power, legal expertise, etc. Therefore, it is equitable to protect consumers to prevent them from being unduly prejudiced on the market. The economic argument is close to the theory of market failure, more precisely asymmetric information in the form of moral hazard and adverse selection. Since the consumer cannot tell the quality of the service, she cannot tell whether the professional is performing properly. Also, for the same reason, she will not be willing to pay for high quality, driving high quality providers out of the market. Consumer protection can therefore take various shapes to change the equation. Firstly, it could be in the form of monitoring the professional so that they act properly despite the contrary incentives giving rise to moral hazard and adverse selection. An example of this is the Swedish BSEA monitoring brokers. Secondly, it could take the form of ensuring that consumers are better informed. That, in turn, can of course be accomplished to some extent by information from government agencies, especially online. However, it can also be accomplished by placing an obligation on brokers and notaries to be active and observant and provide impartial counseling.
- 3) *Prevention of future disputes* – Disputes could be construed as an *ex post* transaction cost for the parties. Preventing them is therefore to lower transaction costs for the parties. However, legal disputes also represent a cost for society. Preventing them is therefore of public interest as well. In that sense, brokers and notaries can be to a said to act as keepers of the contractual peace.

6 Conclusions

The present study has examined the obligations of the Swedish broker and the Latin notary with respect to impartiality, counseling, and drawing up of contract. To begin with, it can be concluded that the rules governing the notary in the nine examined countries are either identical or strikingly similar. Either way, it is both possible and correct to refer to the Latin notary as one profession and legal character despite the fact that it is governed by national laws. As for the common traits of the two professions, the common traits correspond to the posed research questions. Both professions are required to act impartially in relation to the contracting parties and to third parties, and to safeguard their impartiality against undue influence that may raise suspicions among the public that they are not impartial. Both professionals are required to assist the parties in drawing up the necessary contracts. In so doing, the two professionals must ascertain the informed will of both parties and tailor the contracts thereafter. Partly to that end, both professions must counsel the parties, taking particular account of any unbalance between the parties with respect to economic power, education, or expertise. These obligations and interests combined constitute a function on the real estate market, consisting in

- 1) impartial counseling and contract-engineering,
- 2) with the aim of tailoring the transaction to the informed will and needs of the contracting parties, and
- 3) striving to prevent future disputes.

There is of course no term for this function, much less a name for an existing legal character performing exactly these functions and nothing else. A plausible term that could summarize the function is “impartial contract-engineering”.

The study touches various interesting subjects that have not been dealt with. The most prominent of these are:

- 1) analyzing the presented contract-engineering function with respect to transaction costs;
- 2) assessing the economic value of legal security and contractual peace; and
- 3) analyzing the presented contract-engineering function with respect to consumer protection.

These issues are interesting indeed. Whether they are to be approached by this writer or somebody else remains to be seen. However, a more pressing issue hinted at in the foregoing, is to continue analyzing the different functions on the real estate market. This study has analyzed and discussed the functions performed by the Swedish broker and the Latin notary, namely contact and contract, particularly impartial counseling in the contract phase. To complete the picture, the next logical step is to move on to examine, analyze and discuss the different countries’ systems and rules concerning real estate information. Hopefully, such a study will be able to produce a useful tool to analyze the real estate market and its players. This, in turn, will be helpful indeed in future discussions – whether political, economic, or legal - concerning European harmonizations.

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11645-04	Impartiality, representing a party
21503-05	Impartiality, related person
23380-05	Contract, inspection clause, unclear clause
28148-05	Contract, impartiality
645-06	Contract, inspection clause, regulate all relevant issues
889-06	Contract, documenting the agreement
1683-06	Contract, inspection clause, unclear clause
9244-06	Impartiality, trustworthiness, loan to contracting party
19859-06	Counseling, incorrect information
20260-06	Contract, inspection clause, unclear clause
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