Impartial Legal Counsel in Real Estate Conveyances

The Swedish Broker and the Latin Notary

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Abstract

Real estate conveyances are accomplished differently and by different players across Europe. The European Union houses four basic regimes, related to the classical "legal families": 1) The Latin-German notary regime, where the public notary plays the central role, 2) the partly deregulated Dutch notary regime, 3) the lawyer/solicitor regime, prevalent on the British Isles, where conveyances are traditionally accomplished by solicitors, and 4) the Nordic regulated real estate broker regime.

The comparative studies that have been conducted with respect to these regimes have focused on the economic impact—with particular regard to transaction costs—of regulation, particularly that concerning the Latin-German notary profession. The studies, while having great merit, are incomplete insofar as they fail to properly take into account, *inter alia*, the legal framework of the respective regimes and the functions performed by the key players.

The present dissertation examines, compares, and analyzes the nature and scope of the non-litigious legal counsel that buyers and sellers of real estate can expect to receive—without hiring lawyers to represent them—under the Latin-German regime and the Swedish regime. To that end, the Swedish real estate broker and the Latin notary are examined and compared with respect to the role they play in real estate conveyances and their duty to give counsel to the contracting parties. The study is conducted in two steps: first a general overview of the professions' duties and roles, followed by a more detailed juxtaposition of their duty to counsel. The first part comprises Sweden and nine notary regime countries: Argentina, Belgium, Brazil, France, Germany, Mexico, Portugal Puerto Rico, and Spain. The second part focuses on Sweden and France.

The two professions share two main traits: a duty of impartiality and a duty to counsel. The duty to counsel of the Swedish broker and the French notary are strikingly similar and consists in four sub-duties: 1) to conduct verifications to ascertain facts, 2) to disclose relevant information, 3) to give adequate advice, and 4) to draw up all necessary deeds in a manner that is tailored to the instant transaction. The duty of impartiality and the duty to counsel amount to a specific function in real estate conveyances, common to both professions—namely that of impartial counsel.

The desirability of the different regimes can be assessed and discussed from several perspectives, including but not limited to the economic perspective. In general terms, a regime can be said to be desirable if the produced utility exceeds the costs. The question is how to properly measure utility and costs. In limiting studies to such factors as can be readily measured, mainly pecuniary costs, one obtains an incomplete picture since there may be utility and costs that remain unaccounted for. For instance, the extent to which the state should interfere in the marketplace is not merely an economical issue but also an ideological issue. How does one account for ideologically conditioned utility and costs? One way to obtain more solid information is to study the regimes' institutional robustness; that is, their ability to produce the desired results. For instance, harmful incentives for key players such as brokers and notaries may have an adverse effect on the performance of their assigned functions. Future research should focus on these issues.

Sammanfattning

Fastighetsöverlåtelser sker på olika sätt och med inblandning av olika aktörer i Europas länder. Behandlingen av fastighetsöverlåtelser i EU:s medlemsstaters rättsordningar kan grovt delas in i fyra kategorier, som har nära samband med de klassiska rättsliga ”familjerna": 1) Den latinsk-tyska notariemodellen, där notarius publicus spelar en central roll, 2) den delvis avreglerade holländska notariemodellen, 3) solicitormodellen, som förekommer på de brittiska öarna och där överlåtelser av hävd genomförs av advokater samt 4) den nordiska modellen med ett reglerat fastighetsmäklaryrke.

De jämförande studier som har genomförts med avseende på dessa modeller har främst fokuserat på de ekonomiska effekterna, särskilt med avseende på sambandet mellan reglering och transaktionskostnader, med stort fokus på den latinsk-tyska notariens roll. Även om dessa studier odiskutabelt är av stort värde, är de ofullständiga i så måtto att de inte tar hänsyn till de rättsliga och institutionella ramarna för respektive modell. Inte heller beaktas de funktioner som respektive modells nyckelaktörer fyller. En av dessa funktioner är juridisk rådgivning, vilket kan omfatta allt från enkla upplysningar till normativa råd om hur kunden lämpligen bör agera.

Föreliggande avhandling undersöker, jämför och analyserar vilken juridisk rådgivning köpare och säljare av fastigheter kan räkna med att få – utan att anlita juridiskt ombud – enligt den latinska-tyska modellen respektive den svenska modellen. Mer specifikt jämförs den svenska fastighetsmäklaren och den latinska notarien med avseende på den roll respektive profession spelar i fastighetsöverlåtelser samt deras skyldighet att ge råd och vägledning till parterna. Studien genomförs i två steg: först en allmän översikt över respektive professions skyldigheter och ställning gentemot parterna, följt av en mer detaljerad redogörelse för deras rådgivningsplikt. I den första delen studeras Sverige och nio notarieländer: Argentina, Belgien, Brasilien, Frankrike, Tyskland, Mexiko, Portugal Puerto Rico, och Spanien. I den andra delen studeras Sverige och Frankrike på ett mer djuplodande sätt.

De två professionerna har framför allt två gemensamma huvuddrag: en skyldighet att vara opartisk och en rådgivningsplikt. Den svenska fastighetsmäklarens och den franska notariens respektive rådgivningsplikt är förbluffande lika och består i: 1) att genomföra kontroller för att fastställa vissa fakta, främst rörande säljarens förfoganderätt och rättsliga belastningar i köpeobjektet, 2) att lämna relevant information, 3) att ge adekvat rådgivning, och 4) att upprätta nödvändiga handlingar på ett sätt som är anpassat till den enskilda transaktionen. Skyldigheten att vara opartisk och rådgivningsplikten utgör tillsammans en specifik funktion i fastighetsöverlåtelser, som i Sverige utövas av fastighetsmäklaren och i Frankrike och övriga notarieländer av notarien: opartisk rådgivning.

Önskvärdheten och ändamålsenligheten i de olika modellerna kan bedömas och diskuteras ur flera perspektiv, inte minst ett ekonomiskt perspektiv. Generellt uttryckt kan en modell sägas vara önskvärd om den producerade nyttan överstiger kostnaderna. Frågan är hur man på ett adekvat sätt mäter nytta och kostnader. Genom att begränsa rättsekonomiska studier till sådana faktorer som lätt kan mätas, främst pekuniära kostnader, riskerar man att få en ofullständig bild eftersom det kan finnas nytta och kostnader som man inte lyckats mäta och därmed inte tagit hänsyn till. Exempelvis är frågan om i vilken utsträckning staten bör ingripa på marknaden inte bara en ekonomisk fråga, utan även en ideologisk fråga. Hur mäter man sådan nytta och sådana kostnader?

Ett alternativt sätt att utvärdera de olika modellerna är att studera deras *institutionella robusthet*, det vill säga deras förmåga att ge de önskade resultaten. Till exempel kan skadliga incitament för nyckelaktörer såsom mäklare och notarier ha en ogynnsam effekt på utförandet av deras tilldelade uppgifter. Framtida forskning bör fokusera på dessa frågor.

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Preface

The vagabond heart has its home, not in a point of origin or of destination, not in a particular culture or nation—but in the many and manifold places, faces, events, languages, and sensations where it has left little pieces of itself. To pick up a combination of those pieces, even for the briefest of moments, and use them to create and to craft is for the vagabond heart not merely to fashion a memento of the past or a manifesto for the present, but to mold a key that opens the door to its home.

Needless to say, there are a number of people to whom I owe thanks for their assistance in making this dissertation possible. My first thanks go to my supervisor, professor Hans Lind, not only for all the academic and scientific guidance and sublime inspiration, but also for helping me steer through the squallish winds of interdisciplinarity and never lose focus on the way forward. My thanks also to my assistant supervisor, professor Hans Mattsson, for excellent input.

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I thank everybody at the FMI (formerly FMN), who never get enough credit for their contributions to the evolution of real estate brokerage law.

I thank my fellow law teachers and my other wonderful colleagues at the Department of Urban Studies at Malmö University for their patience with me during this journey.

My most special thanks, always, to my wife Michelle and our son Valdemar—you are my everything.

Oh, and nobody really thought I was going to leave out Harry, right? The coolest, toughest, and most wonderfully obnoxious dachshund around.

Malmö, November 29th, 2012

Ola Jingryd

Abbreviations

ARN	*Allmänna reklamationsnämnden*, National Board for Consumer Disputes
BGB	*Bürgerliches Gesetzbuch*
CC	Code Civil
CCH	*Code de la construction et de l'habitation*
EC	European Community
ECJ	European Court of Justice
FMI	*Fastighetsmäklarinspektionen,* Estate Agents Inspectorate (used as of Aug 1st, 2012)
FML	*Fastighetsmäklarlagen,* Estate Agents Act (2011:1066)
FMN	*Fastighetsmäklarnämnden*, Board of Supervision of Estate Agents (used before aug 1st, 2012)
FR	*Förvaltningsrätten,* Administrative Court of First Instance (as of Feb 15th, 2011)
FRN	*Fastighetsmarknadens reklamationsnämnd*, Real Estate Industry Board for Consumer Disputes
KamR	*Kammarrätten,* Administrative Court of Appeals
LC	Land Code (1970:944)
LR	*Länsrätten*, Administrative Court of First Instance (before Feb 15th, 2010)
MC	Marriage Code (1987:230)
RH	*Rättsfall från hovrätterna*, Court cases from the Courts of Appeals
RK	*Rättsfall från kammarrätten*, Court cases from the Administrative Court of Appeals
SA	Sales Act (1990:931)
TOA	Tenant Ownership Act (1991:614)

1 Introduction

1.1 Background

On May 24th, 2011, The European Court of Justice rendered its judgments in cases C-47/08 Commission v. Belgium, C-50/08 Commission v. France, C-51/08 Commission v. Luxembourg, C-53/08 Commission v. Austria, C-54/08 Commission v. Germany, C-61/08 Commission v. Greece, and C-52/08 Commission v. Portugal. The cases concerned the same issue, namely the nationality requirement in the laws of said member states to practice the profession of notary. Under those laws, the notary profession was closed to citizens from other EU member states. The position of the commission was that the nationality requirements were in breach of the freedom of establishment under Art. 43 of the EC Treaty. In their defense, the concerned member states objected that notaries exercise public authority and that the notary profession was therefore exempt from the freedom of establishment by virtue of Art 45 of the same treaty.

The public authority held to be exercised by notaries consists mainly in the authentication of documents such as e.g. real estate conveyance deeds. Authentication, held the defendant states, was an important state function in that it conferred, through the *publica fides* vested in the notary by the state, on the authenticated documents full probative value and immediate enforceability. Furthermore, by guaranteeing the legality and efficacy of the instruments, notaries also performed an important public service by promoting legal certainty.

The court observed that authentication by the notary presupposes the consent of all concerned parties, since the notary has no power to force the parties to accept terms they do not wish to accept. Though the notary may suggest changes to a draft agreement, the parties' consent must be obtained before the draft can be altered. Thus, held the court, the activity of authentication does not involve a direct and specific connection with the exercise of public authority. The court further held that the fact that notaries perform a service to the public by verifying the lawfulness and efficacy of the instruments was not enough to render the notarial profession exempt under Art. 45. Consequently, the ECJ ruled that the nationality requirements of the concerned member states constituted discrimination on grounds of nationality prohibited by the EC Treaty.

The judgments marked the end of a decade-long struggle within the EU, pursued under the flag of non-discrimination, and spurred not least by the initiative and tireless lobbying of British solicitor and notary public Mark Kober-Smith. A British national with an interest in European law, Kober-Smith found fault with above all the nationality requirement to practice the notary profession. In 1999 he made a complaint to the European Commission. In 2011, his work finally bore fruit.[1]

On November 23rd, 2011, The Disciplinary Board of the Swedish Board of Supervision of Estate Agents, the FMN (since August 1st, 2012 called the Estate Agents Inspectorate[2]), rendered its decision in case FMN 2011-11-23:2. The case concerned the sale of a rural property comprising a residential house, a stable, a garage, and 25,031 m^2 land. The sellers informed the broker before the property was put on the market that they planned to partition roughly 3500 m^2 from the property before the

[1] Mark Kober-Smith deceased on January 27th, 2012. He described his lobbying work in his book entitled *Legal Lobbying: How to Make Your Voice Heard* published in 2000.
[2] See 1.4.4 below.

sale; however, they could not specify an exact area figure. The advertisement said that the property would be partitioned and that the area size after the partition would be 21,500 m^2. A buyer was found. The broker drew up a sales contract with the following clause:

"The buyers are aware that the property is sold with exception for [the] piece of land indicated on the appended cadastral map. The estimated area to be partitioned is approximately 3500 m^2. Buyer and seller accept deviances up to 700 m^2 without adjustment of the sale price. The boundary is fixed in consultation with the surveyor at the stone fence. The buyers are further informed that the partition has not begun and that it will not be completed before the day of possession. The partition cost is borne by the seller."

After the sale, it turned out that the partitioned land amounted to 5,337 m^2. While unexpected, the result was inevitable given that the boundary was to be drawn at the stone fence. The buyers were advised by counsel that they would not be able to classify the property as an agricultural property if they accepted the partition, and hence refused to accept it. The dispute reached the District Court, who overturned the surveyor's partition decision. The buyer and seller subsequently met with the surveyor and reached an agreement. The broker drew up new conveyance deeds with the assistance of her attorney and the surveyor.

The seller reported the broker to the FMN. The FMN observed that under 4:1 of the Land Code, the conveyance deed must, *inter alia*, specify a sale price in order to be valid. Since, by virtue of the cited clause, the contract failed to specify a sale price in the event the partition should deviate from 3500 m^2 by more than 700 m^2, the FMN held that the contract was null and void. For drawing up an invalid sales contract, the broker was found in breach of her duty to exercise due care. The broker was issued a disciplinary warning.

The reviewed cases are evidently not directly connected. Their nature is also quite different. Whereas the ECJ rulings are a part of an ongoing process where the position in Europe of the age-old profession of the Latin notary is being seriously challenged—but also vigorously defended—the Swedish FMN case is merely a standard issue disciplinary case where a broker is issued a disciplinary sanction for drawing up an invalid sales contract in a real estate conveyance. However, one very interesting detail is clear from the reviewed cases: Latin notaries and Swedish real estate brokers have a responsibility to give counsel to the parties in the conveyance. In case C-50/08, *Commission v. France*, the Commission observed *en passant* that the notary gives legal effect to the intentions of the parties *after advising them*.[3] In FMN 2011-11-23:2, the FMN observed that under 16 § of the Estate Agents Act, the broker is obliged to give the parties the advice they may need with respect to the property and other issues related to the conveyance. Thus, based on these seemingly isolated cases alone, it can be concluded that these two, quite different, professions have an advisory role in real estate conveyances.

The conclusion may appear trivial. However, observed against the backdrop of the European controversies concerning the notary profession and the high-profile studies concerning real estate conveyances in Europe, it is anything but. In December, 2007, Schmidt et. al published their report COMP/2006/D3/003 *Conveyancing Services Market,* called the ZERP[4] Report. Schmidt et al., working on behalf of the European Commission, compared the way real estate conveyances are accomplished

[3] C-50/08, at 40.

[4] *Zentrum für Europäische Rechtspolitik an der Universität Bremen*.

under the various regimes in the EU member states. First, four regimes for real estate conveyances were identified:

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.

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 typically 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.[5]

Based on the national reports in the studied countries, it was concluded that the Latin-German notary regime was expensive and inefficient. Deregulation of the notary profession was proposed as a way to lower costs for consumers and increase utility. At roughly the same time, another study, conducted by scholars from Harvard University headed by Peter L. Murray, with the title *Real Estate Conveyancing in 5 European Union Member States: A Comparative Study* (the Murray Report) was published.

The ZERP Report, which despite the contributions of legal expertise to the reports from the studied countries must be labeled a singularly economics-oriented study, calls for immediate reform of the conveyancing market in the Latin notary countries. The Murray report, where the relative merits of the different regimes are analyzed more closely and from different perspectives, notably the consumer protection perspective, is less conclusive.

Where the ZERP Report concludes that the services performed by notaries can - with the right institutional framework - be performed just as well by private legal professionals or even brokers, the Murray report states that the German, French, and Estonian regimes offer high consumer protection by requiring notaries to disclose information and give impartial advice. The Swedish broker, however,

[5] *Mäklarsamfundet*, the largest real estate broker association in Sweden, issued the so-called *Riksprovisionstaxan*, recommended fees, until the enactment of the 1993 Competition Act (today replaced by the 2008 statute with the same name).

is held in the Murray report to be incapable of offering impartial legal advice as a result of her conflict of interest and her modest legal training.[6]

It is evident that the two studies are in conflict. Given that the ZERP Report was conducted at the behest of the European Commission, whereas the Murray Report was similarly commissioned by the Council of the Notariats of the European Union (CNUE[7]), this is by no means surprising. The question is, is either of them really correct? Are the findings sound?

As to the ZERP Report, it might be construed as a tad one-dimensional to bestow on strict economic figures the role of supreme policy interest. That flaw is admittedly not unique to the ZERP Report but rather inherent in the field of law-and-economics where—inspired *inter alia* by Ronald Coase´s theories—the pursuit of minimized transaction costs is deemed of paramount importancbande. Now, minimizing transaction costs is considered by many to be a legitimate and important policy interest, and with good reason. However, it is by no means certain that single-minded deregulation is the best way to achieve that end. Market failures arising from asymmetric information can easily offset the benefits one hopes to reap from deregulation.[8]

Whatever the virtues of seeking to minimize transaction costs, analyzing key figures without taking into account the institutional framework provides for insufficient evidence for such long-reaching conclusions as those proposed in the ZERP Report. For instance, Sweden is pointed out as an example of how consumers can handle the conveyance without intervention, by using pre-formulated standard agreements. This is used as an argument against the pro-notariat argument that notarial counsel is a form of consumer protection.[9] While it is true that the Swedish regime makes it possible to convey real estate quite easily and speedily, the fact that consumers can handle the conveyance themselves can never be construed as a form of consumer protection. Nor is it proof that there is no need for consumer protection. Thus, the argument is flawed. Moreover, are pre-formulated standard contracts really adequate conveyance deeds? That presupposes that all conveyances are equal, which is simply not true. On the contrary, all transactions are unique. To name but one example, is it reasonable to include contingency clauses in all sales contracts? Is it reasonable to exclude them from all contracts? How are consumers meant to know which alternative would best suit their needs?

As regards the Murray report, the author is quite quick in dismissing the broker's ability to give proper counsel and thus guide the parties through the transaction. Swedish brokers are required by 8 and 16 §§ of the Estate Agents Act to safeguard the interests of both parties and to give both parties adequate advice. True, since the broker is hired by one of the parties, there is an inherent incentive to lean towards that party. That would seem to work against giving impartial advice. However, it is widely known that incentives can be counteracted. For instance, many people seem to have a natural inclination towards speeding. However, when the individual is faced with stern and steadfast enforcement of speed limits, that incentive is at least mitigated. Moreover, if the marketplace were to reward players who follow the rules and punish those who do not, there would be a powerful

[6] Murray, p. 91.
[7] *Conseil des Notariats de l'Union Européenne.*
[8] There may of course be other problems as well. The fact that a market is nominally open for competition is no guarantee that there will be sound and fair competition. The many problems in competition law attest to that.
[9] ZERP Report, p. 50.

economic incentive to follow the rules. In such a scenario, it would be incorrect to assert that brokers cannot fulfill the advisory role performed by notaries simply because of who their principal is.

It is evident that there is an important dimension lacking in both studies, namely the institutional dimension: how well do the different regimes perform? Is the institutional framework such that the respective regimes can or could function properly? Analyzing all aspects of real estate conveyances would be an epic endeavor. However, an important key seems to be found in one particular activity discussed in the reports: that of impartial advice. Under the Latin-German regime, the professional assigned this role is the notary. Under the Swedish regime, the assigned professional is the real estate broker. Let us focus on that issue. Can advice to both buyer and seller be of value in a real estate conveyance? The answer must be an unreserved yes. However, that does not mean that the value exceeds the cost. Both the value of the advice given, and the answer to the question of whether that value exceeds the cost, depend on what advice is given and how it is given.

It would seem, then, that it is desirable to examine how well the Latin-German and Swedish regimes perform with respect to impartial advice. To that end, it is necessary to examine the nature of the advisory intervention performed by the Latin notary and the Swedish real estate broker. For reasons that will be elaborated in chapter 2, it problematic to investigate what notaries and brokers *actually* do in the physical world. However, one can obtain equivalent insights by examining what they *are meant* to do. That means examining the law.

The law concerning Swedish brokers and Latin notaries is by no means *terra incognita*. However, the legal works that exist are either completely national or at least not comparative in their nature. Thus, the existing legal works are solid and specific but lack the international perspective. As for comparative studies, the two aforementioned reports stand out as the two most important works.[10] However, in terms of legal solidity and specificity, the two studies are lacking. Thus, what is needed is a comparative study that entails a detailed legal examination of the compared regimes.

1.2 Purpose

The purpose of the present dissertation is to examine, compare, and analyze the nature and scope of the non-litigious legal counsel that buyers and sellers of real estate can expect to receive—without hiring lawyers to represent them—under the Latin-German regime and the Swedish regime. To that end, the Swedish real estate broker and the Latin notary will be examined and compared with respect to the role they play in real estate conveyances and their duty to give counsel to the contracting parties.

The nature of the legal counsel—or indeed any counsel—given by one party to another is inevitably conditioned by the counselor's relation towards the client and the client's counterpart. If the counselor is hired to represent one of the parties, as is the case with lawyers/solicitors/attorneys, the counselor cannot be expected to safeguard the interests of their client's counterpart. Similarly, even if the counselor is obliged by law or otherwise expected to give counsel to both buyer and seller, the role the counselor plays in the transaction and/or their relation towards the contracting parties may

[10] Sylwia Lindqvist (2011) also bears mentioning; however, that study is more focused on the transaction process and the obstacles that may be experienced than the institutional framework.

give incentive to give low-quality counsel, or none at all, to the buyer and/or the seller. Therefore, the roles played by the Swedish broker and the Latin notary in real estate conveyances, and their respective duty of impartiality must be examined and compared to provide a proper backdrop for the duty to give counsel.

The dissertation is divided into two parts. The first part examines the respective roles played by the Swedish broker and the Latin notary in real estate conveyances, and their relation to the contracting parties. Particular focus is placed on the duty of impartiality. As regards the Latin notary, the first part entails a general approach where the relevant laws of nine countries—Argentina, Belgium, Brazil, France, Germany, Mexico, Portugal, Puerto Rico, and Spain—will be examined. However, as the second step requires a far more detailed examination, the Latin notary will be studied with France as a proxy.

The second part examines in more detail the nature and scope of the legal counsel the Swedish broker and the Latin notary are obliged by law to give the parties. This entails a detailed examination of the specific obligations in which the duty to counsel consists.

To facilitate the fulfillment of the stated purpose, the following research questions will be answered:

1. What is the general role played by the Swedish broker and the Latin notary in real estate conveyances?

2. What is the scope and nature of the Swedish broker's and the Latin notary's duty of impartiality? What duties and/or prohibitions does it entail?

3. What is the scope and nature of the Swedish broker's and the French notary's duty to give counsel? What duties and/or prohibitions does it entail?

The result from this analysis will also be used for a more general discussion of the advantages and disadvantages of the systems under study.

A common trait of Swedish brokerage law and notarial law (in France and the other countries) is that they have two subfields: 1) the law regulating the profession and how the broker/notary must carry out their work, and 2) the substantive law meant to be applied by the broker/notary - such as property law, inheritance law, tax law, etc. - and in which the professional must therefore be versed. It is the former that is the primary focus of this dissertation. However, to make the obligations of the broker and the notary comprehensible, substantive rules in the latter category will at times be treated and even analyzed.

1.3 Scope

For reasons that I will elaborate in chapter 2, I have chosen to make this a study of law. Admittedly, examining and discussing how real estate conveyances are accomplished under two different regimes in Europe could potentially be interesting in several disciplines, not least economics. Moreover, as hinted in 1.1 above, the subject has clear economic implications. It is my sincere hope that this study could provide new insights that could be of value in the economic discourse

surrounding real estate conveyances. However, I make no claims to provide new empirical findings within the field of economics or any other field of science besides law.

The study concerns two main aspects of the Swedish broker and the Latin notary: the duty of impartiality and the duty to give counsel. The scope is tailored so as to fulfill the purpose stated in 1.2 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—including those that constitute 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 research project in its own right. They have therefore not been studied.

I have chosen to give a historical background to the Latin notary, but have opted not to do so in the case of the Swedish broker. This provides for an asymmetry that may seem unwarranted. However, whereas the Latin notary is intrinsically bound to real estate conveyances and other central parts of private law—which can be explained and put into context by a historical outlook—the broker profession does not share such ties to the conveyance. Therefore, a historical outlook regarding the broker, while undoubtedly interesting in its own right, would not yield any further insights in the present context. Indeed, a historical account in the case of Sweden would by rights focus on the history of the rules concerning the conveyance itself. Westerlind has given an excellent such account—revealing, *inter alia*, that the notion of involving the state in real estate conveyances was considered but rejected in the early 20th century.[11] This is of course interesting as a point of reference given that notaries perform precisely such a function. However, since the broker is not mentioned in those discussions, I have chosen not to explore that subject further.

Finally, since notaries perform public functions, they are 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.

1.4 Terminology

1.4.1 Language Barriers and the Use of the Word "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 my humble opinion, 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, that the English word *billion* means 1,000,000,000 in the U.S. whereas it means 1,000,000,000,000 in the U.K. Whether in dollars, pounds, or euro, even despite the current market value of the latter, the difference is still considerable! To name an

[11] Westerlind, pp. 243-244, 254.

example from the realm of law, consider the manifold association forms found in different countries: e.g. the *handelsbolag* (HB) and the *aktiebolag* (AB) in Sweden, compared to the *Gesellschaft mit beschränkter Haftung* **(**GmbH) and the *Aktiengesellschaft* (AG) in Germany. They are not identical counterparts. At times, the difference between different terms is not evident even in one's home language. For instance, as will be treated in chapter 11, the Swedish term *häva* means "cancel" or "terminate", which is understood to be a sanction available to a party to a contract in the event of breach of contract by the other party. However, the term is often confused with *frånträda*, which is a term used specifically for contingency clauses to denote the right under such clauses to withdraw from the contract. In practice, these terms are—mistakenly—used interchangeably by brokers and lawyers alike. A direct translation of a text where the word *häva* is used incorrectly may give an English-speaking reader the false impression that a breach of contract has taken place, when in fact the buyer has merely withdrawn from the purchase by virtue of the contingency clause.

Thus, there is an inherent language problem in all international contexts, including comparative studies. Legal terms may have an approximate equivalent in other languages, but differences in legal provisions, regimes, or cultures oftentimes make for a substantial incongruence. An excellent example of this can be found in the efforts to create the CEN European standard for services of real estate agents, EN 15733.[12] The real estate professional association CEI initiated the creation of a European standard in 2006. In January, 2010, the standard was published by the European Committee for Standardization (CEN), marking the end of four years of hard work.

During the course of the four years, the participating 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. In the case of Sweden, as will be demonstrated in chapter 3, the 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” has a specific connotation. It is an English word[13], developed to describe a legal character existing in the Anglo-Saxon legal-cultural family where the broker does indeed work on behalf of her principal. Therefore, using the term “agent” would seem inadequate when discussing the Swedish professional.

The common trait of the professional at issue 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 an reasonable term for a person who engages in brokerage is “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

[12] EN 15733 *Services of real estate agents - Requirements for the provision of services of real estate agents*. The Swedish committee consisted of the FMN, the Consumer Agency, Mäklarsamfundet, the consumer organization Sveriges Konsumenter, and Malmö University.
[13] Admittedly, the origin of the word is not English but Latin.

who, despite these stated reasons, have issues with this choice of terminology, I believe it is well within my academic and literary discretion. The terms “agent” and the very English "estate agent" will, however, appear in quotations of legal provisions or of other writers, as well as in names and titles.

1.4.2 The Use of Gender Words

It seems a reasonable position that gender issues, while relevant important in many parts of life and society, are not of prime importance in a dissertation in law and real estate science. However, it is an indisputable fact that the language of any text has implications for the reader, whether intended or not. Therefore, it would be naïve to disregard the notion that gender issues may find their way even into a text such as the present one. One way is through the use of gender words. Now, it could be argued that if one accepts the concept of gender equality—if not as a general political ideal, then at least insofar as holding that gender has no bearing on the subject matter at hand—there is no need to discuss the use of gender words as they do not have any particular connotations. Indeed, when discussing e.g. the obligations of real estate brokers towards buyers and sellers—does it really matter whether the broker is male or female, or transgender? Notwithstanding, not all agree with that proposition (disguised as a question). Hence, the gender issue must be addressed.

Thus, to forestall any objections 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 gender ratio among students attending the real estate brokerage program at Malmö University gives the clear impression 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.[14] The use of the feminine gender should therefore not be interpreted as an assertion of facts, nor as a political statement.

- *The notary is a man*. All references to notaries are masculine. This decision is even easier to explain than the previous: since the female preposition 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 deliberate strategy as to the gender of the buyer and seller, save one: not to have a strategy. Thus, sellers and buyers are sometimes denoted as female, sometimes as male.

[14] Again, given the principle of gender equality, it is hard to see the point of such a feat.

1.4.3 The Words "Counsel" and "Advice"

In chapters 8-11, I will demonstrate that the Swedish real estate broker and the French notary are bound to a duty to counsel. This duty consists in several sub-duties, one of which is to give adequate advice. Now, the words "counsel" and "advice" would seem to mean the same thing. How can I then distinguish between them in this manner, and hold that one is an overriding concept whereas the other is but an exemplification? The fact of the matter is that I am perfectly aware that there is no such distinction in the general language. However, for the sake of the subject matter I need to make a distinction in order to demonstrate that the two professions play the role of counselor in real estate conveyances, and that this role consists in several specific duties. Other options that I considered were to refer to the overriding concept as the "counseling role" or the "advisory function". However, the former option could give the wrong idea since the word "counseling" is generally used to describe the work of psychologists. The latter option was not viable because I use the word "function" in another sense in chapter 13. Thus, the least of all evils seems to be to distinguish between counsel and advice. It is a fine line to tread, to be sure, but assigning names and terms is hardly ever straightforward.

1.4.4 Terms, Titles, Names, and Abbreviations

The way in which the sources of law, the courts, the government agencies, and the various legal or technical terms are denoted is an important issue under any circumstances. The use of terms, titles, names, and abbreviations should be correct. In a study such as the present one, where the laws of ten different countries with five different languages—none of them English—are presented and discussed in English, it is of great importance to translate names and terms in an adequate manner. The problem is, this is not always straightforward. Three different types of situations present themselves: 1) where there are established translations, 2) where there are no established translations but it is possible to make a fair translation that is not misleading and 3) where it is difficult, perhaps impossible, to make a translation that is not misleading in some way.

As to the first category, if there is an established translation of a word, it would seem appropriate to use it. In the case of statutes, courts, and government agencies, there is an official dimension that must be considered: if there is an official name for e.g. a government agency, it should always be used. Consequently, if there is an official translation, it should be used. For the most part, this presents no problem for a writer since it is mostly gratifying to find that one need not take the trouble to come up with a translation of one's own. At times, however, it is a bit frustrating since the language may be at odds with one's own vernacular. In those situations—and they have arisen—I have chosen to use the official/established term or name notwithstanding that I myself would have translated it differently. For instance, I call the statute governing the work of the Swedish broker "Estate Agents Act" because it is the title of the translation used by the supervisory body. I hope the reader is not overly discomforted by such inconsistencies.

An example that falls partly into the first category is the name of the Swedish supervisory body for real estate brokers. Formerly known as *Fastighetsmäklarnämnden* (FMN), its official name as of August 1st, 2012 is *Fastighetsmäklarinspektionen* (FMI). The translation used on the website is Estate Agents Inspectorate. Since both the new and old Swedish names have excellent abbreviations, I have

chosen to use those instead of creating English abbreviations. Thus, the government body is denoted FMN or FMI; FMN for all events up until July 31st, 2012, and FMI for all events as of August 1st, 2012. For statements that are applicable to both periods of time, the abbreviation FMI is used.

As to the second category, I have simply attempted to come up with as adequate translations as I possibly can. I have attempted to stay clear of terms that bear unwanted connotations.

In the third category, the only appropriate decision is not to translate the concerned word at all. Sometimes, there is no equivalent in the English language that is not marred with some kind of bias. Sometimes, there is no translation at all. In those instances, I have instead opted to use the term of the original language. For the purpose of clarity, I have put those words in italics. In a few instances, I have attempted a combination of a (more or less inadequate) translation and the original word in italics.

Apart from translating words, a study such as the present brings the added bonus of diverging conventions with respect to how statutes and court cases are denoted, and where to use capital letters. In this, I will be honest with the reader and say that, mid-way, I gave up all attempts of uniformity. For instance, court cases are denoted quite differently in Sweden compared to France. In Sweden, one uses either the bulletin title, e.g. "NJA 2007 s. 86" for cases from the Supreme Court or "RÅ 2006 ref. 53" for cases from the Supreme Administrative Court (the latter being denoted *Högsta förvaltningsdomstolen*, abbreviated HFD, as of 2011). For cases that have not been published in a bulletin, typically cases from the courts of lower instance, one uses the number of the ruling and some abbreviation or sequence of words to denote the court, e.g. "LR 8600-08" for a case from the Administrative Court of First Instance (denoted *Förvaltningsrätten*, abbreviated FR, as of 2011). As is readily seen, it is difficult enough to maintain uniformity with respect to the Swedish cases alone! As for France, the cases from the Cour de Cassation are most frequently identified by the date of the ruling. However, doing so would give rise to two problems here. Firstly, there are a couple of instances where two examined rulings were rendered on the same day. Secondly, denoting the French cases using the date of judgment would create an incongruence that I feel would be unnecessary given that this dissertation is written in English. This affront to French conventions is further exacerbated by my using capital letters in titles and names in the English manner, such that the *Cour de cassation* has become the Cour de Cassation. I hope *les francophones* can forgive these insults.

1.5 Structure

The remainder of this dissertation will be organized as follows. The methodological issues are discussed in chapter 2. Chapters 3-6 constitute part I of the actual study, which is a general comparison of the respective roles played by the Swedish broker and the Latin notary in real estate conveyances—chapter 3 treating the Swedish broker's duty of impartiality and outlines the duty to give counsel, whereas chapters 4 and 5 treat the Latin notary's history, the institutional framework, and the duty of impartiality. Chapter 6 sums up the question of the comparability of the two professions. Chapters 7-11, which constitute part II, examine in detail the duty to give counsel of both professions. After an examination of the role played by the French notary in chapter 7, the following chapters treat the components of the duty to counsel: the duty to ascertain facts (8), the

duty to disclose information (9), the duty to advise (10), and the contract-engineering duty (11). Completing the dissertation, chapters 12-14 make up part III: comparative legal analysis (12), analysis and discussion, including an account of, and a discussion on, the economic implications of the notary profession (13), and conclusions (14).

2 Methodology

I will discuss what I refer to as "the disciplinary choice" in 2.1 below. Following that, the choice of countries studied (2.2), the theory and methodology of law (2.3) and the used sources (2.4) will be treated.

2.1 Methodology in an Interdisciplinary Context

This dissertation constitutes legal research within the realm of real estate science. On the one hand, it has been conceived and executed in an inter- multi- and/or cross-disciplinary (hereinafter referred to as "interdisciplinary") context. The subject matter is clearly one that transcends the borders of the discipline law, and it is my sincere hope that the findings and discussion presented in this dissertation may prove relevant to readers within real estate science—perhaps even beyond that—who are not jurists. On the other hand, owing to both the nature of the subject matter and my being a jurist, the study remains at heart mainly one of law. This duality has implications, not least with respect to questions of methodology.

In an interdisciplinary context, choosing direction is never self-evident; rather, it is in the very nature of inter- multi- and/or cross-disciplinarity (hereinafter referred to as "interdisciplinarity") that the phenomena and problems of interest are relevant within more than one traditional field of science. For instance, studying the respective roles and behavior of the members of two professions involved in real estate conveyances could be relevant in the subject sociology of the professions. Similarly, real estate conveyances are of great economic importance and therefore a highly relevant object of study within the field of economics. Nonetheless, I have chosen to make this a work of legal research.

It would perhaps be possible to simply leave it at that and retreat into the discipline of law in all respects. Indeed, in legal science, issues of methodology are usually not deemed of prime importance. Among fellow scholars at a law faculty, this is usually not perceived as a big problem. Firstly, traditional legal studies have the same general aim, which is to find the legal answer; i.e. what the law says on a given topic. In order to find that answer, one consults the relevant sources of law. That is the basic recipe for the scientific method of law, with which all legal scholars are familiar. This seems to produce poor incentive to spend a whole lot of time and energy discussing methodology. Most legal works do not contain any deeper methodological discussions.[15]

This is not to say that there are no methodological considerations involved in traditional legal studies. As in all sciences where the study and interpretation of written sources is the main information input, the choice of sources and the sources chosen must be discussed. Thus, legal studies will usually contain methodological discussions concerning the actual sources used in the study. However, the main methodological issue of how knowledge is obtained—i.e. the use of the legal method and the sources of law to find the answer—receives less attention.

[15] Sandgren 2009, p. 39; cf. Zweigert & Kötz, p. 33.

It should also be observed that a general tendency towards routine in methodology issues is not necessarily unique to law.[16] Indeed, one might say that it would be surprising if the same did not apply in many disciplines. Within the impregnable (?) fortresses of the traditional disciplines, it is usually possible to be less questioning and self-conscious since both author and reader come from the same discipline and therefore share 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.[17]

Now, there is of course much to be said for the position that methodology should not overshadow the study itself. However, in an interdisciplinary context, the co-existence of different disciplines brings with it a mosaic of diverging methodological traditions and views. Those traditions and views are not always straightforward to reconcile, as attested to by the virtual culture clash that sometimes arises between those used to quantitative methods and those used to qualitative methods. Law, for its part, differs from both. Methodologically, law could be said to resemble the humanities the most, due to the shared focus on the interpretation of written sources. Thus, with respect to any study presented in an interdisciplinary context it is 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.

2.2 The Disciplinary Choice

Arguably, in an interdisciplinary context the first methodological choice one has to make is which traditional discipline, or disciplines, to adhere to. It is of course tempting to think of all science as a projection of one's own discipline, and to label that projection a holistic and universally applicable concept of science. With all due respect, such thinking is self-delusional. In actuality, each of the many different disciplines of science has their own ontology, epistemology, and methodology (or methodologies). They may share them with some other disciplines, but not all other disciplines. Thus, venturing into other disciplines than one's own without due regard for the ontological, epistemological, and methodological peculiarities of those disciplines could potentially lead the study seriously astray, perhaps enough to render it invalid. Granted, that may sound overly ominous, and it is by no means an impossible feat for a scholar to conduct a study that transcends the borders of their home discipline. However, it is an irrefutable fact that if one chooses to do so, one must consider if and how the methodology may have to be adjusted to accommodate both or all disciplines. Consequently, no matter how one looks at it, the choice of discipline(s) entails a methodological choice.

Why, then, have I chosen to make the present study one of law? Would it not have been just as relevant, perhaps even more relevant, to practice classical empiricism in the form of interviews and/or surveys? Can legal sources really provide insights as to the physical reality?

The simple answer to the question why I have chosen to make this a work of legal science is that I am a lawyer, not an economist nor a sociologist. However, that answer could be labeled the lazy person's excuse. Therefore, while law being my home discipline is undeniably a part of the decision,

[16] The same phenomenon appears to be present in the natural sciences; Sandgren 2009, p.
[17] Cf. Simmonds, p. 3; see also Penny, pp. 35-36.

it is my contention that, far from being a second-best choice made for the sake of convenience, law is the most effective and relevant way to find the answers sought in a study aimed at comparing and evaluating the relative merits of two models for real estate conveyances.

One of the many objections raised by non-lawyers faced with legal studies is that the legal answer, derived from the different sources of law, does not provide information about the physical world. Indeed, as will be seen below (2.4), the law is not even claimed to be a descriptive statement of how the physical world actually is or works. Rather, it is primarily a prescriptive/normative set of rules and principles. To put it simply, just because there is a speed limit sign next to the road does not necessarily mean that drivers abide by it. Similarly, a provision in a statute that something should be done does not mean that it is actually done in the physical world.

The best way to respond to this objection is with two counter-objections. Firstly, it is my contention that the legal answer *can* tell us enough about the physical world to make it relevant beyond the borders of the discipline law. Secondly, empirical studies do not necessarily provide more accurate information about the physical world. In fact, at times it is quite the opposite.

2.2.1 In Defense of the Legal Answer

Law as a discipline is often puzzling to those schooled in social or natural sciences since the traditional legal method does not involve empirical studies such as experiments, surveys, or interviews. Can a study that does not rest on empirical grounds really be called scientific? As to that, it could, and should, be observed that gathering and studying the relevant sources of law can quite aptly be labeled law's equivalent to empirical studies. Just as is often the case in the humanities, the answer to the research question lies not in measuring the physical world but in the interpretation of texts. Imagine history without texts! One can hardly set up an interview with queen Cleopatra and ask her about how she really felt about Julius Caesar. Indeed, looking at all disciplines and considering their fundamental methodological issues, it becomes clear that no matter the discipline and no matter the subject matter, the researcher must identify and employ the method that is best suited to provide the desired knowledge. In the case of law, the legal answer lies in the interpretation of the sources of law, just as in social and natural sciences the answer may lie in the interpretation of quantitative data. Moreover, the essence of scientific progress is not fundamentally different in law or the humanities than in the social or natural sciences. Ultimately, knowledge comes not from the collected data *per se*, but from the researcher's interpretation and analysis of said data. In that, all science is the same.

As to the legal answer, it is a perfectly legitimate ambition to "merely" ascertain the position of the law on a given topic. That is a scientific endeavor that is often quite challenging, not to mention highly relevant, in itself. However, in the present study it is my ambition to use the legal answer as a torch to shed light on an issue the relevance of which is not confined to law. In a way, I intend to claim that the legal answer can provide knowledge about the physical world. More specifically, I will try to demonstrate that studying the law concerning the legal duties of the Swedish broker and the Latin notary can provide insights as to how certain aspects of the market for real estate conveyances actually work.

Now, it is hardly to be contested that the mere existence of a norm cannot *per se* prove that it is adhered to. However, that does not make it either logical or reasonable to assume *a priori* that it is not adhered to. There are instances around the world where laws that are nominally in force are disregarded to such extent that it is questionable whether they can really be considered laws. Obsolete laws are a perfect example, though one had best exercise caution before asserting that a particular law is actually obsolete. Even if a law is still a valid law, it is at times questionable whether it is an effective norm in society; the sociology of law uses the dichotomy *law in the books* as opposed to *law in action*.[18] Some countries are so far from the rule of law, e.g. due to prolonged civil war, that it can be readily assumed that at least some nominally valid laws are not generally adhered to. Further, if it is widely known in a country that a particular legal norm is not enforced, it seems fair and reasonable to at least question its efficacy. However, as concerns jurisdictions governed by the rule of law where laws are generally enforced, it seems reasonable to hold that it is those wishing to claim that the law does not exist who must bear the burden of proof. By the same token, it is those wishing to claim that a particular law lacks connection to society, rendering it an invalid or at least unreliable source of information as regards the physical world, who must bear the burden of proof. In a jurisdiction with reasonably effective enforcement, the assumption must be that a valid legal rule is generally adhered to and that infractions constitute exceptions.

Thankfully, the actual state of affairs need not boil down to the allocation of burden of proof. Case law is an excellent source of law in several regards—one of them being that court cases serve as evidence that a rule is enforced. Case law can also, depending on how it is used, carry the advantage that the actual course of events leading to the dispute at issue serves as a window to the physical reality and the practical application of the law. As will be seen in chapters 3 and 8-11, both Swedish brokerage law and French notarial law are fields where case law is plenty. The many reviews of court cases will hopefully paint a sufficiently convincing picture of the reality in which the relevant rules are meant to apply. Thus, while the legal answer is not in itself an empirical answer, the search for the legal answer can provide similar insights.

2.2.2 The Fallibility of the Empirical Method

It is hardly to be contested that it would be of value to know the full extent of how the law is adhered to and applied in practice. However, absolute certainty is a formidable achievement under any circumstances; in the present study, achieving absolute certainty through empirical studies is, as it turns out, simply not feasible. And it is not for want of trying.

To complement the legal answer as regards the second part of this dissertation, I had originally intended to conduct empirical studies in the form of a survey (the Swedish broker) and a series of interviews (the French notary). The survey was conducted in May and June, 2010, and can be described as a success in terms of the response rate and the information revealed. However, in many responses, and in subsequent e-mails from respondents, a certain apprehension could be detected. The same occurred in my preliminary contacts with French notaries, which took place during the spring of 2010. The predominant opinion among the latter group appeared to be that the proper

[18] Deflem, pp. 100, 105, 150, 276.

course of action was to seek the legal answer through legal sources. There seemed to be a great deal of willingness to assist in finding and even discussing those sources. By contrast, there seemed to be scant understanding of complementing the legal study with surveys or interviews. It seems lawyers and legal scholars share the same view of the law and of legal science, in France as in Sweden.

A dismissive stance on the value of empirical studies cannot, however, alone explain the apprehension among prospective interviewees, especially since the same apprehension could be detected among Swedish brokers, who cannot be assumed to biased against such scientific methods. In hindsight, the endeavor was perhaps doomed from the beginning. After all, to distinguish clearly between the law and the physical reality is to assume that there is a dichotomy between the two. That is contentious by nature: it is a bit as if one were to say: "It it is well and good that brokers and notaries have all these duties, but can we really trust the likes of them to honor their duties?". To approach people and inquire of them how they handle their legal obligations in practice is, in the eyes of those approached, to voice an implicit accusation that they do not adhere to the law.

The willingness to participate in a study that not only appears biased against oneself, but which could also in a worst case scenario be incriminating, is presumably low. In fact, the outcome of approaching people in the aforementioned manner is likely to be one of the following two. Either the person approached refuses to participate, or they do participate but do so with such clear response bias that the reliability of the results is questionable. Granted, response bias can be avoided to some extent by the way the survey or interview is structured, and by asking the questions in a way that does not automatically call for one answer that is "right" as opposed to all others that are "wrong". However, neither Swedish brokers nor French notaries can be assumed to be ignorant of their legal obligations. It is therefore difficult to counteract the likely response bias.

Thus, even in the event of an acceptable response rate, as in the case of the Swedish broker survey, the there is no guarantee that the responses are bias-free. Moreover, even in the event that bias-free responses could be obtained, one has to question the relevance of such answers. What is there to be learned from such an approach, apart from the extent of the adherence or non-adherence to the law among the members of the two professions? As mentioned in the previous section, in a country that is governed by the rule of law and where there is proper enforcement, adherence to the law must be seen as the rule and non-adherence as the exception. If empirical studies were to reveal a gross disregard for the law among a majority of the members of the studied professions, that would be of interest insofar as it would serve to cast serious doubts as to the connection between the legal answer and the physical reality. However, such a scenario is highly unlikely, partly because of response bias, and partly because it is not reasonable to assume such non-adherence to the law.

It should be observed that the reluctance among some to participate in the proposed studies cannot be taken as evidence of non-adherence to the law. The subject matter of the survey and the intended interviews was the broker's/notary's duty to counsel. As will become clear in chapters 8-11, the specific obligations derived from that duty is not always clear-cut; nor can it always be determined with complete accuracy how the broker/notary is expected to act. The respective duties to counsel of the two professions are not two neat sets of clear and unambiguous rules. On the contrary, the duties to counsel have evolved in great part through case law, which demonstrates that it is far from always clear whether a particular behavior is in accordance with the law or whether it constitutes an infraction. It would therefore seldom be clear-cut how one should answer in order to

answer "correctly". Thus, the fear of incriminating oneself—to the extent that that is indeed the reason for the reluctance to participate—cannot be interpreted as evidence of actual infractions.

Of course, all these problems notwithstanding, it stands to reason that much could be learned from such empirical studies. For instance, the responses in the survey (which will be discussed to some extent in 2.5.2 below), along with voluntary comments by some respondents, provide interesting insights as to how brokers view different advisory activities, and how frequently such activities occur. However, that does not automatically mean that the survey is relevant for the purpose of this dissertation. It is my intention to return to the survey results in the future.

The reader will no doubt have observed that I have left out a quite interesting empirical option, namely surveys and/or interviews with home buyers and sellers. A well-performed such study would yield immensely valuable information as to the role actually played by brokers and notaries. For practical reasons, not least because the law is a big enough bite to chew on for now, I have not even considered conducting such a study. It is, however, my sincere hope that I will be able to explore that option in the future.

2.3 The Choice of Objects of Study

For the first part of this dissertation—chapters 3-5—which corresponds with some modifications to my licentiate thesis from 2008, I chose to study the laws of Sweden and nine other countries: Argentina, Belgium, Brazil, France, Germany, Mexico, Portugal, Puerto Rico, and Spain. My reasons to do so were as follows.

The Latin notary is usually 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—public notary, civil law notary, etc.—but the most common name seems to be 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

As for the second part of the dissertation—chapters 8-11—given that it is a more detailed examination, the number of countries to study had to be limited to a couple of countries to make the study feasible. In the end, I chose to limit the study to Sweden and France. The choice of France hinges on two key factors. Firstly, since I have passable skills in the French language, the language barrier is not insurmountable; at least, the gap is sufficiently bridged. Secondly, the abundance of available legal material such as at the Internet-based (free-of-charge and government-run) database www.legifrance.gouv.fr is really helpful.

Now, can a study of merely one country be considered valid for all other countries within the Latin notary family? As a general rule in comparative law, that is by no means certain. However, preliminary studies of the duty to counsel of the German notary suggest that German law is not very different from French law.[19] As will be seen in chapter 5, the laws in all nine studied countries are similar enough that it seems reasonable to assume that the laws of the other seven countries will not differ greatly from French and German law. However, short of studying those countries as closely as I have studied France, no clear conclusions can be drawn about the details.

2.4 The Methodology of Law

Established that the nature of this dissertation is primarily legal, and that the relevant methodology is consequently that of law, does not mean that all methodological problems are dealt with. Now it is time to deal with the methodological problems of law. A fact that cannot be escaped is that, despite the international approach, this dissertation is ultimately written from the perspective of an author trained in Swedish law. This need not create problems as long as one retains humility and practices full disclosure. That said, the methodological discussions must center on law in general, comparative law, and the law of the studied countries. While I maintain that that is a valid and relevant summarization of the subject matter, it is not unproblematic since my understanding of "law in general"—an issue that belongs to the realm of legal philosophy—emanates from my understanding of law as taught and practiced in Sweden. This bias can be mitigated by a good understanding of the different legal families—particularly, of course, those at issue, viz. the Swedish/Scandinavian and the Latin ones—but never fully neutralized.

The methodological problem need not be insurmountable. Firstly, Swedish and Latin law share the same heritage, at least in part. Though the former has never adapted fully to Roman law, canonical law was a part of Swedish law until the Reformation. Moreover, the development of modern Swedish

[19] See the Beurkundungsgesetz (BeurkG) and the Dienstordnung für Notarinnen und Notaren (DONot), commented in Armbrüster et. al.; see particularly pp. 269-281.

had the Enlightenment and 19th German jurisprudence as inspiration. Secondly, as will be demonstrated below (2.4.3.2), the differences as regards the sources of law and the manner in which they are used to produce the legal answer are practically negligible. In this respect, it is fortunate that Swedish law is a variation of civil law, as opposed to common law. That being so, the legal answers found in Latin law—particularly French law—are not at risk of being invalid.[20]

In view of the foregoing, this section will be organized as follows. First follows an account of legal dogmatics and the sources of law (2.4.1). Then follows a discussion on the prescriptive or descriptive nature of the law (2.4.2). Though the relevance of the latter subject seems to transcend the Swedish context, I deliberately place the account of the Swedish legal method first to serve as a useful framework and as a reminder that all jurisprudential discussions are inherently marred by cultural bias. Following that (2.4.3), I will discuss the problems of comparative law: the basic assumptions (2.4.3.1), the aims of comparative law and comparative legal studies (2.4.3.2), the contextual problem (2.4.3.3), and finally a brief methodological account of the methodology of the nine studied notary countries (2.4.3.4).

It should be observed that the accounts in 2.4.1 and 2.4.2 are centered on Swedish law and thus primarily applicable to Swedish law. Consequently, the account is admittedly biased towards the civil law postulate that statutory law is the prime source of law. Intuitively, it seems inevitable that a Swedish legal author writing about Swedish law will be biased in this way. However, the cautious reader may detect, especially in 2.4.2, a certain ambivalence as to the nature of the law that is traceable to some fundamental differences in how civil law and common law views the nature of case law.[21]

2.4.1 Legal Dogmatics and the Sources of Law

The search for the answer to the legal question is conducted by means of what is commonly referred to as the "legal method" or "legal-dogmatic method".[22] In a nutshell, it means that the lawyer 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 established sources of law are the following: (1) legislation/statutes[23], (2) case law, particularly from courts with the power to give precedents, most notably the Supreme Court and the Supreme Administrative Court, (3) *travaux préparatoires*, where the intention of the legislator is meant to be clarified, 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. Peczenik[24] 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

[20] Cf. Bogdan, p. 44.
[21] I am referring primarily to how case law is viewed; cf. Zweigert & Kötz, pp. 259-264.
[22] Narits, at pp. 19-21.
[23] Legislation has its own internal hierarchy: (1) constitution (*grundlag*), (2) statute (*lag*), ordinance (*förordning*), and (4) government agency regulations (*myndighetsföreskrifter*).
[24] Peczenik, pp. 212-223.

first category represents the truly binding sources, namely legislation and "fixed" rules of customary law. These sources hold complete normative power and must therefore be followed based on their authority alone.[25] The second category includes case law (precedents only) and *travaux préparatoires*. 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.

Strömholm[26] summarizes Peczenik's theory along with those of fellow writers Ross, Sundberg, and Augdahl.[27] He then proposes that the appropriate definition of a theory of the sources of law 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. Strömholm chooses to view sources of law as normative. 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 on the sources of law.
B. Other sources of law;
    i. Statutes;
    ii. Travaux préparatoires;
    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.[28]

In contrast to the cited writers, Hellner[29] takes a seemlingly pragmatic view and expresses skepticism towards the usage of the term "sources of law". He dismisses the notion of a hierarchy between the sources of law as "extreme", and observes that while it sometimes occurs that courts argue and rule in a way that is consistent with such a theory of law, one can without gigantesque efforts find examples of the contrary.[30]

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 even if there is a hierarchy at all. Only one assessment seems to unite the different writers, and that is that

[25] It is noteworthy, however, that Peczenik, in contrast to legal positivists, also holds that strong arguments to the contrary—such as a law being obviously and strongly iniquitous (such as discriminatory laws)—can render a "must-follow" source hollow of authority; see p. 218.
[26] Strömholm, pp. 311-321.
[27] 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.
[28] Strömholm, pp. 317-321.
[29] Hellner, pp. 24-26.
[30] *Ibid.*, p. 25.

legislation is the highest ranking source of law. Many, particularly older, lawyers will probably argue that the *travaux préparatoires* outrank case law, if not in authority then at least in importance. Indeed, *travaux préparatoires* have traditionally been used extensively. In some fields of law, it is common practice to treat them as though they were an integral part of the written law.[31] In these fields, at least, the *travaux préparatoires* are 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 and Zacharias, for instance, are 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, as long as one remembers the distinction between precedents and other case law. The courts with the power to issue precedents are the Supreme Court, the Supreme Administrative Court, and the specialized courts of highest instance, e.g. the Labor Court *(Arbetsdomstolen)*. Precedents are binding to the courts of lower instance. They are therefore for all practical matters just as binding—a "must-follow" source—as statutory law. The same cannot be said for other case law; therefore, court cases from the courts of lowest instance or the courts of appeal must be used with the important caveat that other courts are not formally bound by them. However, the fact that those cases are not formally binding does not mean they cannot be used convincingly as sources of law: they can and they are.

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 bestowed with 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 or the Supreme Court. In sum, case law is an important source of law that is divided into two categories: precedents, which are binding to all, and all other case law. I will return to the nature of case law in section 2.4.2 below.

The matter of hierarchy is not really important unless the sources are in direct conflict, which thankfully does not happen very often.[32] A far more common problem is where the sources are vague and do not give a clear answer to a question, or do not provide any answer at all. It is, however, clear that statutory law outranks all other sources of law. Indeed, statutes are arguably the

[31] Real estate brokerage law is a perfect example: see for instance Melin (numerous instances throughout the book) or the FMN/EAI case law.

[32] Since *travaux préparatoires* are considered a high-ranking source of law, it would indeed take extraordinary circumstances for a court to rule in direct opposition to them (which is not to say that it could not occur).

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 ultimately not themselves bound by their earlier precedents.[33] All other sources, including the *travaux préparatoires*, are “should-follow” sources.

2.4.2 The Prescriptive and Predictive Aspects of Law

An important question, that sometimes (though perhaps not often enough) causes debate among legal scholars, is whether the nature of the legal answer is normative/prescriptive or descriptive/predictive. Does the law describe something that *actually* takes place or is *likely* to take place, or does it prescribe what *ought* to take place? In a general scientific context, where law as a discipline has historically been (and sometimes still is) attacked for being unscientific due to the lack of empirical studies and thus connection to the physical world, it is tempting to shape one’s understanding of the law to fit scientific ideals. One way of doing so is to create a “hypothesis and experiment model”, where the jurist interprets the sources of law in order to create a hypothesis, whereas the court of law is the “laboratory” and a court case an “experiment”. In so doing, one has created an explanation of law as a “proper” science based on empirical findings.

This notion could be dismissed immediately on at least two grounds. Firstly, empirical studies such as experiments, surveys, and interviews are not the only defining criterion of science. As previously mentioned, one cannot set up interviews with historical figures such as Cleopatra and Julius Caesar. That does not in any way render it unscientific to conduct a historical study on the relations between Ancient Rome and Egypt. The interpretation of texts—not just newly written or newly discovered texts—is a perfectly acceptable scientific method depending on what knowledge one is pursuing. Thus, the “hypothesis and experiment” model is not necessary. Secondly, naming court cases the empirical proof of the law is to name the courts’ findings the final answer to the legal question. Such judicial power is simply irreconcilable with a civil law system such as the Swedish one, where statutory law is considered the highest-ranking source of law. Moreover, such a theory of law is not necessary even in the common law system. Granted, the *stare decisis* doctrine means that court cases in common law are immediately binding sources of law.[34] Thus, the judgment of the court in a given case immediately turns into law. However, that does not mean that even the common law judge has unlimited discretion to settle the case: he or she must respect the existing sources of law. To hold otherwise would be to claim that the judge is at liberty to sentence a defendant to death for shoplifting! And thus, the circle is closed: the sources of law are not merely sources of information from which a jurist can create hypotheses—they are an instruction to the judge indicating how he or she is allowed to rule, including what level of discretion he or she has.

Of course, it is possible to take the view that the law is descriptive with respect to the legal system as a whole. For instance, if it can be established that a certain statutory provision is always, or at least generally, interpreted and applied in a certain way by courts and other lawyers or officials, then that interpretation of the provision could be considered a description of what takes place in the legal system. According to this view, then, the answer to a legal question is a *description* of what takes

[33] However, ruling in direct opposition to a precedent may require that the court sit in full session.
[34] Zweigert & Kötz, pp. 259-260; Bogdan, pp. 93, 102-106.

place, and at the same time a *prediction* of what will take place if said legal question is raised in court.

To give voice to this view—whether intentionally or unintentionally—is more common than one might think, among jurists and non-jurists alike. It is particularly common with regard to new legislation. One can often hear or read comments such as "It will be interesting to see how the courts will interpret this new provision. We'll have our answer then." Will we? If that proposition is true, then it would seem that until a court has interpreted and applied a given rule, there is no law on the subject, merely a hypothesis of sorts. That would be a fine logical trap: with that reasoning, if a court rules on an issue, regulated in a statutory provision that has never previously been tried in the court of law, then there would consequently be no law on which to base the judgment. If so, then arguably the judgment cannot be called an expression of the law, since any competing interpretation of the statute would have an equal claim.

Furthermore, the proposition that the law is descriptive, and that it is the fact that jurists interpret the law in a certain way that makes it law, is arguing in a circle. By that reasoning, it is right for a court to rule in a certain way simply and solely because courts rule in a certain way—even if the wording of the applicable statute has other more, or at least just as, plausible interpretations. In other words, under a theory of the law as solely descriptive, it is impossible to dispute court rulings on legal grounds, as long as other courts have ruled in a similar manner.

A descriptive/predictive theory of law, it would seem, is not only incompatible with the civil law system—it is only compatible with a common law system that does not exist, namely one where the courts freely disregard the sources of law, statutes and precedents alike. Now, disregarding statutes does have its history in common law, where statutes have historically often been codifications of court rulings, and enactments of Parliament viewed with suspicion. However, even common law—which has evolved in a more "statute-friendly" direction—recognizes statutory law as law.

It should be abundantly clear that a theory of the law as descriptive does not stand closer scrutiny. If there is a statute, then of course there is law on the subject. If there is another possible interpretation of the law to be made than the one made by the court, then of course it is possible to dispute the ruling on legal grounds. If ninety-nine percent of the courts apply the law incorrectly, then those ninety-nine percent are wrong. At least, it is a valid legal argument to assert that they are. It is clear, therefore, that the nature of the law must be primarily *prescriptive*.

Let us consider an example from real life. In Chapter 10, I will briefly discuss the Supreme Court ruling **NJA 2007 s. 86**, the so-called "Motocross case". The ruling was sharply criticized by professor Folke Grauers. Grauers is a senior expert in Swedish property law and has published several works on the subject. Grauers's opinion of the ruling was that the Supreme Court had misapplied the law. Suppose Grauers is right in the sense that the combined logic of the relevant sources of law available at the time would seem to yield an answer that is contrary to the ruling. Would this mean that the professor is "right" and the court "wrong"? No. It does, however, mean that it is a legally valid argument to dispute the soundness of the court's findings. Of course, the matter is complicated because the court in question is the Supreme Court, with power to create precedents, the idea of which is that once the Supreme Court has held that the rule at issue should be interpreted in a certain way in cases equal or similar to the instant case, all other courts are bound by that ruling. Thus, the Supreme Court's interpretation trumps that of the professor. However, it is the normative

power vested in the Supreme Court that makes it so, not the mere fact that “a court” has ruled in a certain way.

The conclusion that the law is prescriptive has bearing on the use of case law as a source of law. Precedents from the Supreme Court or the Supreme Administrative Court are binding to all within their respective jurisdictions as regards identical or similar cases. However, courts of lower instance do not hold that normative power. Under any theory of law, they stand as testaments to how the law is applied in practice. However, the courts have done only just that: *applied* the law. The legal answer precedes the court's ruling. This is because Swedish courts, being civil law courts, do not have the power to make law. In hard cases, they are understood to *find* the law, but never to *make* it. Admittedly, the line between the two can at times be thin indeed.

These arguments would seem to present a challenge for the present dissertation, since I make extensive use of case law in chapters 3 and 8-11 to prove my points. Many of those cases are rulings from courts of lower instance. Does the foregoing mean that those cases are poor evidence that the law is how I claim it is? Not necessarily. The cases from courts of lower instance, while not universally binding, are at the very least testaments that the courts have interpreted the law in the described manner. Without venturing into a sociological discussion, one might say that the learned at the courts are after all no strangers to the law. While it would be an impossible task to prove or disprove it, misapplication of the substantive rules by courts must be deemed an extremely rare occurrence.

A more common occurrence is where there are two or more possible interpretations of, or ways of applying, the law. The court has to make a choice between those interpretations/applications. A commentator such as a scholar may find the choice flawed, and disapprove of the ruling. However, that does not render the court's findings invalid. By so asserting, I have claimed that there is not always one "correct" legal answer that renders all other positions "incorrect". Dworkin's superhero judge Hercules, who has unlimited intelligence, unlimited resources, and unlimited time, may or may not find one, and only one, correct answer.[35] On that issue, I refrain from venturing an opinion. However, it is clear that even the most esteemed legal professionals in the physical world are not Hercules. Thus, for all practical matters one must accept that even though one may believe that one has found the only correct answer, there *may* be another, equally valid interpretation. It is a mildly unsettling thought, for sure, but nonetheless true.

The reader will no doubt have observed that I seem to leave the door ajar for a descriptive view on the law. Let me settle that here. I hold that the essence of the law is prescriptive. However, the law is distinct from its application: the law may therefore be applied correctly or incorrectly. Now, “incorrect” application of the law, in the sense that the court completely misinterprets the sources of law, is in all probability extremely rare. But if there are several equally valid interpretations, the court must make a choice. Suppose, now, that district courts tend to make a particular choice, e.g. to mete out 3-month prison terms for a certain crime. Suppose there is no Supreme Court precedent and that the Criminal Code does not expressly provide a 3-month term but rather provides a scale of up to one year imprisonment. Suppose a lawyer is asked by their client, who has committed the crime in question, to estimate the sentence the court is likely to mete out. It would seem sensible for the lawyer to answer that somewhere around 3 months is a likely outcome. Is that the "legal answer"? Is that "the law"? No. It is, however, an intelligent assessment of the likely application of the law. Thus,

[35] Dworkin 1988, pp. 225-275, 313-354, 379-401, 412.

while I maintain that a distinction must be made between the law and its application—the former preceding the latter—it must be acknowledged that the latter is often of equal if not higher importance.

Admittedly, this distinction may be of limited practical value in many situations. The client asking their attorney about the chances of success in a hypothetical dispute is not helped by hearing that they have the law on their side, but that the courts will rule otherwise. The attorney will in all likelihood not answer with the counter-question "Do you want to know the law, or how the courts will rule"? Technically, such an answer from the attorney would mean that he/she has interpreted the law in one way, whereas he/she deems it likely that the courts will interpret it in another manner. The distinction is, however, in all probability lost on most clients. A more pragmatic approach would seem to be to accept that the stance most likely taken by a court is the best answer. The fact that the answer is not really "the law" but rather "the interpretation of the law most likely to be made by the court" is something both the attorney and the client can live with. Thus, in sum, while I maintain that the law itself is normative, the practical application of the law will often boil down to predictions of likely interpretations. In that sense, it is not incorrect to speak of the law as descriptive or predictive.

2.4.3 The Challenges of Comparative Law

Since it is well known that not all countries or jurisdictions have the same laws, and given that comparative legal studies necessarily involve studying parts of other legal orders than one's own, it is a potential problem in any comparative legal study that one may not possess the tools to correctly understand the object(s) of study. Even assuming that all legal orders involved in the study are equal or similar insofar as they are both governed by "the rule of law"—in which case one can at least assume that it is relevant to seek the legal answer in the relevant sources of law—legitimate questions come to the fore. How can one be certain that one has obtained the right sources? How does one understand them? Language barriers can prove difficult obstacles indeed. The language issue is not exceedingly problematic in the present study; as previously stated, the choice of objects of study hinges, *inter alia*, on the language. As for the right sources, I will treat the issue of the recognized sources of law in the ten studied legal orders—Sweden and the nine "notary countries"—in 2.5 below.

However, another fairly intuitive question remains, namely one of context: do I really know enough about the other countries and their legal orders to be able to examine and analyze them properly and produce valid findings? It is both possible and plausible that a jurist trained in one legal order may misinterpret the sources from another legal order. The issue of context is not unfamiliar in the discourse of comparative law and must be addressed.

And yet, more problems remain. Comparative law as an endeavor has been, and remains, marred with scientific, methodological, and ultimately ideologically conditioned disputes. Anybody meddling in comparative law, therefore, inherits an academic discourse that dates back at least to the early 20th century and still goes on. While this dissertation is by no means the right forum to settle these problems (to make such a claim would be ludicrously conceited) or even discuss them at length, it seems proper to at least address the key features of the most critical problems. Firstly, comparative

law was early on connected to the idea that there was a "real law of mankind" to be found. Is this idea really reasonable? Secondly, comparative law can be used for different purposes, such as finding a "good" legal solution that can, and perhaps should, be exported to all nations, which are not necessarily acceptable to all. Thirdly, the aforementioned issue of context has become increasingly critical in the wake of globalization.

These issues will be treated in subsections 2.4.3.1-2.4.3.3. In 2.4.3.4, the legal method of France and the other studied notary system countries will be addressed.

2.4.3.1 The Basic Assumptions

Comparative law, understood as the study of laws foreign to one's own, are in all probability as old as the concept of law itself. Indeed, the proliferation of civil codes in the wake of the French Code Civil is a perfect example of how a foreign law was studied and then introduced, with the amendments held to be necessary. The custom to study foreign law in the process of drafting national law is one that survives to this day. However, the discipline of comparative law came to be in earnest in 1900 at the time of the World Exhibition in Paris, when the Congress for Comparative Law was founded. The spirit of the congress and its founders, Édouard Lambert and Raymond Saleilles, was one of optimism and belief in international progress. The goal was to develop a common law for all mankind (*droit commun de l'humanité*).[36] In early comparative law, the endeavor was not "merely" a question of *creating* a common law, but to *find* it. Thus, it seems there was a basic assumption that, behind the national laws, there was something resembling a natural law. Such thoughts are much akin to those of Aristotle, who emphasized the *telos* as an intrinsic part of the nature of all things. While legal positivism rejected those thoughts, they had a revival after World War II, when legal positivism fell into disrepute.[37]

Comparative law, as legal science as a whole, did not and does not operate in a scientific and philosophical vacuum. As a result, it has interacted all along with the social sciences, such as anthropology and sociology—along with the epistemologies and methodologies employed and discussed there. Of all ideas thence derived, none seem to have affected comparative law as much as the idea of *functionality*: the idea that law performs functions that are connected to society.[38] Functionalism, as other ideas, can be divided into categories. The main five categories are: 1) neo-Aristotelian functionalism, 2) evolutionary functionalism, 3) structural functionalism, 4) neo-Kantian functionalism, and 5) equivalence functionalism.[39]

From the latter category comes the idea of the *functional equivalent*. While laws may differ from country to country, the problems they are meant to resolve are the same or at least very similar. Therefore, hold the functionalists, one can assume *a priori* that two legal orders will have some kind of solution to the given problem. It may not be found in the same place, e.g. the civil code, but if one "casts the net" wide enough, one will find it.[40]

[36] Zweigert & Kötz, p. 2-3.
[37] Michaels, p. 7.
[38] Zweigert & Kötz, p. 34; Michaels, pp. 1-2; Platsas, p.2.
[39] Michaels, pp. 7-23.
[40] Zweigert & Kötz, p. 34; cf. Bogdan, pp. 56-59.

Bogdan offers a down-to-earth example that demonstrates that the idea is not entirely without merit.[41] Suppose one sets out to compare government entitlements to parents in Sweden and France. The Swedish entitlement model is a monthly allowance per child, paid to the parents (the mother by default). No such allowance will be found in France, which may lead the researcher to conclude that there are no such entitlements in France. The conclusion would be false, however. The French entitlement simply takes the form of a tax reduction instead of an allowance. The lesson is that the functional equivalent to a particular rule or institution is not necessarily found in the same legal or political field as in one's own country or jurisdiction. The specific solution to the problem may differ, even if the views about the problem itself are similar.

It seems clear that the idea that laws perform functions in society, and that the relevant study of comparison may not lie in the same place in the legal order, have great merit. However, it is equally clear that the foregoing rests on at least two assumptions: 1) that the legal orders, and the societies in which they exist, have the same problems to be solved, and 2) that these problems have been solved in one way or another. The second assumption also seems to imply a third, namely that the functions are indispensable to society. Are these assumptions reasonable? Not all would agree. For instance, Örücü has adduced that these ideas and methods, whether functionalist or functional-institutional, are poor tools for the problems of comparability between a Western legal order on the one hand and a religious system or a developing legal system on the other.[42] Bogdan has also discussed the issue of comparability, addressing the dichotomy of capitalist and socialist societies. To avoid pitfalls, Bogdan suggests that, when comparing the legal orders of countries with different social systems, the comparatist should distinguish between the legal norms that regulate situations that are particular to one social system and those that regulate situations that are common to both systems.[43]

The assumption that all legal orders have the same problems that need solving—the *praesumptio similitudinis*—was put forth by Zweigert. If the comparatist finds no functional equivalent in a foreign legal order, they should assume that they have not looked close enough, or looked in the wrong place.[44] The proposition has received extensive criticism. Firstly, an assumption of similarity can be construed as contrary to the basic scientific idea that the researcher should try to falsify her hypotheses, not confirm them. Secondly, assuming that legal orders, and thus societies, face the same problems is not ideologically neutral; it could be that what is perceived as a problem in one society is not thus perceived in another. Thirdly, the proposition has been accused of being reductionist, as similarity will only appear once the legal orders are stripped of culturally contingent details.[45]

The criticism appears sound insofar as assumptions carry the risk of bias. It is not always straightforward for a researcher who has made an assumption to remain honest if the collected data falsifies the assumption. It need not even be an issue of honesty; it is a common and well known phenomenon amongst human beings to interpret the world in a manner that is consistent with one's beliefs. Therefore, to maintain neutrality it seems best not to assume anything—staying clear both of

[41] Bogdan, pp. 46-48.
[42] Örücü, pp. 50-52.
[43] Bogdan, pp. 59-63; for further references see footnote 13 on p. 61.
[44] Zweigert & Kötz, p. 40; Michaels, p. 31.
[45] Michaels, pp. 31-32; Platsas, pp. 13-14.

the *praesumptio similitudinis* and its antithesis, the *praesumptio dissimilitudinis*. Indeed, assuming dissimilarity is no more logical than assuming similarity. Of course, as a practical matter assumptions and hypotheses can be quite useful since it can serve to direct the researcher's efforts in a certain direction. However, if the expected results are not found, it seems best not to make bold assumptions to explain the disappointing findings.

As for the assumption of indispensability, it is a bold assumption indeed that without this or that function—fulfilled by a certain institution—the legal order or even society as a whole cannot survive. It is also quite easy to find examples that speak against that notion. To name but one such example, the tenant ownership home is an institution that does not exist outside Sweden. Do other societies collapse? Are they otherwise dysfunctional? In the scientific discourse, one of the many arguments that have been raised against the assumption is that it is a circular argument: the institutions are thought to be responses to societal needs while, at the same time, the existence of said societal needs is derived from the existence of the institutions.[46]

Two remarks should be made here. Firstly, functions can be of great value to society without being indispensable in the sense that society would "fail" if the function is not performed. For instance, reducing transaction costs is widely believed to promote economic efficiency. Thus, if a particular institution fulfills the function of reducing transaction costs, it can be regarded as beneficial. Now, beneficial is not necessarily indispensable. It could be that a particular society feels that high transaction costs are an acceptable price in exchange for another function it values higher. However, that does not in any way render it irrelevant to lower transaction costs, and it certainly does not render it irrelevant to use transaction costs as a yardstick of comparison in comparative studies.

The present study focuses on impartial legal counsel in real estate conveyances under two regimes. This is without question a kind of functional study. However, the aforementioned assumptions should not present a problem. I have made no assumptions whatsoever as to the substantive rules of the studied legal orders. The great similarities that will be revealed in chapters 3-11 are grounded in the collected data, not in assumptions of similarity. As for the indispensability of functions,

I make no claims that legal counsel to home buyers and sellers is "indispensable" to society. Its desirability is, however, something that will be discussed in chapter 13.

2.4.3.2 The Aim of Comparative Law

Why are comparative legal studies undertaken? Is there a particular agenda to comparative law as a whole? In view of what has come to hand in 2.4.3.1 concerning the basic assumptions of comparative studies, it is fairly evident that their purpose must also be addressed.

Arguably, the simplest reason for a researcher to wish to study a foreign legal order is simple curiosity and desire to learn more about the world. It seems reasonable to assume that, on some level, all comparatists are thusly motivated. To the extent that the study results in a text book that can be used by other jurists, the ambition to learn more about another legal order can certainly be enough. However, it would be overly naïve to believe that is the sole motivator.

[46] Michaels, p. 15.

While the overall purpose of comparative law as a whole need not be discussed at length here, it seems proper to identify a few main features. As previously mentioned, Lambert and Saleilles had an agenda with their Congress: to compare the legal order of different countries in order to find the common core and develop a law for mankind. Zweigert and Kötz hold that the pursuit of knowledge is the ultimate aim of all science and that comparative law is no exception.[47] However, they also point out and discuss five major practical "benefits" of comparative law: 1) an aid to the legislator, 2) a tool of construction, 3) a component of the curriculum of the universities, 4) a contribution to the systematic unification of law, and 5) the development of a private law common to the whole of Europe.[48]

Nelken has proposed a similar list of purposes: 1) to discover and understand differences between legal systems and legal institutions and explain the reasons for these in order to enhance knowledge and, at the same time, to discover similarities between different and diverse legal systems and find explanations for these, 2) the grouping of legal systems, 3) broadening the mind of the law student and helping in the development of tolerance, 4) a tool in legislative law reform, working *de lege ferenda*, 5) a tool of interpretation, as a *de lege lata* "gap-filling device", 6) as basic information for the drafting of international conventions and agreements, whose terminology must be distilled from the lars of the legal systems of the target audience, and 7) a tool in the harmonization of law, e.g. in the European Union.[49]

In addition to the different purposes and "benefits" just mentioned—or, perhaps more correctly, as an intrinsic part of said purposes—there is a descriptive-prescriptive dimension that must be addressed. A particular comparative study could of course be conducted to gather basic data about other legal orders, or to map the legal orders, but it could also be used for prescriptive analyses. Perhaps the solution adopted by country A could be adopted in country B? Perhaps it *should*? For instance, functionalist studies, with their focus on the relation between law and some part of society, seem tailored for prescriptive analyses: if the different legal orders have their own rules or institutions to solve the same problem, those solutions can be compared and measured against a given criterion in order to establish which of the solutions is the "best".[50]

The idea of harmonizing laws and institutions, and of "exporting" them to other countries, may be problematic. Cotterrell has questioned the desirability of legal harmonization and the motives behind it. For instance, within the context of harmonization in the European Union, economic efficiency is often cited as a reason to harmonize, with weak evidence that harmonization will achieve that end.[51] Örücü has discussed the process of "mixing systems", i.e. the influx of laws and institutions from one legal family to a country in another legal family. This transmigration, observes Örücü, may work smoothly in some instances but lead to a dysfunctional legal system in others.[52]

The hazards of hyperbolic optimism in the prescriptive use of comparative legal studies should not be ignored. Nor, however, should they be exaggerated and understood to apply to every comparative study with a prescriptive dimension. As previously mentioned, the present study is a functionalist

[47] Zweigert & Kötz, p. 15.
[48] *Ibid.*, pp. 16-31.
[49] Nelken in Nelken & Örücü (eds.), pp. 54-56.
[50] Cf. Michaels, p. 15.
[51] Cotterrell in Nelken & Örücü (eds.), pp. 133-154.
[52] Örücü in Nelken & Örücü (eds.), pp. 169-187.

study since impartial legal counsel in real estate conveyances is a function in the legal order and in society. As stated in 1.2, the purpose is to examine, analyze, and discuss this function. The discussion will to some extent be prescriptive. Whether this constitutes a problem or an asset is left for the reader to decide.

2.4.3.3 The Contextual Problem

The terms "culture" and "legal culture" have been used frequently to discuss and criticize the basic assumptions of comparative law and the purpose of comparative studies. With such arguments, comparative law has, among other things, been accused of (Western) ethnocentrism.[53] The assumptions and aim of comparative law and the present study have been treated in the foregoing. However, the question has been raised whether the comparatist can really understand anything about the law of a country outside his or her own culture. With its origins in philosophy and anthropology, the idea has spread to comparative law that each legal culture is unique and contextually contingent, and that the comparatist can only validate his or her findings concerning the laws of another country through an elaboration of the cultural context of those laws. This is sometimes held to be a nearly insurmountable obstacle, even rendering the work of the legal comparatist practically impossible.[54] The latter point raises the question whether a jurist from one country can really ever understand anything that pertains to another legal culture. That point must be addressed.

It is an indisputable fact of life that we are all, to a considerable extent, conditioned by our environment. While it seems less than fruitful to subscribe to the unmitigated idea of *tabula rasa*, we are shaped by our experiences from the time of our conception and onward. Our accumulated experiences and the wisdom thence derived affect not only our choices and actions, but also our perception of that which surrounds us. Indeed, much—perhaps most—of what we learn and add to our knowledge and wisdom is conditioned by the basic contexts in which we find ourselves: family, local community, ethnicity, religion, nation, and country. Connected to these entities are other contexts such as language, geography, history, politics, customs, traditions, and values. The different interrelated contexts in which we live and which condition us constitute our frames of reference.[55]

Before going further, we must distinguish between two related, but not identical, phenomena. Our cultural heritage and environment, or whatever other contextual entity one can identify, conditions our perception of the world. When a person born, raised, and residing in Gothenburg, Sweden receives the news that Osama bin Laden has been killed, that person's perception of the event, as well as his or her analyses as to its possible consequences, will in all likelihood differ to some degree from those of a person born, raised, and residing in Amman, Jordan. On the question of how the average person in Arabic countries will react to the killing, the Gothenburg resident will most likely have difficulties in finding as nuanced and insightful an answer as his or her Amman counterpart. This is because the Amman resident is closer to the cultural context to which the question pertains and, presumably, where the answer is to be found. It must be borne in mind, however, that it is not a

[53] Cf. Nelken in Nelken & Örücü (eds.), pp. 114; Twining in Nelken & Örücü (eds.), pp. 69, 75-77; Örücü in Nelken & Örücü (eds.), pp. 170-171.
[54] Palmer, pp. 3-4; see also Bogdan, pp. 44-48.
[55] I refrain from using the term "culture", to avoid unwanted discussions concerning its definition.

question of different culturally shaped personalities or intellects, but rather a question of background information.

Now, the example just mentioned illustrates the difficulty, owing in most part to the lack of relevant background information, in understanding and answering a question that pertains to another contextual entity. This difficulty must not be confused with the inclination to agree with what is familiar and disagree with what is unfamiliar. It is quite possible to attempt to understand and explain, say, a tradition from another country, and fail miserably on account of one's lack of knowledge of said country and its culture, without finding fault with the tradition simply because it differs from one's own.[56]

The difficulties described here amount to what could be called a *contextual challenge*. On the one hand, since we are conditioned by our own contexts, we will always have difficulties in processing, assessing, analyzing, or explaining that which pertains to other contexts. It cannot be denied that the Amman resident has great advantages over the Gothenburg resident in relating to the average Arab person. On the other hand, if a different contextual background is regarded as an insurmountable obstacle to understanding, then communication itself is pointless.

How, then, is one to handle the contextual challenge? Is there a golden mean to be found? Of course there is. Firstly, that which unites people exceeds by far that which divides. Secondly, vicarious learning is not only possible but in many respects essential. Thus, one does not have to experience everything first hand to get the gist of it. Thirdly, there are other contextual entities to be considered than those pertaining to the general culture of a country or ethnic or religious group. For instance, physicians around the world share the same medical science and the same underlying desire to cure diseases and save lives. Musicians and music lovers share the love for music, often the same music and the same artists. A professional musician in Sweden would presumably be better equipped to understand how a musician in Jordan would feel about not being paid for a concert as promised beforehand, than would a non-musician in Jordan. By the same token, a jurist from Sweden can be just as well equipped to understand and discuss a French legal text as a French national who is not versed in the law. Arguably, a non-French jurist is more likely to interpret the text correctly than a French non-jurist. Fourthly, not belonging to the same contextual entity may in some cases be advantageous rather than detrimental. Sometimes, the "from without" perspective can reveal important information that is hidden to those "within" due to familiarity.[57] Finally, as stated above, the contextual problem is not one of intellect but of information.[58] It is entirely possible to learn enough about another contextual entity to be able to answer questions regarding it. It may at times require a lot of work, but it can certainly be done.

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[56] Of course, in practice, it is not uncommon for people to act upon both of these phenomena simultaneously. That is sometimes (or, more aptly, all to often) when civil land and common law jurists discuss the other system.

[57] The same applies to interdisciplinarity, where a person from another discipline can often contribute with new insights and perspectives to one's own home discipline - and, hopefully, vice versa.

[58] Some like to point out that different historical paths throughout the ages have led to completely different cultures and hence different philosophies among different peoples - ontological and epistemological differences, to use scientific terms. And granted, it is difficult not to appreciate the cultural differences between, for instance, Western and Chinese or Japanese culture. Many of us have mused at this upon reading "Shogun" and other renditions of the cultural meetings of East and West. However, the very fact that we can understand and appreciate cultural differences proves that it is possible to learn about the other culture, as long as we receive the necessary information.

The contextual problem will always be an important factor to deal with in comparative law. It is not, however, an insurmountable obstacle—particularly if the legal orders that are studied are culturally related, as in the case of legal orders within the European Union. That which unites Swedish law on the one hand and French or German law on the other exceeds that which sets them apart. For instance, the legal method is essentially the same, as is the valuation of the sources of law (see 2.4.3.4). Moreover, the substantive rules in central private law are very similar: looking at the rules on the entering of contracts and on sales in the Code Civil reveal great similarities with those in the Contract Act and Sales Act. Even where there are differences, one can readily observe that the most important problems to be solved are the same.[59]

In sum, context should not be too problematic in the present study. The contextual differences can be bridged with a bit of knowledge, humility, and desire to learn. The possibility to compare solutions in different jurisdictions is also certainly worth the challenge.

2.4.3.4 The Legal Method in France and the other Notary-System Countries

As previously stated, the ZERP Report identified the Latin-German system as an entity with the common factor that real estate conveyances are accomplished with the intervention of the public notary. That does not, however, mean that the nine countries selected for the present study are identical in legal culture or, perhaps more importantly, legal method. In the established—though neither eternally fixed nor universally accepted—classification of legal families, the countries in Europe and the Americas where the public notary system prevails belong to the Romanistic and Germanic families. Since these two families are more closely related to each other than to the Anglo-American common law family—most notably by their common roots in Roman law—they are also referred to as the civil law family.[60] Are these countries identical in legal method? In view of the discussion in the foregoing concerning the pitfalls of comparative law, it would seem foolhardy to make such an assumption—tempting though it is to assume that the legal method is part of a *tronc commun*.[61]

However, the present study is not aimed at the "proper" classification of legal systems into families; nor is it my ambition to compare the legal method applied by legal professionals and scholars in all studied countries. For the purpose of this study, it is enough to establish that the place of the studied sources of law in the respective jurisdictions, and the manner in which the relevant sources of law are selected and treated, are similar enough that the findings are not invalid. As to that, Belgium, Spain, and Portugal are clearly related to French legal tradition, not least by the adoption in the 19th century of civil codes, inspired by the Code Civil—despite the adoption in 1966 by Portugal of a new *Código civil* that drew heavily from the German BGB.[62] Looking at the civil codes of the Latin American countries, it is evident that the influence of the Code Civil reached those countries as well.

[59] This would seem to validate the *preasumptio similitudinis*.
[60] Zweigert & Kötz, pp. 63-73, 257-275; Bogdan, pp. 76-83; Cotterell in Örücü & Nelken (eds.), pp. 138-141; Örücü in Örücü & Nelken (eds.), pp. 169-187.
[61] Cf. Bogdan, pp. 84-88.
[62] Zweigert & Kötz, pp.101-109.

The perhaps most distinguishing trait of the civil law family—which sets it apart from common law—is the prime importance attached to statutory law. The way in which other sources of law—case law, jurisprudence, customary law, etc.—are treated and valued varies across jurisdictions, but statutory law is understood to be the primary source of law.[63] Belgian law has three formally binding sources: statutes, customary law and general principles of law. The other two—case law and jurisprudence—are merely considered complementary.[64] In the case of Spain, Article 1 of the *Código civil* provides that the sources of law are statutes, customary law, and the general principles of law. Case law is not considered a direct source of law, barring consistent application of the three official sources of law by the Supreme Court.[65] In Portugal, statutory law is the only officially recognized source of law, whereas jurisprudence and case law are recognized as influential for the creation and application of the law.[66] In Germany, statutory law is of paramount importance, whereas legal precedents are not considered formally binding (although they are usually followed).[67]

As for the studied countries in the Americas, they do not deviate from the pattern in the European countries—which is perhaps to be expected since they are former colonies of Spain and Portugal. Thus, the Argentinian *Código civil* establishes the hegemony of statutory law over other sources of law in Art. 1-22. Brazilian law seems to deviate from the pattern insofar as case law and general principles are gaining in influence; however, statutory law remains the highest-ranking source.[68] Mexico recognizes seven sources of law with the following hierarchy: 1) the Federal Constitution of 1917; 2) International treaties and conventions to which Mexico is a party, closely followed by 3) federal statutes; 4) codes; 5) doctrine; 6) custom; and, 7) general principles of law.[69] Puerto Rico is unique in that it is a part of the Romanistic family but influenced by the US. However, the hegemony of statutory law is clear, not least from Art. 1-23 of the Civil Code.

French law is a part of the same Romanistic family as the aforementioned countries; indeed, the French Code Civil is, along with the Roman heritage, one of the most important factors holding the family together. Consequently, and since Swedish law shares the Romanistic family's valuation of statutory law as the prime source of law, the French legal method does not differ appreciably from that applied by Swedish legal professionals.[70] The basic concept is of course identical: to derive the legal answer from the recognized sources of law. The chief sources of law are statutes (*constitution, loi, décret, ordonnance*), case law, and jurisprudence/legal doctrine.[71] It is those sources legal

[63] It may be worth mentioning that the words for "statute" or "act" in several civil law languages are linguistically related to "law": "lei, ley" in Spanish and Portuguese, "loi" in French.
[64] European Judicial Network, http://ec.europa.eu/civiljustice/legal_order/legal_order_bel_fr.htm (2012-09-20).
[65] Instituto Roche, http://www.institutoroche.es/Legal_nociones_basicas_de_derecho/V4.html (2012-09-20); European Judicial Network, http://ec.europa.eu/civiljustice/applicable_law/applicable_law_spa_en.htm#1. (2012-09-20).
[66] European Judicial Network, http://ec.europa.eu/civiljustice/applicable_law/applicable_law_por_en.htm#I. (2012-09-20).
[67] Bogdan, p. 169.
[68] Quintella, especially section 3, http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=7338 (2012-09-20).
[69] Vargas, http://www.llrx.com/mexicolegalsystem.htm#SectII (2012-09-20).
[70] Bogdan, pp. 157-159.
[71] To further confuse matters, the English word "jurisprudence" refers to the works of learned writers, whereas the French word with the same spelling means case law. The French equivalent to the English word "jurisprudence" is "doctrine".

scholars use as authoritative sources that together provide the legal answer. Customary law is cited as a fourth source, though it is usually presented with the caveat that it is of limited importance and equally limited applicability.[72] *Travaux préparatoires* are recognized as a source of law, but are nowhere near as important as in Sweden.[73]

For practical research matters, one can of course employ more sources, understood as sources of information. Laws are published in the *Journal officiel de la république française* (J.O.). The case law of the Cour de Cassation is published in the *Bulletin des arrêts de la Cour de Cassation* (Bull.), and reviewed in law journals, such as the *Juris-classeur périodique - La semaine juridique* (J.C.P.). The Internet is gaining importance as a means of publishing legal material. Statutes and case law can now be accessed on the state-run www.legifrance.gouv.fr, and the Cour de Cassation publishes its case law on its website www.courdecassation.fr, where the *Bulletin* issues dating back to 2008 can also be found.

As to the practical research method for lawyers, Bucher and Manarin suggest:

1. legislation (including *travaux préparatoires*),
2. case law,
3. legal encyclopedias,
4. law journals,
5. introductory works,
6. law databases, and
7. certain Internet sites.[74]

It is readily observed that the list is more of a practical guide for junior researchers (though it is of course suitable for senior researchers as well) than a list of authoritative source of law. It is more a list of *resources* than *sources*. To name but one example, the list does not mention academic works beyond introductory works and, implicitly, those that may be found in journals.

France being a civil law country, the role of case law is the same as in Swedish law. Thus, the courts are not primarily understood to make law, but rather to interpret and apply it.[75] Consequently, the role of case law is to clarify the position of the law and to adapt it to the facts of every case. However, Art. 4 of the Code Civil compels judges to give judgment even where there is no law. Thus, in the event of a genuine dispute or appeal where justice is sought, if the issue at hand is unregulated, or if the law is so obscure that no conclusion can be drawn, then the court is obliged to create a rule in order to give judgment.

In addition to the national sources of law, since France is an EU member state, French law is of course bound to community law. Thus, the sources of community law apply, including the principle of the precedence of community law.

[72] Frochot, pp. 1-5; as to the way sources are used by scholars, see e.g. Biguenet-Maurel, de Poulpiquet, and Yaigre & Pillebout (throughout the cited works).
[73] Bogdan, p. 157.
[74] Bucher & Manarin, p. 5.
[75] Zweigert & Kötz, p. 264.

As to the nature of the law, it is the same in France as in Sweden. Thus, the law is primarily prescriptive, and the legal answer is a conclusion based on the relevant sources of law. To name but a simple example, when the Cour de Cassation quashes[76] a ruling by the Cour d'Appel, it states that by ruling as it did, the Cour d'Appel has ruled in breach of the relevant provision(s).[77] Thus, the court has in some way, in the eyes of the Cour de Cassation, misapplied the law. That position is only consistent with the view that the law is prescriptive.

2.5 The Sources Used

2.5.1 Swedish Law

The applicable statute governing the work and role of the Swedish real estate broker is currently the Estate Agents Act (2011:666), which entered into force on July 1st, 2011, replacing the 1995 statute with the same name.[78] The chief *travail préparatoire* is prop. 2010/11:15. It was widely expected beforehand that the new statute would introduce the amendments suggested in the report of the Real Estate Brokerage Commission, SOU 2008:6. However, as will be treated in part in chapter 3, the government and the parliament chose a quite different statute instead. As a result, the relative importance of SOU 2008:6 as a source of law is greatly reduced. As regards the provisions that are examined in the present study, it is of secondary value at best.[79]

Many provisions in the current statute—including, notably, several of those that are examined closely in the present study—emanate from the 1984 and/or the 1995 statute. Thus, the *travaux préparatoires* of those statutes are still relevant sources of interpretation in those parts. The most important documents are SOU 1981:102, prop. 1983/84:16, prop. 1994/95:14, and 1994/95:LU33.

Travaux préparatoires are often treated as a high-ranking source in brokerage law, at times to the point where it almost seems to trump the lexical interpretation of the actual statute provisions. In view of what is said in 2.4.1 above, that must be regarded as a less than satisfactory practice. Therefore, while I make references to the *travaux préparatoires*, I do not consider them high-ranking enough to trump the explicit language of the statute. Now, that should by rights be a matter of course. However, it occurs all too often that Swedish jurists cite *travaux* préparatoires as though they were absolute normative sources—at times even speaking of "legislation through *travaux préparatoires*", which refers to the practice of writing short statutes with short, and vague, provisions, relying on the *travaux préparatoires* to provide the "correct" interpretation. That "correct" interpretation is understood to be the will of "the legislator". I find that practice a bit hard to countenance. Laws in Sweden are enacted by the parliament; 1:4 of the Instrument of Government (IG). The enacted laws consist in the statutes, not the preparatory documents where the government explains their purpose to the members of the parliament. If the government—who does

[76] The Cour de Cassation can only quash a ruling of the Cour d'Appel, not substitute its own decision on the merits; Zweigert & Kötz, pp. 120-124.
[77] The standard wording is "*qu'en statuant ainsi, la cour d'appel a violé se texte suvisé*".
[78] Estate Agents Act (1995:400).
[79] As to the proposed provisions that *were* introduced, such as the obligation for brokers to keep notes of the brokerage assignments (20 §), the report remains an important source of interpretation.

not in itself have the power to pass laws[80]—wants its purposes with a statute to be fully effectuated, it is up to them to write bills with a language that achieve that end. It is not reasonable to hold that courts and the public are eternally bound by those considerations. This is particularly true in the case of old *travaux préparatoires*, since they cannot by definition take into account the development after the enactment of the statute at issue. Many problems involved in the application of the law were perhaps not even conceived of at the time the *travaux préparatoires*. Granted, even in such cases, the *travaux préparatoires* can give voice to the spirit of the law, and hence be a useful guide to an adequate interpretation and application. However, reason dictates that one be careful not to place undue importance in out-of-context statements.

An important example of the exaggerated importance placed in *travaux préparatoires* is the interpretation problems surrounding the damages reduction rule in 25 § EAA (see 9.1.6). It is impossible not to be deeply critical of an interpretation and application of a provision—sponsored by respected legal experts—that is in breach of the statutory provision itself. It is even harder to countenance in view of the fact that the highly questionable interpretation is to the detriment of the weaker party. Thus, in sum, I use the relevant *travaux préparatoires* as important, yet auxiliary and not absolute, sources of interpretation.

I make extensive use of case law throughout the study. The reason for this is ultimately the language of 8 § (12 § in the 1995 statute) which calls for the broker to exercise "due care" and to act in accordance with "sound estate agency practice". I will return in detail to those to concepts in chapter 3. The relevant case law has two branches, corresponding to the two kinds of responsibility: civil and disciplinary. The forum for civil liability is the civil courts, with the Supreme Court as highest instance. A few very important rulings, most notably in this study **NJA 1997 s. 127 I & II**, are from the civil courts. The greater number of cases, however, are from the administrative courts and the FMN.

As will become apparent, I make rather extensive use of case law from the FMI (then FMN) and the courts of lower instance. As previously mentioned, those cases are not precedents and hence not “binding” in the same sense as rulings from the Supreme Court and the Supreme Administrative Court. However, it is a clearly stated intention from the legislator that case law be used as a central source of law as regards the obligations of the broker. The language clearly indicates that cases from courts of lower instance, as well as that of the FMN/FMI itself, are relevant sources.[81] Furthermore, even a brief look at the central jurisprudential works in the field, as well as the rulings from the courts of lower instance themselves, indicates that this practice is widely spread. Thus, with the caveat that, ultimately, only precedents are formally binding, it can safely be adduced that case law is regarded as a central source in brokerage law, and that courts will not deviate from other rulings without extremely good reasons and strong arguments.

As for jurisprudence, the central authors whose works I have used are Claude Zacharias, Folke Grauers, Magnus Melin, and Lars Tegelberg.[82] Others, such as Cervin and Dotewall, have written about some aspects of brokerage law. However, those works have little bearing on the subject matter of this study.

[80] 1:4 of the Instrument of Government *(regeringsformen)*.
[81] Prop. 1994/95:14, p. 40.
[82] The co-authors are Per Henning Grauers and Mats Rosén; however, the sections of greatest interest in the present context are those written by Tegelberg.

As will be discussed in Chapter 3[83], real estate brokerage is also regulated by other statutes than the EAA. There are other statutes that have direct bearing on the broker's work, e.g. the Marketing Act (2008:486), and others that have indirect bearing on the broker's work, such as the Land Code (1970:994) and the Sales Act (1990:931). Those, and other statutes, are used where necessary. As they are not the primary focus of this dissertation, however, I have not delved more deeply into those subjects than I have deemed necessary. Thus, I have not scoured all the sources of law in those respects.

2.5.2 The Swedish Survey

As the purpose of this dissertation is to examine and discuss the law, not the physical world, the survey I conducted in 2010 is not used as a source in the direct sense. However, it has implicitly affected the way in which I value some aspects of the broker's duties. It seems appropriate, therefore, to give a brief account of how it was conducted.

A questionnaire was sent out by e-mail in May-June 2010 to roughly 5019 brokers, namely those who had at that time voluntarily submitted their e-mail addresses to the FMN.[84] 1,558 responses were received in all; a response rate of roughly 31 %. The sample is "blind" in the sense that the questionnaire was sent to all brokers on the list. There was no deliberate selection involved; indeed, there was no reason for such selection since the purpose is to study the Swedish "system" and thus the broker profession on a national level. With that said, the issue of sample bias must nonetheless be addressed. As of June 2010, there were 6,416 registered brokers in Sweden. Thus, about 1,400 registered brokers (roughly 22 % of all brokers) did not receive the questionnaire. What people, then, have not submitted their e-mail addresses to the FMN? There is no way to know with complete certainty who these 1,400 brokers are and how this affects sample bias. However, three plausible categories of absentees spring to mind. Firstly, it might be speculated that a large part of the group consists in people who only use e-mail to a limited extent. Intuitively, low use of e-mail could be associated with higher age, small towns and sparsely populated areas. Secondly, a plausible reason not to submit one's e-mail address is a disinclination to share personal information with the authorities. However, it is unclear who would be so disinclined, and even less clear what persons with said disinclination have acted upon it. Last, but not least, the failure to submit one's e-mail address to the FMN could also be a matter of mere oversight or disinterest—both of which provide little, if any, relevant information that has bearing on sample bias. The only educated guess to be made, then, is that the group of 1,400 people who are not included in the questionnaire study has an overrepresentation of older brokers, presumably over 55, and of brokers residing in provincial areas of the country.

[83] Particularly 3.2.2.

[84] The exact figure is not clear at this point since between 100 and 300 addresses were either invalid, incorrect or obsolete.

2.5.3 The Nine Studied Notary Countries

In the first part of this study I examine nine countries. The purpose is not to provide deep insights as to the details of each country's notarial law—that would be an enormous task well beyond what is possible in this context. Rather, the purpose is to provide a means to compare the notary with the Swedish broker. The aim is therefore to demonstrate 1) that the laws are similar enough that it is relevant to speak of the Latin notary as a legal character, 2) that the Latin notary is bound to a duty of impartiality and a duty to give counsel. The sources are therefore mainly limited to the relevant statutes, articles, and Internet resources, with the odd court case as complement. While one can never be completely certain of the legal method of each jurisdiction without examining it in detail, the fact that all studied countries are civil law countries with a legal tradition that is highly similar—and not so different from the Swedish tradition—it seems safe to use the sources in the employed manner.

Regarding the secondary sources used—mainly articles—it seems prudent to point out that, as will be demonstrated in chapter 13, the regulation of the notary profession has been the subject of heated debate during the last decade 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 classic notary system. Said sources have been read and cited with due note to this fact.

2.5.4 The Historical Outlook

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 in chapter 4, 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 Gauis' *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.

2.5.5 France

The notary has a role in the law and in society that goes well beyond the subject of the present study. Thus, there are more applicable statutes and other sources than have been used here. The statutes of prime importance are:

- Code Civil
- Loi du 25 Ventôse an XI, Loi contenant organisation du notariat, ”Loi Ventôse”
- Ordonnance n° 45-2590 du 2 novembre 1945 relative au statut du notariat
- Ordonnance n° 45-1418 du 28 juin 1945, relative à la discipline des notaries et de certains officiers ministériels
- Décret n° 45-117 du 19 décembre 1945 portant règlement d’administration publique pour l’application du statut du notariat

As in the case of the Swedish broker—and to an even larger extent—there are other laws that have bearing on the notary's work. One example of such a law is the Construction and Housing Code (*Code de la construction et de l'habitation).* As in the case of the broker, such laws are only examined to the extent it is necessary in the present context.

As will be elaborated in chapter 7, the French notary's duty to counsel is derived from Art. 1382 of the Code Civil. It has evolved through the case law of the Cour de Cassation, which is the French Supreme Court. As will be apparent in chapters 8-11, I make extensive use of case law. This seems sensible, since the rulings must be considered the most important source of law as regards the notary's duty to counsel.

As for jurisprudence (in the English sense of the word), I rely most on the works of Cécile Biguinet-Maurel, Jeanne de Poulpiquet, and Jean Yaigre & Jean-François Pillebout. The English solicitor Henry Dyson has also written a book - in English - on French property law and inheritance law, which has been quite helful.

Needless to say, Internet sources have been of great use. One fine example is the aforementioned www.legifrance.gouv.fr, where legislation and case law can be freely accessed. Other Internet sources such as articles, FAQ's, notary association websites and the like have been used. In the end, however, it is the classical sources of law that serve as actual sources.

Part I: A General Comparison

3 The Role of the Swedish Broker

The present chapter will examine the role of the Swedish broker as laid down in the Estate Agents Act (2011:666). It is of course neither possible nor relevant to treat all aspects of brokerage and its regulation here; there is plenty of literature for that purpose. I will instead focus on the provisions that define the general role of the broker in the real estate conveyance process. As will be demonstrated, the broker fulfills two major functions in the conveyance process: a *matchmaking function* and a *counseling function*. The latter function entails four duties: 1) to ascertain certain facts, 2) to disclose relevant facts, 3) to give adequate advice, and 4) to draw up the necessary documents, primarily the sales contract, in an adequate manner.

Whilst performing her tasks and functions, the broker is held to two important duties, which are laid down in 8 § EAA. The first is the duty to exercise *due care*.[85] It can be roughly summarized as a general standard of diligence and prudence, and is a cornerstone of the broker's counseling function. I will return to it in detail in Chapter 7. The second is the duty to safeguard the interests of both the buyer and the seller - a duty that has probably been debated and discussed more than any other rule governing the broker's work. It is described as a duty to act as an *impartial intermediary.* The duty of impartiality is complemented by a duty of *integrity and independence*, which can be summarized as a prohibition for the broker to act in a manner that is likely to cause suspicion that the broker is being unduly influenced.

Since ascertaining facts, information disclosure, advice, and contract-engineering are the subject matter of the second part of this dissertation, those provisions will only be treated superficially in this chapter. Consequently, full references to support the claims in those parts will be presented in chapters 8-11. However, the duty of impartiality, integrity and independence will be treated in a bit more detail. The chapter will then be finished off with a brief account of the broker's civil and disciplinary responsibility.

3.1 The Matchmaking Function - Bringing the Parties Together

Merriam Webster's online dictionary defines the word broker as *"one who acts as intermediary,* [such as] *an agent who negotiates contracts of purchase and sale".* While most people would probably find that definition adequate enough, it lacks specificity. What does it mean to act as an intermediary? What does it mean to negotiate contracts? Previous statutes have lacked a definition of brokerage, although the fact that the broker's right to remuneration has been made contingent on a successful conveyance might serve as an indicator. The present EAA, however, stipulates in 1 § that:

"[b]rokerage refers to an activity, based on a client-agent agreement, with the purpose of designating a counterpart with whom the client can enter an agreement of conveyance or lease".

[85] *Omsorgsplikt*.

The passage is only slightly different from the definition in the *travaux préparatoires* of the 1984 EAA, which defined brokerage as the contractually based task of introducing to the principal a counterpart with whom the principal may enter a contract.[86] 23 § EAA provides that, unless otherwise agreed, the broker's remuneration shall be calculated as a percentage of the sale price (commission). The broker is only entitled to her commission in the event of a valid and binding agreement between her principal and their counterpart. Thus, it is clear that brokerage is *aimed* at negotiating an agreement between two (or more) parties.

However, while the broker is assigned several duties and tasks by the EAA and the other relevant sources of law, there is no general definition of how brokerage should be carried out. Rather, it is left up to the marketplace and the individual broker to decide exactly how to go about finding a counterpart for the principal. Typically, brokerage will involve advertising in the relevant media. In that respect, there are in Sweden excellent forums which are 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, arranging showings—or by means of web cameras. None of this, however, is expressly provided in the statute.

Of course, the broker's freedom is limited by the several bans and obligations in the EAA and all other applicable statutes such as e.g. the Marketing Act (2008:486). Moreover, in **RK 5135-1999**, the Administrative Court of Appeals ruled that if the broker and her client agree on a remuneration model where the right to remuneration is not contingent on a valid and binding sale, the broker is obliged to undertake to perform "an acceptable service in return".

It seems fairly straightforward to conclude that the reason brokerage has not been assigned a legal definition is because the legislator has not perceived any need to do so. This, in turn, is most probably because, with a few variations, brokerage is and has been conducted in roughly the same manner. The broker advertises and shows the property. As a natural part of this, the broker visits the property. The arrival of Internet-based brokers have tested this rule, with the result that the FMN issued a statement in 2009 saying that, in the opinion of the supervisory body, brokerage cannot be properly conducted by means of a mere online service.[87]

While it seems a bit odd to lay down, as the legislator has done, several important and highly qualified tasks and duties, and still define brokerage as merely the act of bringing the parties together, it is irrefutable that matchmaking is at the very least a central function in real estate brokerage. The rest of this dissertation will complete the picture by shedding light on the other functions.

[86] Prop. 1983/84:16, p. 27.
[87] http://www.fastighetsmaklarnamnden.se/default.aspx?id=2109&ptid=0 (2012-07-30).

3.2 Due Care and Sound Estate Agency Practice

3.2.1 Due Care

Under 8 § EAA, the broker is required to perform the service for which she has been engaged with due care and in accordance with sound estate agency practice. The provision has been transferred unchanged in substance in this part from the 1995 EAA. The term "sound estate agency practice" has of course received enormous attention, and is commonly used as the generic term for the broker's code of conduct. Surprisingly, the same cannot be said of the term "due care", which does not seem to be given much thought in the literature. As will be demonstrated here, this is a mistaken view. In actuality, the duty to exercise due care is not only a cornerstone of the broker's duties – it is their very foundation.

The term due care seems widely overlooked in the *travaux préparatoires* as well as the literature: the widely spread definition of due care seems to be that the broker must act "expediently", primarily vis-à-vis her client.[88] The lack of guidance in the *travaux préparatoires* have caused quite the interpretation problem: it has been suggested both that the term applies only in relation to the client and not their counterpart, and that there is no reason to draw a clear line between the due care obligation and sound estate agency practice.[89] Thus, the sources are inconclusive and the only general consensus seems to be that "sound estate agency practice", not due care, is the key term.

However, there is simply no going around the fact that the statutory provision clearly states that the broker must perform her service with due care. The fact that the *travaux préparatoires* do not appear to make a big issue of the phrase cannot change that; neither can the fact that the literature seems somewhat at a loss as to how the term should be interpreted. Moreover, it must be assumed that the requirements laid down in the statute are not just for show but rather meant to be applied. This intuitive notion is given ample support by the sparse language of the statute as a whole. Thus, since the statutory rule exists and cannot be overlooked, an interpretation simply *must* be made. Moreover, other provisions in the EAA can be used as interpretation guides. Here, two provisions would seem of particular importance.

Firstly, 8 § p. 2 requires the broker to safeguard the interests of both the buyer and the seller. The main point of this sentence is arguably to provide the statutory foundation for the broker's impartiality. However, the sentence can also be read as requiring the broker to *safeguard the interests* of the parties. The point is not merely that the broker should treat both parties equally: if it were so, the broker could simply treat both parties with equal indifference. Rather, it is clear that the broker must actively safeguard the parties' interests.

Secondly, the broker is obliged under 21 § EAA to strive to ensure that the parties reach agreements on important issues, so as to prevent future disputes and—unless that obligation is contracted out, which is rare—to draw up all necessary documents. As will be discussed in detail in chapter 10 below, the broker is understood to have a duty to be "active and observant" in order to get a clear picture of any potential conflict issues. There is an intuitive logical link between due care on the one hand and being active and observant and striving to prevent future disputes on the other: the latter are natural

[88] SOU 1981:102, p. 201; prop. 1983/84:16, p. 36; Rosén in Grauers et al. (2011), pp. 94-96.
[89] Zacharias 2001, p. 62; Melin, p. 129.

exemplifications of the former. It seems reasonable to hold, therefore, that the main principle is that the broker must act with due care; the specific implications of that principle with respect to the drawing up of contracts is that the broker must be active and observant and strive to prevent disputes.

Thus, it is established that due care has a deeper meaning than the *travaux préparatoires* and the jurisprudence have recognized. It is also reasonable to find it satisfactorily established that being active and observant and preventing disputes between buyer and seller are exemplifications of due care. The question is, can a general definition be found?

By definition, the term "due care" implies acting with some level of diligence and prudence; diligence signifying that the broker must make a substantial effort, and prudence signifying that the broker must have the best interests of the buyer and seller in mind and strive not to expose them to excessive risks. Here, it bears reminding that the EAA is to a great extent a consumer protection law.[90] Thus, where the buyer and/or seller is a consumer, one must take into account that the consumers are entitled to trust the broker as a professional to safeguard their interests and alert them as to all risks and possible complications. In order to do so, the broker must be both active and proactive. Being active is intuitive: where the broker perceives that there is a substantial risk that the buyer or the seller will suffer e.g. a legal or financial loss, it is incompatible with due care to remain passive. Being proactive is, if not intuitive, then at least fairly straightforward: in order to safeguard the interests of the parties, the broker must first and foremost identify the possible pitfalls. This requires a constant alertness. While some risks are present in virtually all real estate conveyances, others arise only in some cases. To properly safeguard the interests of the parties, the broker must identify the risks that are, or could be, present *in the transaction at hand*.

In sum, the due care obligation requires the broker to act diligently and prudently in order to safeguard the interests of the parties. This is the general principle underpinning the whole duty to counsel and all its activities. In the following sections, we will explore the different activities involved: gathering information, disclosing information, giving advice, and drawing up contracts. As will be apparent, these activities are in no way separate islands but rather interconnected aspects of the broker's duty to counsel. Their common measure of interpretation—the blood system that brings them oxygen, as it were—is the obligation to act with due care.

3.2.2 Sound Estate Agency Practice

Sound estate agency practice (hereinafter referred to as SEAP) is a term that seems imposing and impressive. It implies that there is a sound and good way to practice real estate brokerage that is in opposition to any undesirable practices that may exist, and that is based on sound and equitable principles such that it gives sustenance to the interpretation of the broker's duties in every conceivable situation. Indeed, whether intentionally or not the term is used in that manner so often and in so diverse contexts that it is impossible to account for them all. The problem is, when one seeks to peel off the outer layers to get to the essence of the term—which is unquestionably not

[90] Prop. 1983/84:16, p. 7; prop. 2010/11:15, p. 17. SOU 2008:6 bears the title "The Real Estate Broker and the Consumer". Finally, 4 § EAA provides that the rights of consumers under the statute cannot be contracted out.

merely of interest but rather a strict necessity since acting in accordance with the term is a statutory obligation—one is quickly left at a loss, the essence of the term seeming as elusive as sand through one's hands. The main problems that present themselves are the following.

1. What is SEAP? What are its underlying principles? What are its implications as to the interpretation of the broker's obligations, statutory or otherwise?

2. Who decides the position of SEAP on any given topic?

3. Is this concept institutionally and substantively adequate?

As to what SEAP is, it should be observed first that it must be understood within the context of individual responsibility as prescribed by 1 § EAA. Hence, "sound practice" can never be defined by what real estate firms *do*. It could well be that the brokers in a particular firm follow sound practice. It could even be the case that they do so in part because it is company policy to do so. However, it is not the fact that the firm and its employees follow sound practice that makes it sound practice. Given that there is a statute that governs the work of brokers, and given that said statute prescribes individual responsibility, a broker can never be exonerated by referring to company policies. Even in situations where there the law gives no clear answer as to how the broker should act, the practices and policies of firms can never be used as auxiliary normative sources. To apply a principle stating that a practice is sound simply because it is being used is no option. Firstly, it is arguing in a circle and thus illogical. Secondly, it is irreconcilable with consumer protection: it would hardly be acceptable if the legal rights of consumers were defined and determined in corporate board rooms.

It follows from the foregoing that SEAP is not and never could be descriptive or predictive. It can never be said that that a given course of action is in accordance with SEAP simply because said course of action is taken by brokers every day. The fact that something takes place can never in itself prove that it is legal, nor that it is proper. The same applies to predictions that a given course of action is likely to be taken by other brokers. Consider, for instance, the much discussed ban for brokers to market a property at a significantly lower asking price than the assessed market value.[91] The existence and contents of the rule are indisputable. Suppose that in a given local market—say, for instance, central Stockholm—it can be surmised that a majority of brokers defy this ban on a daily basis. Would that in itself mean the practice is sound? Few would say yes to that. Hence, it is clear that SEAP is and must always be *prescriptive*.[92]

[91] SOU 2008:6, pp. 172-174; prop. 2010/11:15, p. 33; Zacharias 2012, pp. 550-551, 779; Melin, p. 132-133; Tegelberg, pp. 23, 46, 52-53, 63.

[92] It should be observed that this is in no way meant to denigrate the view that brokers should be allowed to use any asking price they want. After all, the logic of the ban is that it lures consumers to visit showings and take part in bidding procedures, thereby driving up prices and tricking consumers to overpay. That position can certainly be challenged. Firstly, it hinges on the assumption that consumers are inherently "stupid" and that they cannot be expected to possess even the weakest instinct to look out for their own best interest even in transactions as costly as the purchase of a house or apartment. Secondly, if a certain practice is common in the marketplace, the players will eventually adapt to it. Thus, if in a local market—say, again, central Stockholm—it is more a rule than an exception that the asking price is significantly lower than the market price, perhaps even lower than the seller's reservation price, it would not seem far-fetched to predict that, in the long run, consumers will learn to adapt. Thus, if the asking price of a particular apartment is SEK 1,300,000, consumers would assume that the real price is somewhere in the region of SEK 1,600,000. Of course, that position could

Having established that SEAP is prescriptive, the next step is to determine by what norms it is underpinned. As to that, it is fairly straightforward to conclude that it cannot be considered good practice to act in breach of the law. Besides the obvious and intuitive advisability of following the law, since SEAP is expressly mentioned in the statute and thus granted the status of a legitimate source of interpretation, it follows that it must harmonize with all existing legal rules, whether statutory or derived from other sources. This means, in turn, that the recognized sources of law must constitute the primary boundaries of SEAP no matter who is set to interpret it. Needless to say, the obligations laid down in explicit provisions in the EAA must always be fulfilled. That follows logically from the *lex specialis* principle: a more specific rule overrides a more general rule.

Case law based on the EAA is of course another important source of interpretation. If, for instance, there is a Supreme Court ruling on a given topic, SEAP could by definition never contradict the ruling. Of course, the same goes for all statutes that are applicable to brokers. A perfect example, to which 7 § of the current EAA makes explicit reference, is the Money Laundering and Terrorism Prevention Act (2009:62). Said statute not only provides explicit obligations for the broker, but gives rise to new interpretations of specific provisions in the EAA and of SEAP. Other statutes with direct bearing on the broker's duties include the Market Act (2008:486) and the Non-Discrimination Act (2008:567).

Moreover, given that SEAP must be in accordance with the law, it must be consistent with not only all existing explicit obligations and prohibitions, but also with any existing criterion of interpretation. The EAA contains one main such criterion, namely the due care obligation described in the previous section. Since that obligation provides the foundation for the broker's professional obligations, it follows that a broker can never cite SEAP to justify the non-performance of a certain task. If the performance of said task is necessary to comply with the obligation to act with due care, then the task must be performed.[93] Suppose, for instance, that the broker possesses knowledge that she knows or can reasonably suspect to be of importance to one of the contracting parties. Suppose, further, that it is reasonable to assume that if said party is informed of the situation they will take appropriate measures to avoid legal or financial losses. Under such circumstances, it would hardly seem diligent or prudent for the broker to withhold the information. Consequently, withholding such information is not consistent with SEAP.

Since SEAP can by definition never deviate from applicable law, including the due care duty, one arrives at the point where it is questionable whether it is relevant to speak of a SEAP that is separate from the due care obligation. The logical answer would seem to be no. Since there can be no SEAP that is inconsistent with existing obligations and prohibitions, it follows that there can be no activity or course of action that is consistent with SEAP but inconsistent with the due care obligation. Hence,

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also be challenged since there are many buyers who are new to the local market and thus unfamiliar with the practice. However, whichever position one prefers, none of this changes the fact that the practice is banned. That ban does not disappear because it may seem likely that a number of brokers defy it.

[93] Within the context of disciplinary proceedings, the principle of legality would seem to partly contradict this notion, since the meting out of disciplinary sanctions is only acceptable if the rule is foreseeable, which in turn usually requires an explicit provision. However, the contradiction is if not illusory then at least not clear-cut. It is clear from the EAA itself, its *travaux préparatoires* and case law that "sound estate agency practice" is meant to evolve to fit the needs of society; prop. 1983/84:16, p. 36-37, prop. 1994/95:14, p. 40. Therefore, the absence of an express provision does not in itself mean that a given task is not mandatory. Moreover, a course of action could be deemed illegal per se and still not warrant a disciplinary sanction in a particular case due to mitigating circumstances.

the determinant, apart from the explicit obligations and prohibitions, is the due care obligation. Consequently, SEAP must be deemed a dependent variable while interpreting and applying the law.

It should be noted that this only applies to the broker's relation to the parties, i.e. the seller, buyer and prospective buyers. There are, of course, rules of conduct that are not directly linked to safeguarding the interests of the parties. The rules governing the broker's integrity and independence are good examples. For instance, it follows from RÅ 2008 ref. 63 that it is illegal under 14 § EAA for a broker to broker a tenant ownership home in an association where she herself is a member. The logic of that ruling is that doing so would give rise to *suspicions* that the broker did not have the best interest of the parties in mind, since she herself had a vested interest in her own association. The rule applies irrespective of the broker's actual performance. Thus, it the term SEAP is by no means obsolete. As concerns the broker's performance in matters pertaining to the interests of the parties, however, it is overridden by the due care obligation.

Given that it is the due care obligation and not SEAP that determines the correct interpretation of the broker's obligations, the question of who gets to decide the contents of SEAP loses much of its importance. However, since SEAP is linked to the due care obligation, it follows that the institutions that determine the contents of the due care obligation also determine the contents of SEAP. Thus, the FMN and the administrative courts are the principal interpreters of SEAP, along with the civil courts. As previously stated (2.4.1), private institutions such as dispute resolution boards must be deemed of secondary significance.

As to the question of whether the described situation is institutionally and substantively adequate, it seems prudent to begin by summarizing the situation before giving commentary. The consequence of the foregoing is that it is the competent authorities, namely the courts and the supervisory body, who determine the scope and contents of SEAP, and thus its position on any given topic. Apart from the possibility that the FMI makes its position public by means of "general advice" (*allmänna råd*) or other statements, the interpretation will take place in the process of supervision and/or adjudication. It follows that the contents of SEAP will chiefly be determined by case law, one of the principal established and accepted sources of law.

3.3 The Counseling Function

Pursuant to 17 § EAA, the broker must verify who is entitled to dispose of the property and to what extent it is encumbered by easements, mortgages, or other rights. The broker must also verify if the property forms part of one or several joint facilities. In the case of tenant-ownership homes (*bostadsrätt*), the duty applies to right of disposal and mortgages. This is the *duty to verify*. It is not merely a duty to make efforts to obtain information: if it is at all possible to obtain correct information in these respects, then failure to do so constitutes an infraction. Normally, the concerned information is easily accessible from the Land Register, to which the broker can subscribe as a part of the software packages used by virtually all brokers. In the case of tenant ownership homes, the concerned information is obtained from the association. It may not be as reliable as the Land Register, and in some instances the broker may experience minor difficulties in obtaining the information, but on the whole the information in question is available. There are instances, however, when the broker must go beyond the Land Register or the tenant ownership association. Those

situations may concern information encompassed by 17 §, but they may also concern other kinds of information where the broker is understood to have a *duty to investigate.* The latter duty is derived from the general due care duty. Together, the duty to verify and the duty to investigate form the broker's *duty to ascertain facts*, which will be examined in detail in chapter 8.

16 § 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 phrase encompasses two distinct obligations: 1) to provide both parties with *advice* concerning the property and other matters that are relevant to the sale, and 2) to provide both parties with *information* concerning the property and other matters that are relevant to the sale. Now, at a glance, advice and information may seem like the same thing, or at least so intertwined that separating them is not meaningful. That, however, is a mistaken view. Informing another person that something is, in other words informing them of a fact, is not the same as informing them of its significance. An expert may inform the layperson of something the latter lacks the knowledge to understand. Thus, disclosing information is one duty. Giving adequate advice, *inter alia* by educating the parties as to the significance of the conveyed information, is another.

16 § further obliges the broker to 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. One the surface, this may appear as simply promoting good faith and protecting the buyer from fraudulent behavior. Indeed, that is undeniably a part of the rationale. However, the seller can also profit from disclosing information, e.g. concerning known defects, since it may serve to limit their liability. Therefore, the obligation is also tantamount to legally prescribed advice to the seller.

It is further stipulated in 16 § that the broker must strive to ensure that the buyer inspects the property prior to the sale or hires an expert to do so. This obligation is complemented by a novelty in the 2011 EAA, viz. a new sentence in 16 § obliging the broker to inform the buyer in writing of their duty to inspect. The only real novelty is the requirement to inform *in writing*; the rest is in actuality no more than a codification of a previously existing obligation, since informing the parties of their respective obligations falls under the general duty to advise.

Another novelty in the current statute is that 16 § p. 3 explicitly stipulates that if the broker has observed, or due to her experience and/or expertise has reason to suspect, anything concerning the physical condition of the property of which the buyer may need to be informed, the broker must inform the buyer thereof.

Information disclosure will be treated in detail in chapter 9, whereas the duty to advise will be treated in chapter 10.

21 § EAA obliges the broker to make efforts to ensure that the buyer and seller reach agreement on issues that need to be resolved in connection to the sale. Unless otherwise agreed, the broker is also obliged to assist the parties in drawing up the necessary deeds. This duty, which I call the *contract-engineering duty*, is a hybrid duty that calls for the broker to inform herself by whatever means necessary of the issues that need to be resolved, to advise the parties adequately and to draw up deeds that are tailored to the instant transaction. 21 § must be read in conjunction with the general

due care duty in 8 § and the duty to advise in 16 §. Together, the three provisions give rise to five separate obligations which constitute the contract-engineering duty:

1. to indentify the potential problems and issues of conflict;
2. to present adequate solution to said problems;
3. to formulate the deeds and clauses in an adequate manner, so as to minimize the risk for future disputes;
4. to explain the content and full significance of all deeds and clauses; and
5. to make efforts to ensure that all non-trivial agreements between the parties are documented, even where it is not required for a valid and binding agreement.

The contract-engineering duty will be treated in detail in chapter 11. Chapters 7-11 will of course contain all the references necessary to prove the claims made here.

3.4 The Impartial Intermediary

As is widely known, at least on a superficial level, the Swedish broker is expected to act as an impartial intermediary. The intuitive, at-a-glance interpretation of impartiality is that the broker must see to the interests of both seller and buyer. However, that 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:

- 8 § Safeguarding the interests of both parties (3.4.1);
- 15 § Prohibited from representing either party (3.4.2);
- 11-14 §§ Maintaining the independence and integrity of the broker (3.4.3);
    - 11§ prohibited from purchasing the property
    - 12 § prohibited from brokering properties to or on behalf of relatives and other parties to whom the broker has personal or economic ties
    - 13 § prohibited from trading in real estate
    - 14 § prohibited from engaging in other activities that may affect the broker's professional trustworthiness.

3.4.1 Safeguarding the Interests of Both Parties

8 § EAA obliges the broker to perform her assignment 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 duty of impartiality. The rule/principle itself, however, is of

older origin. The Home Ownership Commission suggested, in its 1981 report SOU 1981:102 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".[94] In the end, no such provision was introduced in the EAA of 1984. It was not until the 1995 statue that the rule was introduced as an explicit provision. Whether and to what extent there was nonetheless 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 and has existed since the 1995 statute.

It stands to reason that the duty of impartiality cannot be without limits. As is sometimes adduced by commentators, there is one fundamental problem with the impartiality rule, namely the inherent asymmetry in the party constellation buyer/broker/seller. One of the parties—in Sweden this is usually the seller—hires the broker to find a counterpart. The broker has a contractual relation to her client, meaning in turn that she has contractual as well as statutory obligations towards that party. 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 seller. This is all the more so given that brokers usually charge a commission and therefore share the seller's interest in obtaining a higher sale price.[95]

The legislator has long since foreseen the problem, discussing it in the *travaux préparatoires* of the 1995 EAA. However, no explicit provision in this regard was introduced in that statute. The statement in *travaux préparatoires* was quite vague, saying that the broker was entitled to prioritize her client's interests with respect to "purely economic considerations".[96] The most common interpretation of this is that it allowed the broker to lean towards her client with respect to the sale price. However, the language is so vague that the exception was interpreted by Zacharias as offsetting the impartiality rule altogether.[97] Melin would not go so far, but held that the broker was not only *allowed* to act in favor of her client with respect to economic/financial issues, but also *required* by her contractual obligations to do so.[98]

As of the current statute, there need be no great confusion. 8 § p. 2 provides that within the limits of sound estate agency practice, the broker is obliged to give particular regard to the economic

[94] SOU 1981:102, pp. 190, 200-201, 208, and 244-245; see also Melin, p. 147.
[95] 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 sale price would therefore, by the same token, not be as strong as one may be inclined to believe.
[96] Prop. 1994/95:14, pp. 41-42.
[97] Zacharias 2001, pp. 213-222.
[98] Melin, p. 149.

interests of her principal. The *travaux préparatoires* mention two examples. Firstly, it is stated that the broker is obliged to give advice as to whether a particular offer should be accepted. Secondly, if the broker receives information that the buyer lacks the financial capability to complete the purchase, she must inform the seller.[99]

From the two examples just mentioned, it would seem that the exception to the impartiality rule is nothing more than an indication that the duty to advise takes precedence over the duty of impartiality. The conclusion is a matter of pure logic. Sound estate agency practice is the sum of all applicable legal norms. Among those norms, it is readily understood that the provisions in the EAA are of prime importance. Thus, the exception should be read as an obligation to pay special attention to the economic interests of the principal, as long as it does not collide with a legal norm that is binding to the broker. For instance, one might surmise that if the broker knows that the property is marred by a defect that is costly to repair, it is not conducive to a high sale price to inform the buyer of the defect. Notwithstanding, the broker is obliged under 16 § EAA to disclose the defect, and that provision takes precedence over 8 § p. 2. The order of precedence is explicit in 8 § p. 2; however, one could arrive at the same conclusion by considering the *lex specialis* principle, whereby a specific rule takes precedence over a general rule.

Since sound estate agency practice also refers to relevant case law, it follows that the broker is not allowed to act contrary to such rulings in order to safeguard the economic interests of the principal. The following case, adjudicated under the term of the 1995 statute but still valid, illustrates the point.

> In **KamR 7165-07**[100], the broker and the seller had agreed upon a rule for the bidding process, to the effect that all bids must exceed the highest previous bid by at least SEK 20,000 in order to count. Two prospective buyers - a married couple - bid SEK 10,000 over the latest bid and were informed by the broker that the bid did not meet the standard required by the seller. The couple, who were keen to purchase the property, conceded to bid SEK 20,000 over the latest bid in order to comply with the requirement. They subsequently won the bidding and purchased the property. However, they reported the broker to the FMN. The oversight agency's disciplinary board held that under sound estate agency practice, all prospective buyers have an unconditional right to have their offers, bids, and messages conveyed to the seller. That right, held the FMN, cannot be contracted out by the broker and the seller. The FMN was not appeased by the broker's submission of an affidavit from the seller stating that the broker had acted on their express instruction. The broker was issued a warning.
>
> The broker appealed the decision to the Administrative Court of First Instance, who concurred with the FMN in substance. However, the court observed that the broker had acted upon the instruction of the seller. Consequently, the court found the infraction "minor" and overturned the decision. The FMN appealed the ruling to the Administrative Court of Appeals, who concurred in all parts with the FMN. The warning was upheld.

[99] Prop. 2010/11:15, pp. 24, 49.
[100] Ruling of September 9th, 2008.

The ruling may raise a few eyebrows since it would seem to effectively curtail the seller's possibilities to control the sale process. However, given the duty of impartiality, the ruling is logical and sound. The broker had, and still has, an obligation to convey all offers, bids, and messages. That obligation is not fulfilled until all messages have been conveyed. Logically, an obligation on the part of the broker to convey a message from the prospective buyer is mirrored by a right on the part of the latter to have their messages conveyed. That right can of course be waived, but only by the buyer themselves. An agreement between the broker and the seller can never be binding to the buyer as agreements are not binding to third parties.

The duty of impartiality may at times, at least apparently, be at odds with other provisions in the EAA, such as the duty to advise. For instance, a good advice to one party may be detrimental to the other party. Should the broker refrain from giving the advice in order to remain impartial? The collision is perhaps even more obvious when it comes to advice concerning the sales contract. As will be demonstrated in chapters 10 and 11, if the broker perceives a problem that can be solved by means of a contract clause of some kind, she is obliged to suggest that the clause in question be included in the sales contract. However, the problem at issue may well be a problem for one of the parties only. "Solving" it could in some instances mean contracting out statutory rights for the other party. Should the broker give such advice, or remain impartial? I will return to these issues in chapters 10 and 11.

It is generally not compatible with the impartiality rule to take extraordinary measures in order to promote the sale of the property. One such measure is to extend loans to either of the contracting parties. The rationale is that a contractual tie to one of the parties gives the broker incentive not to safeguard the interests of the other. That being the rationale, it is not clear-cut whether to cite 8 § or 14 §. The latter provision, which will be treated in detail below (3.3.3.4), may render a particular activity or action illegal not because the broker *actually has* failed to safeguard the interests of both parties, but because it may give the broker *incentive* to that effect. The case law of the FMN is not entirely clear as to which provision it has based its decision on. For that reason, all cases concerning the loaning of money to the buyer or the seller will be treated in the present section.

> **RK 1948-07.**[101] 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.
>
> The buyer had approached both the responsible broker and the 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. The seller agreed to move the day of possession only if the sale price was paid in full before. 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.

[101] Ruling of 15 October, 2007.

The case reached the FMN, who held that it is not compatible with sound estate agency practice to extend 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 just such a position, and thus upheld the warning. The broker appealed the ruling to the Administrative Court of Appeals, 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.

In **FMN 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 FMN made it clear that the loan offer alone merited a warning.

In **FMN 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 FMN 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 **FMN 2006-03-22:1**, the broker was issued a warning for extending a loan to one of the parties. The FMN 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.

In **FMN 2006-05-10:1**, the seller was a small firm 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 FMN pointed out that such transactions are generally not conducive to an impartial behavior, but refrained from issuing a warning, on the grounds that the transaction had apparently not affected the broker's performance as broker.

Furthermore, the broker is not at liberty to assist either party in a subsequent dispute. Melin holds that this follows from 15 §, since that provision prohibits acting on behalf of either party.[102] That is not entirely true, since the broker could lend the parties valuable assistance without necessarily acting on behalf of them. Nonetheless, doing so could be construed as failing to safeguard the interests of both parties. This 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. A balanced view would seem to be that if the assignment is completed—which, if the property is sold, normally means after the day of possession—the broker has no more duties in relation to the parties. In such situations, therefore, there is no collision of norms.

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. 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. For instance, advice in the form of information about the judicial choices available to the parties would not seem to be contrary to the impartiality rule. However, if the broker openly takes the position of one of the parties and tells the other party so, the opposite would seem to apply.

3.4.2 Prohibited from Representing the Parties

15 § EAA prohibits the broker from representing the buyer in relation to the seller or the seller in relation to the buyer; however, the broker may take limited measures to that effect. The whole provision would seem superfluous given that 8 § already stipulates that the broker must safeguard the interests of both parties. One can hardly be said to safeguard the interests of both whilst representing one of them.

The fact that representing one of the contracting parties was already incompatible with the impartiality rule was not overlooked in the *travaux préparatoires* of the 1995 EAA. It was held 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.[103] 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. Finally, representing either party could be made expressly prohibited. This solution was favored on the grounds that representing somebody is fundamentally different from brokerage in that whereas the

[102] Melin, p. 151.
[103] This conclusion seems incorrect, and was indeed rebutted by the parliamentary Law Committee; LU 1994/95:LU33, p. 10-11. See also Melin, pp. 181-184.

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.[104]

Notwithstanding, it was deemed 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 legislator 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 through the supervisory work of the FMN.[105]

The provision was left largely unchanged when the current EAA was introduced; even the numerology remained intact as the rule is still found in 15 §. The provision in the 1995 statute contained a reference to sound estate agency practice that was deemed superfluous and left out of the provision. Besides that, the intention from the legislator is an unchanged provision.[106] However, it is not entirely clear that that is the case. The current provision prohibits the broker from representing the buyer in relation to the seller and the seller in relation to the buyer. The 1995 provision prohibited the broker from representing either party altogether. There is a difference, as it is conceivable that one of the parties wishes the broker to represent them in relation to third parties. Under the 1995 statute, that would be prohibited unless it could be construed as a "limited measure". Under the current statute, it is not encompassed by the language of the provision. Since the intention of the legislator seems to be an unchanged provision in substance, however, it may seem a bit uncertain how the current state of affairs should be understood. Since the provision clearly limits the ban to representing either party in relation to the other, that is clearly the current standing of the law. The assertion that the rule does not differ from the provision in the old statute, however, seems patently incorrect.

As to the scope of the exception regarding "limited measures", it is clear from the *travaux préparatoires* that representing a party is only permissible if the issue at hand is undisputed by both parties. Both the seller and buyer must be in agreement.[107] 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 “trade the broker suit for the attorney suit”. The EAA applies equally irrespective of how the parties choose to label their agreement.[108]

> In **RK 7861-03**[109], 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—assumed 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 FMN, alleging that the broker had acted in breach of the impartiality rule. The FMN

[104] Prop. 1994/95:14, pp. 47-49.
[105] Prop. 1994/95:14, pp. 49-50.
[106] Prop. 2010/11:15, p. 55.
[107] Prop. 1994/95:14, p. 80-81.
[108] Melin, p. 184.
[109] Ruling of September 9th, 2004.

pointed out that 12 §[110] requires the broker to safeguard the interests of both parties whereas 15 § forbids the broker from acting on the behalf of either party. The FMN concluded that the broker's actions could not be construed as falling under the exception in 15 § intended for limited, *undisputed*, issues. 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, arguing that the FMN had no jurisdiction over the case, since the FMN 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 FMN 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 Administrative Court of Appeals who concurred with the lower instances and upheld the warning.

In **LR 11645-04**[111], the broker had represented the seller under power of attorney. The power of attorney granted the broker the 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.[112] The FMN 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 arguing, *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 observed 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.

FMN 2004-12-15:4 concerned a conveyance where 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 FMN held that merely accepting such a power of attorney constituted a breach of 15 §. The broker was issued a warning.[113]

[110] 8 § in the current statute.
[111] Ruling of December 8th, 2004.
[112] Decision 4-64-01 of May 29th, 2002. The FMN did not broach the subject of the power of attorney in that decision.
[113] 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.

In **FMN 2005-02-16:1**, the client-agent agreement contained the clause "[the broker] is hereby commissioned to sell (…)". The FMN 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.

FMN 2005-02-23:7 contained two cases of representing a party, one on behalf of the buyer and one on behalf of 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 sales contract and deed had already been sent to the Land Registry along with an application for title registration, which meant that the transaction was complete and that the ownership was transferred to the buyers. The FMN 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 **FMN 2006-08-23:5**, the broker repeatedly negotiated terms for the transactions with the buyer. The FMN 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 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 §. However, the FMN's assessment was that the broker had only conveyed the seller's messages, acting as a mere conduit. The decision highlights the difficulty in establishing the boundaries of the impartiality provisions.

In **FMN 2006-09-27:5**, the sale transaction was problematic and led to a dispute in court. The broker represented the seller in the proceedings, but contended before the FMN that the measures fell under the exception. The FMN 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 **FMN 2006-09-27:6** is interesting; subsequent to the signing of the contract, 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 FMN refrained from issuing a warning due to lack of evidence that the broker had taken any active measures that were in breach of the prohibition.

3.4.3 Maintaining the Independence and Integrity of the Broker

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 regulated in 11-14 §§ EAA.

11 § provides that the broker may not, in conjunction with her assignment, purchase the property she is or has been engaged to broker. 12 § prohibits the broker from brokering to or on behalf of relatives or other parties with whom she has personal or financial ties. 13 § prohibits the broker from trading in real estate. 14 § prohibits the broker from engaging in activities that are likely to undermine the public's confidence in her integrity as a broker.

These provisions will be treated in the following.

3.4.3.1 Prohibited from Purchasing the Property

The notion that it is inappropriate for the broker to purchase the assets she has been hired to broker is by no means a novel one. To name but one example, brokers in medieval Montpellier 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.[114] Despite the fact that lawgivers close to a millennium ago found this issue important enough to regulate, the 1984 EAA contained no prohibition against brokers purchasing the property being sold.[115] 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. Two reasons were stated. 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.[116]

In the 2011 EAA, a novelty was introduced. Previously, a broker who wished to purchase the property had the option to do so if she observed the following routine. The first step was to terminate the client-agent agreement and explain the reason to the principal. Next, the broker had to afford the principal fair time to consider whether to hire another broker, and if so then whom to hire.[117] Exactly what period of time the seller had to be afforded before the broker was allowed to enter negotiations for the purchase is not clear and could of course vary, but around a week seems a fair amount of time. Finally, the broker was obliged to report the purchase to the FMN.[118]

[114] Reyerson, p. 97-98.
[115] It did, however, contain a provision (17 §) stipulating 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 2001, p. 369.
[116] Prop. 1994/95:14, p. 51.
[117] Prop. 1994/95:14, p. 52.
[118] 13 § EAA (1995:400); prop. 1994/95:14, p. 52.

Under the current provision, that option no longer exists. Thus, if the broker signs a brokerage agreement first and then develops a craving to purchase the property, she will simply have to accept that the purchase is not to be. To brokers who find it difficult to make up their minds in such matters, it may be some consolation that the prohibition only applies in conjunction with the current transaction. Thus, in the immediate future the broker will have to accept that the property will be sold to another party, or not at all. However, when that party wishes to sell the property in the future, the broker is free to purchase it (as long as she refrains from signing a brokerage agreement with that owner too). The same applies if the property is not sold, after a period of time.[119] The rationale behind the amendment is that even if the brokerage agreement is terminated, the problem remains that the situation is such that it may raise suspicions that the broker is taking unfair advantage of the situation in order to purchase the property at a discount price.[120] In the event that the broker purchases the property from the new owner, or from the same owner after a substantial period of time, the situation is different, and the prohibition does not apply.

3.4.3.2 Prohibited from Brokering to or on Behalf of Related Parties

12 § EAA stipulates that the broker may not broker a property to or on behalf of

1. a spouse or partner,
2. siblings or a relative in a direct ascending or descending line,
3. someone to whom the estate agent is related by marriage in a direct ascending or descending line or in such a way that one is married to a sibling of the other, or
4. any other such closely related person referred to in Chapter 4, Section 3 of the Bankruptcy Act (1987:672).

The 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 this instance, however, the possibility to step down from the brokerage agreement in order to allow a purchase remains intact in the current statute. Thus, faced with the situation that a related party wishes to purchase a property the broker has been assigned to broker, she must therefore choose between two courses of action. Either she persuades the concerned party 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.[121] Where a purchase of the property by the broker's relative or other closely related person takes place, it must be reported to the Estate Agents Inspectorate; 13 § paragraph 2.

As to the applicability of the provision, it is interesting to observe that spouses *and partners* are expressly mentioned, meaning that cohabitees count as related persons. By contrast, siblings of partners are not mentioned whereas siblings and parents of spouses are. However, those persons may fit the description of closely related persons envisaged in 4:3 BA. That provision contains a very similar list, but fails to mention the family members of cohabitees. However, the provision also

[119] Prop. 2010/11:15, pp. 24, 51.
[120] Prop. 2010/11:15, p. 24.
[121] Prop. 1994/95:14, p. 78, Melin p. 166.

mentions "other persons that are closely related to the debtor". Can a sibling of a cohabitee perhaps count as such a person?

> **KamR 1344-09**[122] concerned a transaction where the broker had brokered a property to the sister of his cohabitee. The FMN issued a warning, holding that the cohabitee's sister was a closely related person within the meaning of 4:3 BA. The broker appealed to the Administrative Court of First Instance who made the assessment that that the sister of a cohabitee did not fit the description of a closely related person. The Administrative Court of Appeals, however, held that brokering a property to the sister of a cohabitee was not appreciably different from brokering to in-laws, which was expressly forbidden. The court upheld the warning.

There is an excellent figure of the relevant *relatives* in Melin and Zacharias originally made by Hans Elliot.[123] However, the prohibition applies to a larger group. The rule also applies to "other persons to whom the [broker] is particularly close". The *travaux préparatoires* suggest foster children and partners in a relationship.[124] The ban further applies to parties with 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.[125]

The provision in the 1995 statute only mentioned brokering *to* related persons, failing to regulate explicitly the permissibility of brokering *from* related persons, i.e. brokering properties belonging to such persons. That led to unfortunate uncertainties as the FMN interpreted the provision in the light of the general impartiality rule and sound estate agency practice, holding that the ban applied equally to brokering *to* and *from* related persons. However, the 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.[126] The *travaux préparatoires* of the 1995 statute expressly provided that, *inter alia*, guidelines issued by the Consumer Agency were to be regarded as sources of sound estate agency practice. Therefore, when the FMN issued warnings to brokers in 2002 and 2003, the administrative courts could not uphold the warnings.[127]

As of April 30th, 2007, the Consumer Agency abolished their guidelines. Following that, the state of affairs was uncertain. The interpretation of the FMN was that the abolishment made it clear that thenceforth, brokering *from* related persons was forbidden. As of the 2011 EAA, the uncertainty is history, since the new provision expressly prohibits both brokering to and from related persons.

[122] Ruling of March 15th, 2010.
[123] Melin, p. 167, Zacharias 2001, p. 375.
[124] Prop. 1994/95:14, p. 78.
[125] Prop. 1994/95:14, p. 78; prop.2010/11:15, p. 52. See also Zacharias 2001, pp. 373-380.
[126] KOVFS 1996:4, p. 11.2; the announcement was required to be made in both the marketing and the sales contract.
[127] RK 2006-04, RK 6721-04.

3.4.3.3 Prohibited from Trading in Real Estate

13 § prohibits brokers from trading 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 the 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.[128]

> In **FMN 2007-03-28:5**, the broker was issued a warning for marketing her own property in an advertisement. The advertisement explicitly referred interested parties to a telephone number at the broker's firm, along with the firm name. It did not avail the broker that buyer was informed forthwith that the broker was in fact the seller.
>
> **FMN 2007-04-25:2** concerned the sale of a property belonging to the broker and the estate of the broker's deceased colleague. The advertisement posted the name and telephone number of the brokerage firm. The broker was issued a warning.
>
> In **FMN 2007-08-29:8**, the broker had sold three properties. He was also the owner of a real estate firm that was listed at the Company Registrations Office as a firm trading in real estate. The FMN acquitted the broker on the grounds that it was not established that the sales were connected to his brokerage activities, and that the properties had been purchased before the ban on trading in real estate was introduced in 1995. However, the FMN pointed out that it was inappropriate for a broker to own a firm that was listed as trading in real estate.

It should be observed that *trading* in real estate is not synonymous to *investing* in real estate. The ban applies to selling one's own properties in a way that is connected to the brokerage firm, and to buying properties cheap and selling them at a profit. Long-term investments aimed at property management, however, falls outside the scope of the prohibition. The crucial issue is the purpose of the purchase of the property: if the purpose is trading, it is banned, whereas it is permissible if the purpose is property management.[129]

3.4.3.4 Activities That Compromise the Broker's Integrity

In addition to the prohibition to trade in real estate, the broker is prohibited under 14 § from engaging in any activity whatsoever that may compromise her integrity. The main principle underpinning this ban is the same as in 11-13 §§, viz. to protect the *integra fama* 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

[128] Prop. 1994/95:14, pp. 53-54, 79, Melin, pp. 171-175.
[129] Melin, pp. 174-175; Zacharias 2012, pp. 373-374.

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.[130]

Before the introduction of the current statute, it was widely thought that the general ban on integrity-compromising activities would be replaced by an obligation to disclose to all parties any side-activities for which the broker was remunerated in some way. That was the suggestion of the Brokerage Commission.[131] However, the legislator was not convinced that such an obligation was enough to satisfy the need for adequate consumer protection. Therefore, the general prohibition remains, albeit with an amendment aimed at permitting side-activities to a certain degree.[132] I will return to the exception, stipulated in 14 § p. 2, later in this subsection.

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 *travaux préparatoires* do not offer any precise definitions of acceptable and unacceptable activities but leave it up to the FMN 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 the like. In these cases, it is conceivable that the broker may steer the buyers into purchasing from this company. Alternatively, the broker may try to steer the transaction towards buyers that agree to purchase these parts.[133] The most widely discussed activities which are considered to be banned by the provision are mortgage brokerage and insurance brokerage.[134]

> In **RÅ 2006 ref. 84**, the broker had undertaken to broker a tenant-ownership apartment in an association that had sub-contracted its financial administration to a firm partially owned by the broker. The FMN 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 FMN, 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-compromising activities mentioned in the *travaux préparatoires*. 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 said *travaux préparatoires*, that the broker may not combine her brokerage activities with any other activity that may raise suspicions that she may be influenced by irrelevant interests to the detriment of buyer and seller whilst carrying out her brokerage assignment. 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.

[130] Prop. 1994/95:14, pp. 53-54, 79-80; Melin, p. 176; see also the case law reviewed below.
[131] SOU 2008:6, pp. 16-17, 152-169.
[132] Prop. 2010/11:15, p. 26-27.
[133] Prop. 1994/95:14, pp. 54, 80.
[134] Zacharias 2012, p. 375; SOU 2008:6, pp. 16-17.

The broker appealed to the Administrative Court of Appeals 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 FMN the broker had resigned from the FMN 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 FMN contested the appeal and maintained that the broker's diverging interests called her impartiality into question. The FMN 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 assignment. Where there is such a connection between that business and the brokerage assignment that the trustworthiness or the broker might be called into question, it is incompatible with sound estate agency practice as laid down in 12 §[135] to accept the assignment. The court therefore upheld the warning, on account not of 14 § but rather 12 §.[136]

The ban further means it is not permissible for brokers to be employed by construction companies, as attested to by the following landmark ruling.

RK 8008-05[137] concerned a broker employed by a Swedish construction company, with the job description real estate broker. She received a fixed 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.

[135] Again, 8 § in the current statute.

[136] 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 §.

[137] Ruling of March 6th, 2007.

The FMN held that the employment as broker at a construction company was in breach of 14 § p. 2 and issued a warning. The FMN referred to its statement of April 28th, 2004[138] where it had announced its position that a broker may only be employed by a construction company if her job instructions are limited to brokerage activities initiated by tenant-ownership associations or other tenant-owner than the employer. Further, the construction company and its representatives must 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 FMN 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. 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 FMN appealed the ruling to the Administrative Court of Appeals. The appellate court held 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 court upheld the warning.[139]

With the following ruling, the Supreme Administrative Court has made it clear that brokers are prohibited from brokering tenant-ownership homes in the association where they reside.

In **RÅ 2008 ref. 63**[140], the broker had brokered a tenant-ownership home in the association where he was a member. The FMN issued a warning on the grounds that a broker who brokers in her own association is susceptible to undue influence, compromising her role as an impartial intermediary. The Administrative Court of First Instance overturned the decision, on the grounds that the brokers who had previously been issued warnings for brokering in their own associations had been found guilty of other charges as well. The court did not find the single infraction at issue enough to warrant a warning.

The FMN appealed the ruling to the Administrative Court of Appeals, who conceded that brokering in her own association gives the broker undesirable incentives. However, held the court, the assessment must be made on a case-by-case basis. In the instant case, the court observed that the association was relatively large, comprising 122 row houses, and that the FMN had not even alleged that the broker had mishandled the conveyance. The court ruled in favor of the broker.

[138] FMN 7/2004.
[139] Case 1956-07.
[140] Ruling of December 20th, 2008. On the same day, the legally identical case **1298-07** was adjudicated.

> The Supreme Administrative Court observed that tenant-ownership associations are economic associations and that, by definition, a broker who is member has economic interests conveyances of units in the associations. Therefore, held the court, brokering units in the same association is by definition a situation that typically raises suspicions as to the integrity of the broker. The warning was upheld.

14 § p. 2 EAA provides that the sole fact that the broker is remunerated for other activities than real estate brokerage shall not by itself be considered to compromise her integrity, provided that the remuneration is purely negligible. The language should raise a few eyebrows: who in their right mind would want to work for a "purely negligible" remuneration? It should be borne in mind that the activities that are considered integrity-compromising are not the kind of work that is typically done pro bono. However, the legislator's explicit intent is to allow some measure of freedom to engage in side activities that have thus far fallen under the prohibition.[141] It seems reasonable, therefore, to assume that "purely negligible" should not be read as "virtually non-existent". However, the level of uncertainty is high. The *travaux préparatoires* do not give any other guidance as to how large a remuneration the broker is allowed, besides a statement that a remuneration exceeding "a few thousand kronor" cannot be considered negligible, and another statement that the purpose is to allow the broker a remuneration that does not typically raise suspicions as to her integrity.[142] In other words, the remuneration must not be so high that the broker has incentive to set aside the interests of her client and their counterpart. Still, questions remain unanswered. How many thousand kronor constitute "a few"? Two, three, four, five? Suppose one decides that it is SEK 4,000. The next question, equally crucial is: SEK 4,000 per what? Per assignment? Per week? Per month? Per year?

Consider the following example. A broker brokers a residential property that is sold for SEK 2,000,000. Her commission is 3 %, which turns out SEK 60,000. The commission is always charged VAT included when dealing with consumers, meaning that the actual commission is SEK 48,000. Suppose the broker is employed at a brokerage firm. Typically, the employee gets to keep roughly 25 % of the commission as salary, giving the broker SEK 12,000.[143] Suppose the broker receives SEK 4,000 for every mortgage she manages to broker. Would that be enough to give her incentive to act contrary to the interests of the buyer and the seller? Perhaps. The rule, however, means that the remuneration must be small enough that *third parties* would not *typically believe* that the broker was unduly influenced. Can SEK 4,000 per assignment be considered "purely negligible" in light of this? All that can truly be said at this point is that the provision is wide open for interpretation.[144]

It is immaterial whether the remuneration is paid in money or in kind, e.g. in the form of discounts or free advertising. It is likewise immaterial whether the remuneration is paid directly to the broker or to the brokerage firm she owns or where she is employed. If it can be established that a part of the remuneration reaches the broker in any way, e.g. as a bonus or a paid pleasure trip, the value of

[141] Prop. 2010/11:15, p. 26.
[142] Ibid., p. 53.
[143] From the 75 % kept by the employer, the latter must pay employer taxes (*arbetsgivaravgifter*) and vacation salary (*semesterersättning*). The net percentage kept by the employer is therefore between 60 and 65.
[144] Tegelberg holds that somewhere between SEK 2,000 and SEK 5,000 per assignment is a likely limit; Tegelberg in Grauers, P.H. et. al, pp. 49-50.

what the broker receives counts.[145] In practice, it may prove difficult to establish that such indirect remuneration has been received.

14 § p. 2 further obliges the broker to disclose to both buyer and seller what side activities she is engaged in and what remuneration she receive. The principal must be informed before the brokerage agreement is signed, and all other parties as soon as possible.

3.5 Disciplinary Responsibility and Civil Liability

The broker's *disciplinary responsibility* is laid down in 29 § EAA. Pursuant to that provision, the FMN can revoke the registration of a broker who no longer fulfills the requirements for registration laid down in 6 §. One of those requirements is that the broker "possesses integrity and is otherwise suitable to be an estate agent". 29 § p. 2 goes on to stipulate that if the FMN deems it sufficient, it can instead issue a warning or a disciplinary reminder. If the misconduct is deemed minor, the sanction can be waived.

The sanction "reminder" is a novelty introduced in the current statute. It had been the subject of debate and criticism that there were formerly only three options: revocation, warning, or no sanction at all. Revocation is, needless to say, a quite stern sanction since it deprives the individual indefinitely of the right to exercise her profession. It is therefore used sparingly. The no-sanction option is not very appealing since it can give the mistaken impression that the disputed conduct was completely lawful. Even if the FMN—or, after appeal, the administrative court—clearly states in its decision/ruling that the conduct at issue did in fact constitute a breach of the EAA, and that it is only the presence of mitigating factors in the individual case that made the FMN/court waive the sanction, the message received by many is that the decision/ruling is tantamount to a "green light".[146] Since neither revocation nor no-sanction is appealing where a breach of the EAA has been found, the only available option was warning. That, in turn, was (and remains) problematic since the same sanction has been issued for very diverging misconducts. It would not seem equitable that an omission that many would find excusable, but which nonetheless merits a sanction since it constitutes a breach of the broker's obligations, receives the same sanction as gross misconduct that most people would find morally reprehensible. For that reason, the sanction "reminder" has been introduced. A reminder is a less serious sanction than a warning.

The broker's *civil liability* is laid down in 25 § EAA. Under that provision, if a broker intentionally or negligently fails to adhere to any of the provisions in 8-22 §§ EAA, she is liable for any damages incurred by the buyer or the seller as a result of her act or omission. The provision is a standard-issue rule of civil liability, with the added requirement that the act or omission must constitute a breach of the broker's legal obligations under the EAA. Thus, the broker is liable for damages where the following requirements are met:

1. a breach of an obligation under the EAA,
2. intent or negligence,

[145] Prop. 2010/11:15, p. 53.
[146] I must refer to anecdotal evidence in this part.

3. injury, and
4. a foreseeable line of causation.

In its second sentence in the first paragraph, 25 § goes on to provide that where it is equitable, the damages may be reduced or "waived entirely". This is also a standard-issue rule of civil liability, namely an exemplification of the mitigation of damages doctrine, the main embodiment of which lies in 6:1 of the Torts Act (1972:207). Arguably, it was not strictly necessary to codify the principle in the EAA since the TA is subsidiarily applicable. However, the interest of clarity provides ample reason to do so anyway.

Under the mitigation of damages doctrine, which is a cornerstone of torts law, the party who has suffered an injury must take all available steps that can reasonably be required of them in order to avoid additional injury. If the injured party fails to take such measures, they will not be entitled to compensation for such injury or loss has could have been avoided had such measures been taken. It should be observed that the failure to take protective measures to avoid further damages does not result in the complete loss of entitlement to compensation. It merely means that the tortfeasor will not be liable for those injuries or losses that could[147] have been avoided had the protective measures been taken.[148]

Generally speaking, it is neither surprising nor unreasonable that the mitigation of damages doctrine should apply to the civil liability of brokers. If the broker fails to observe her obligations and thereby causes a loss on the part of the buyer or the seller, but the injured party has contributed to the loss, it seems fair that they should split the costs between them. Suppose, for instance, that the broker draws up a sales contract with a deficient clause. Suppose, further, that because of the wording of that clause, the seller becomes liable for defects to a greater extent than they had expected and that this results in a financial loss. As will be demonstrated in detail in chapters 10 and 11, the broker is obliged to draw up all contract clauses in an adequate manner and to give proper advice on the matter. Thus, the broker's conduct constitutes a breach of 8, 16 and 21 §§ EAA. Suppose, however, that the clause in question had in fact been drawn up by the seller, who mistakenly thought it would limit their liability.

Now, pursuant to the provisions just mentioned, it is incumbent on the broker to examine the clause and to advise the parties as to its contents. In the case just described, the broker should have explained that the clause did not limit the seller's liability and that, in fact, it may have had the opposite effect. In the absence of such advice, the broker must be deemed negligent despite the fact that the clause emanated from the injured party. Thus, the broker is liable for the damages incurred by the seller. However, since the clause did emanate from the seller, it could at least be argued that it would not be fair to award full damages.

[147] Observe the choice of word: "*could* have been avoided", as opposed to "*would* have been avoided". From a procedural point of view, it would seem reasonable to place the burden of proof on the defendant to establish that the plaintiff's failure to take protective measures contributed to the injury, just as the plaintiff must establish causation. However, in practice it may often be difficult to establish causation with complete certainty. Therefore, the court must ultimately base its ruling on an assessment of probability. Hence, "could" seems a better choice of words than "would".
[148] Hellner & Radetzki, p. 221.

The question is, how should the costs be split? Suppose the injury amounts to SEK 100,000. Should the seller receive SEK 50,000 or possibly SEK 0? Again, contributing to the injury does not result in the complete loss of entitlement to damages. However, it is quite possible in the individual case to reduce the damages to 0 if it is deemed equitable. In this example, reducing all the way to 0 hardly seems fair given that, after all, the broker has (or seems to have) failed to give adequate advice. The parties should be able to trust the broker to guide them through the pitfalls of the transactions, and the breach of the professional obligation cannot be ignored. Declaring a party negligent and in breach of their obligations in principle, only to award 0 in damages, is in all probability a tad too nuanced for most people. Simply put, 0 in damages will be perceived as a ruling in favor of the defendant, and as approval of the broker's conduct. The reasonable solution, then, would seem to be to award damages *d* in the range of $0 < d < 100{,}000$.

It must be observed that even if the court should choose to reduce the damages all the way to SEK 0, that is not the same as declaring that the broker has not acted in breach of the professional obligations. Again, it will most probably be perceived as such, which is why a reduction to 0 should only be used in extreme circumstances. However, the reduction is no *de jure* exoneration. This follows from the fact that the reduction rule is only applicable where it is established that the broker is liable. That, in turn, presupposes a breach of the obligations laid down in 8-22 §§ EAA. Thus, the conduct is separate from its sanctions. Of course, this also follows from the existence of disciplinary responsibility. The FMN and, upon appeal, the administrative courts, are concerned exclusively with the broker's *conduct*, not its *consequences*. Therein lies the greatest difference between disciplinary and civil responsibility: the former is a matter between the individual and the state and concerns only the individual's conduct, whereas the latter concerns cases where the broker's misconduct has caused injury to buyer or seller. However, since civil liability presupposes a breach of the EAA, when it comes to assessing the scope of the broker's duties it makes no difference in substance whether a particular case concerned disciplinary or civil proceedings – as long as one does not forget the to distinguish between the breach and its sanction.

I will return to the damages reduction rule in 9.1.6 below.

3.6 Comments

The account of the Swedish broker's role and obligations is thus far clearly incomplete, since the important counseling role with its duties has yet to be examined in detail. However, this chapter has demonstrated that the definition of real estate brokerage in 1 § EAA, which probably reflects most people's view, is insufficient. The Swedish broker is no mere matchmaker, designating a counterpart with whom her client can contract and then disappearing. While matchmaking will always remain at the heart of brokerage, real estate brokerage as defined by the EAA and performed by brokers in Sweden transcends that concept. Thus, the role of the Swedish broker is characterized by

1. matchmaking (classic brokerage),
2. counsel (ascertaining facts, information disclosure, advice, contract-engineering), and
3. impartiality and integrity.

As will be evident in chapters 8-11, the broker's counseling role is neither to be taken lightly nor always straightforward to fulfill. As demonstrated in this chapter, the same goes for the duty of impartiality and integrity. Thus, no universal claim can be made that all brokers throughout Sweden always succeed in adhering to their duties flawlessly. However, can any profession really boast universally flawless performance by all its members? Furthermore, it should be borne in mind that several of the broker's duties have been introduced, or honed by above all case law to their present shape, during the last 15 years or so. The mandatory two-year university education was introduced on January 1st, 1999.[149] It is therefore not surprising that brokers, and others, perceive matchmaking as the broker's only real function, and the other duties as legally prescribed encumbrances that may or may not be desirable.

That said, the legal reality - and the reality of any broker wishing to avoid civil liability, disciplinary responsibility, and/or a tattered reputation - is that counsel and impartiality are just as integral to the broker's work and role in real estate conveyances as matchmaking.

[149] Melin, p. 78.

4 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. Nevertheless, as will hopefully be demonstrated 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.[150]

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.[151] 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*.

4.1 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

[150] See the discussion above (2.4.3).

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

question is: why did the Latin notary profession emerge? 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, though needless to say one must be careful not to draw too far-reaching conclusions without evidence.

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.[152] 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.[153] 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

[152] Malavet, at p. 404.
[153] Malavet, at p. 405; Tamm, pp. 35-43; Greenidge, § 10.

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, 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.[154] 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.[155] 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".*[156]

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 aquired 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.[157] 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.[158]

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

[154] 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.
[155]. This ambiguity lies in the Roman word *res* and is discussed by Poste in his commentary of Gaius *Commentarius Secundus*, §§ 1-14.
[156] Gaius, *Commentarius Primus*, § 119; Tamm, pp. 89-90; Ankarloo, pp. 34-35, 38.
[157] Gaius, *Commentarius Secundus*, § 14 a; Tamm, p. 79.
[158] Gaius, *Commentarius Secundus*, § 16.

previously been settled. If the seller answered no, or refrained from answering, the Praetor would give the property in question to the buyer.[159]

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 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.[160] 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*.[161] Possessio was, however, protected by law in the sense that it was unlawful for any person to take the object from the possessor.[162] 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.[163] 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.[164] Upon prescription, the right of possession was converted into Quiritary ownership.[165] 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.

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[159] Gauis, *Commentarius Secundus*, § 24; Tamm, pp. 90-91.
[160] Gauis, *Commentarius Secundus*, § 19.
[161] Gauis, *Commentarius Secundus*, § 19; Tamm, p. 88.
[162] 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.
[163] 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.
[164] Ankarloo, p. 39.
[165] 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.

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, relying 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.[166] 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 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.[167] 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.[168] 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.[169] The Code of Hammurabi clearly demonstrates that there was commerce based on written contracts that had 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.

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[166] 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).
[167] Strömholm 1991, p. 45.
[168] 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).
[169] Ibid.

4.2 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 public status by the official seal.[170] 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.[171] 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.[172]

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.[173] 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

[170] Malavet, at p. 405.
[171] Sander, p. 1.
[172] Malavet, at. pp. 406-407.
[173] Malavet, at p. 408.

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.[174]

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 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).[175]

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.[176] The idea of mandatory intervention by tabelliones may have emanated from the Church.[177] 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 was comprised of new legislation, it is safe to

[174] Yaigre & Pillebout, at p. 15.
[175] Söllner, pp. 78-85; Tamm, p. 250
[176] Malavet, at pp. 410-411; Sander, p. 2.
[177] Brandelli, p. 3.

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 obsolete. 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.[178]

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*. Roman law was back in Western Europe.[179] 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.[180]

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.[181] In northern France, King Louis IX ("Saint Louis") created sixty notary positions in 1270, to be stationed in Paris.[182] 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.[183]

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.[184] 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

[178] Romero, p. 5.
[179] 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.
[180] Reyerson, p. 79.
[181] Reyerson, p. 80.
[182] Yaigre & Pillebout, p. 16.
[183] Malavet, at pp. 418-419; Sander, p. 3.
[184] 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).

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.[185]

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 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.[186]

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.[187]

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*, pubished in 1234, the famous notary Rolandino used the terms *notarius* and *tabellio* in a way that suggests that the terms had become synonymous.[188] 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 the statutes and the books and articles of 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 statute distinguishes between the "notarial function" and the "profession of escribano".[189] A plausible explanation for this is that *escribano* was the commonly used Spanish word for notary before the

[185] Reyerson, pp. 79-83.
[186] Reyerson, pp. 83-84, 143-144, 147-152.
[187] Yaigre & Pillebout, p. 16.
[188] Malavet, at p. 419.
[189] Ley 404, Art. 1.

Notarial law of 1862 replaced it with *notario*.[190] 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.

4.3 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. 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.[191]

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.[192] 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

[190] Malavet, at p. 423.
[191] Sander, p. 2.
[192] Romero, p. 6-7.

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.[193]

During the centuries of the Cordóba Cahiphate, no new notarial legislation seems to have been enacted[194], 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.[195] 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:

"[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 (…)."[196]

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."[197]

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.[198] 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

[193] Gonzáles, at p. 266.
[194] The Qur'an does, however, mention the witnessing of contracts and their documentation by scribes; Gonzáles, p. 264.
[195] Romero, p. 7.
[196] Gonzáles, p. 267 (unofficial translation Jingryd).
[197] Gonzáles, at p. 267.
[198] The fact is evident in the case of Spain; however, see also Reyerson, pp. 183-185, and Malavet, at p. 420.

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.[199]

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.[200] 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 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.[201]

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 thing) 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.[202]

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.[203] 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

[199] Reyerson, pp. 82-83; the term ”laymen” refers to non-clergy, not non-lawyers.
[200] Gonzáles, at p. 268.
[201] Ibid., at pp. 267-269.
[202] Gonzáles, at pp. 271-277; Malavet, at pp. 420-421.
[203] Malavet, at pp. 421-422.

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".[204]

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.[205] As will become apparent in the next chapter, this model was to influence notarial legislation in the whole Latin world.

4.4 Summary

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.

[204] Ibid., at p. 422; the provision is still in force and is currently Art. 1 of the 1945 Ordonnance.
[205] Ibid., at p. 423-424.

5 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 examine the notary's role in real estate conveyances, it would seem appropriate to limit the account to rules and principles concerning those parts of the notary's duties. 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.

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 (5.1) 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 giving counsel (5.2), the impartiality of the notary (5.3), and finally an overview of the notary's civil, criminal, and disciplinary responsibility.

5.1 The Framework

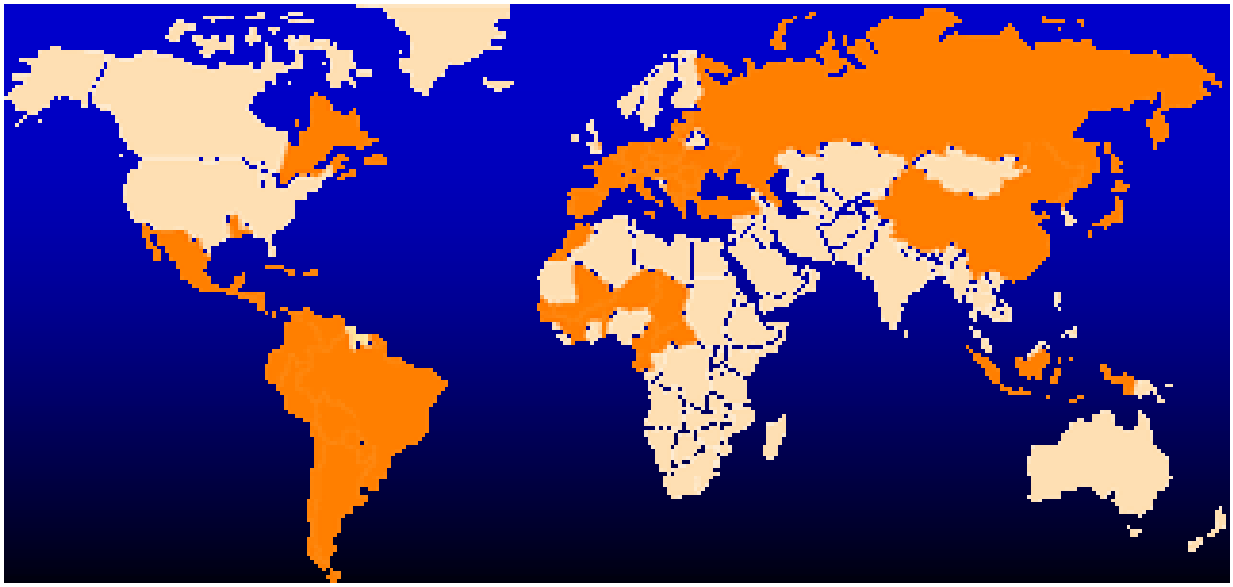
5.1.1 The International Notariat

As 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![206] 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 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.[207] Since then, the notarial has evolved interdependently in

[206] Formicolla, p. 2.
[207] http://www.pclna.org/, http://www.notarialarchives.org/civil.htm, http://www.history-timelines.org.uk/american-timelines/18-louisiana-history-timeline.htm (all 2012-08-02).

Europe and the former colonies, not least through the work of the Colegio de Escribanos de la Ciudad de Buenos Aires.[208]

Figure 1 *The prevalence of the Latin notariat worldwide*



Source: http://uinl.org/

In 1948 representatives from the Notary Chambers in nineteen countries[209] 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.[210] 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 engages in the study of law in the field of notarial practice, including the study and compilation of legislation relating to notaries. It also holds and promotes international congresses.

[208] https://www.colegio-escribanos.org.ar/ (2012-08-02).
[209] Argentina, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Cuba, Chile, Ecuador, Spain, France, Italy, Mexico, Paraguay, Peru, Puerto Rico, Switzerland, and Uruguay.
[210] http://uinl.net/presentacion.asp?idioma=ing&submenu=MEMBRES (2012-08-02).

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.[211] The express mission of the CNUE is to promote the notariat and its ative 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.[212]

5.1.2 The Legal Basis of the Notariat

5.1.2.1 The Notarial Statutes

One of the fundamental principles of law, recognized as early as by the Romans (see above Chapter 4), is that laws are only applicable within the jurisdiction of the legislator. 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 legal professionals 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.[213]

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.[214]

[211] http://www.cnue-nouvelles.be/en/001/index.html (2012-08-02).
[212] http://www.cnue-nouvelles.be/en/001/002.html (2012-08-02).
[213] http://uinl.net/notariado_mundo.asp?idioma=ing&submenu=NOTAIRE (2012-08-02).

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 statutes 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 statutes presented in the table will be referred to in the rest of the chapter. All references to legal provisions hereinafter concern these statutes. Secondly, it gives a decently clear indication that the chief traits of the notarial profession are the same in all examined countries. All statutes are denoted using their official title, which often contains a date. The date refers to the original day of enactment, not the most recent amendment.

Figure 2 *Comparison of notarial statutes with respect to authentication and impartiality*

Country	**Legislation**	**Comment**
Argentina	*Ley orgánica notarial nº 404*, Buenos Aires 15 de junio de 2000	**Art. 17º a)** Impartiality (independence)
Belgium	• *Coordination Officieuse de la Loi du 25 Ventose An XI*, Contenant organisation du notariat telle que modifiée par les lois du 4 mai 1999 • *Code de déontologie*, 2004-06-22/44	**Art. 1** Give authentic character to acts **Art. 9** Intervene and counsel the parties in all impartiality
Brazil	*Lei dos cartórios*, Lei nº 8.935, de 18 de novembro de 1994	**Art. 1** Publicity, authenticity **Art. 6** Formalize will of the parties legally, grant authenticity
France	• *Loi du 25 Ventôse an XI*, Loi contenant organisation du notariat • *Ordonnance* n° 45-2590 du 2 novembre 1945 relative au statut du notariat • *Ordonnance* n° 45-1418 du 28 juin 1945, relative à la discipline des notaries et de certains officiers ministériels • *Décret* no 45-117 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

[214] Ibid.

Germany	• *Bundesnotarordnung (BNotO)* vom 24. Februar 1961 (BGBl. I S. 98) • *Beurkundungsgesetz (BeurkG)* vom 28. August 1969 (BGBl. I S. 1513)	**§ 1** Independent public office, authentication **§ 14** Impartiality and counsel, independence and incompatible undertakings
Mexico	*Ley del notariado para el Distrito Federal* de 28 de marzo del 2000	**Art. 3** Impartiality **Art. 42** Publica fides
Portugal	• *Estatuto do Notariado*, Decreto-Lei n.° 36/2004 de 4 de Fevereiro • *Estatuto da Órdem do Notariado*, Lei n.° 27/2004 de 4 de Fevereiro	**Art. 1** Publica fides, give legal form to acts **Art. 13** Impartiality and independence
Puerto Rico	• *Ley notarial de Puerto Rico de 1987*, Ley Núm. 75 de Julio de 1987 • *Reglamento Notarial de Puerto Rico*, Tribunal Supremo de Puerto Rico[215]	**Art. 2** Publica fides, authenticity, give legal form to the will of the parties **Art. 3** Independence and impartiality
Spain	• *Ley del Notariado*, Ley de 28 de mayo de 1862 • *Reglamento Notarial*, aprobado por decreto de 2 de junio de 1944	**Art. 1** Publica fides

5.1.2.2 Mandatory Notarial Intervention in Real Estate Conveyances

It has been asserted that real estate conveyances 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 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

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

reality that is more complex than is often assumed, and the quests 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 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 authenticated by a notary; Art. 2 of Law 18/12/1851 (Belgium), and Art. 4 of the Décret 55-22 of Jan 4, 1955 (France). Also, Art. 261-11 of the Code de la construction et de l'habitation (France) stipulates conveyances of properties where the seller undertakes to construct a building before the buyer takes possession must be notarized in order to be valid.

Figure 3 *Mandatory notarial intervention for valid real estate sales contracts*

Country	**Legislation**	**Comment**
Argentina	*Còdigo Civil*, Ley 340 de 25 de setiembre de 1869	**Art. 1184** Mandatory
Belgium	*Code Civil Belge*	**Art 1582** Voluntary
Brazil	*Código Civil*, **Lei n° 10.406, de 10 de janeiro de 2002**	**Art. 108** Mandatory
France	*Code Civil*	**Art. 1589** Voluntary
Germany	BGB, Bürgerliges Gesetzbuch	**§ 311b** Mandatory[216]
Mexico	*Codigo Civil* para El Distrito Federal en Materia Comun y para toda La Republica en Materia Federal	**Art. 2316-2322** Mandatory (with exceptions)
Portugal	*Código Civil*, Decreto-Lei No 47344 de 25 de novembro de 1966	**Art. 875** Mandatory
Puerto Rico	*Código Civil* de Puerto Rico de 1930	**Art. 1232** Mandatory
Spain	*Código Civil* 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

[216] 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.

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. The registration of rights such as titles and mortgages is administered by the Land Registry, which was formerly allocated to seven selected district courts, but which is now since 2011 in the care of the National Land Survey.[217] 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).[218]

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	*Còdigo Civil*, Ley 340 de 25 de setiembre de 1869	**Art. 1184** Mandatory
Belgium	*Code Civil Livre III Titre XVIII : Des privilèges et hypothèques*, 16 décembre 1851. - Loi hypothecaire -	**Art. 81-82** Mandatory
Brazil	*Código Civil*, **Lei n^{o} 10.406, de 10 de janeiro de 2002**	**Art. 1492** Mandatory
France	*Code Civil*	**Art. 2416** Mandatory
Germany	*BGB*, Bürgerliges Gesetzbuch *GBO,* Grundbuchordnung	**§ 29 BGO, § 873 BGB** Mandatory
Mexico	*Codigo Civil* para El Distrito Federal en Materia Comun y para toda La Republica en Materia Federal	**Art. 2917, 2317** Mandatory (with exceptions)
Portugal	*Código Civil*, Decreto-Lei No 47344 de 25 de novembro de 1966	**Art. 875** Mandatory
Puerto Rico	*Código Civil* de Puerto Rico de 1930	**Art. 1232** Mandatory
Spain	*Código Civil* español	**Art. 1280** Mandatory

[217] Land Register Act (2000:224) and 19:3 of the Land Code (1970:1994), respectively.
[218] Hertel & Wicke, p. 36-37.

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 immediate enforceability, 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.[219]

5.1.3 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".[220] This encompasses two separate issues. 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.[221] 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 statutes.

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

[219] Ferreira & Weinzenmann, at p. 60; Murray 2007, p. 30.
[220] Malavet, at p. 434.
[221] van den Bergh & Montangie, p. 5.

name or within a private enterprise. Similarly, the Belgian statute (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 statute (Art. 1) defines the notary as a civil servant[222], 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 statute was introduced. The current statute (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 statute (Art. 2) explicitly refers to the notary as a "legal professional who performs a public function, *authorized* [italics added] to give faith and authenticity (…)".[223] 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 statute (Art. 3) refers to "legal professionals vested with publica fides to whom is delegated the practice of the notarial activity". The Mexican notarial statute has a similar wording; "[t]he notary is a legal professional vested with publica fides (…)" (Art. 42). Finally, the wording of the Argentinean statute 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. It is usually left to the discretion – and the responsibility – of the notary to choose and run the operations of his office.[224]

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 statutes, those explicitly mentioning publica fides are the statutes 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 statutes of the other examined countries should not be interpreted as a substantive deviation from the principle; the

[222] "Funcionário público".
[223] "El notario es el profesional del Derecho que ejerce una function pública, autorizado para dar fe y autencidad (…).
[224] Yaigre & Pillebout (2006), at p. 8.

concept of publica fides is embedded in all countries' notarial statutes since they describe the public functions the notary performs, and the implications of those functions.[225]

5.2 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.[226] 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.

5.2.1 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 statutes of Argentina (Art. 20.a), Brazil (Art. 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 statutes 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.

5.2.2 Authentication

Arguably, the single most important function of the notary is that to authenticate, or "give authenticity" to contracts and other deeds. Indeed, it is the very reason the state confers upon the

[225] The fact that the Spanish statute (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.
[226] Geimer, p. 8.

notary some of its powers.[227] 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.[228] 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.[229] 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.[230] 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"[231] and "shall be enforceable within the borders of the Republic". It can only be suspended by judicial order. Art. 1319 of the Code Civil provides that an authentic instrument is conclusive evidence of the agreement it contains between the contracting parties and their heirs or assignees. The Belgian notarial law (Art. 19) has a provision identical to its French equivalent, with the exception that "Republic" is replaced by "Kingdom". The Brazilian notarial statute lacks such a provision; instead, Art. 364 of the Code of Civil Procedure[232] 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 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)[233] 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.[234] The party wishing to contest the authenticity bears the full burden of proof.[235] 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.[236]

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[227] Yaigre & Pillebout, at p. 2
[228] Illustrated Oxford Dictionary.
[229] Antunes, p. 9.
[230] Malavet, at pp. 443-445.
[231] "(…) feront foi en justice".
[232] Código de Processo Civil, Lei n.º 5.869, de 11 de janeiro de 1973.
[233] Zivilprozessordnung, 12.09.1950.
[234] 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.
[235] 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).
[236] Yaigre & Pillebout, pp. 74-75.

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 under Swedish law there is no immediate enforceability of contracts, the creditor cannot enforce the contract before obtaining an enforceable title in accordance with Chapter 3 of the Enforcement Code (1981:774), such as a court order. The immediate enforceability of notarized deeds means that no such steps are necessary.[237] 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.[238] As indicated above (5.1.2), this makes it highly interesting for private persons as well as companies to obtain notarized deeds even where notarial intervention is not strictly mandatory.

5.2.3 Giving Counsel

Counseling the contracting parties is an essential notarial task, second in importance to none except, perhaps, authentication. Counsel/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).[239] The Brazilian law (Art. 7) all but explicitly stipulates a duty to counsel; 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 counsel, 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 duty to counsel, first voiced in the *exposé des motifs* of the Loi Ventôse and subsequently developed through case law.[240] 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 duty to counsel 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?

[237] Yaigre & Pillebout, p. 75.
[238] Geimer, p. 24.
[239] The Portuguese provision, if interpreted conservatively, only explicitly requires the notary to explain to the parties the legal implications of the transaction.
[240] de Poulpiquet, p. 61; Yaigre & Pillebout, pp. 98-99, 110-111.

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 duty is not mitigated even where the client is well-informed and does not seem to be in need of counsel. As will be seen in chapters 8-11, particularly chapter 10, 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 duty to counsel, to the point where it 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 duty to counsel 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 duty to counsel.[241]

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 government decrees—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. 20.a obliges the notary to give counsel 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.[242] § 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 duty to counsel, 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/attorney operating as both notary and lawyer/attorney to

[241] de Poulpiquet, pp. 63-66.
[242] Wagner, pp. 33-34.

explain to the parties clearly in advance in which capacity he is giving advice.[243] 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 duty to give counsel; the Cour de Cassation asserting in a 1989 ruling that the duty to counsel applies even where the notary is only charged with authenticating acts in which the terms have been laid down without his participation.[244] 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, it 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.[245] 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 duty to counsel 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 only is legally valid but is also the most favorable solution to them.[246] 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 duty to counsel. In practice, that limit may often be strictly academic. The notary's work entails giving counsel on a daily basis, be it to resolve cases that need advice or in the preparation of a contract to be notarized.[247] It may prove impractical to establish strict lines between mandatory and optional counsel, unless of course the latter should take on large proportions. In such instances, the notary is of course free to offer his legal services for an agreed fee, taking into account that the rules of impartiality still apply. For instance, under German law the notary is not obliged to give tax advice. It is of course permissible to give tax advice, but

[243] Wagner, p. 34.
[244] Yaigre & Pillebout, pp. 6-7.
[245] Wagner, p. 39.
[246] Yaigre & Pillebout, p. 99.
[247] San Martin, at p. 776.

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.[248]

5.3 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.

5.3.1 The Notary's Relation 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.[249] 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 interests in either of the parties" as well as "the impartial editors or their will".[250] 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.[251] 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?

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[248] Geimer, p 9. As will be seen in chapter 10, French law is different on this point.
[249] Antunes, p. 3 (with further references to Brandelli); Ferreira, p. 1; http://www.notariado.org.br/#/2 (2012-08-02).
[250] Yaigre & Pillebout, p. 6.
[251] http://www.notariado.org/ (2012-08-02).

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.[252] 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 *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.[253] 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.[254] The conclusions adopted by the UNIL at the 2004 International Congress in Mexico City

[252] Malavet, at p. 485.
[253] Malavet, at p. 486.
[254] Collantes, p. 6; the Model Law is available in Portuguese at http://www.mundonotarial.org/deonto.html (2012-08-02).

hold that impartiality demands *active intervention*, going beyond the simple recordation of the wishes of the parties.[255] 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.[256] 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.[257]

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.[258] 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.[259] 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 statute, the Beurkundungsgesetz (BeurkG), which governs the authenticating activities of the notary. § 3 lays down several prohibitions against 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 void.

[255] XXIV International Congress of the Latin Notariat, Mexico City, October 2004, *THEME I: Impartiality of the Notary; Ensuring Certainty in Contractual Relationships*, at 1.
[256] Malavet, at p. 487.
[257] Sevilla et al., at 3.
[258] Yaigre & Pillebout, p. 58.
[259] The degree of kinship that triggers the prohibition varies.

5.3.2 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 and 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 legislator 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.[260] 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.[261] 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.[262] 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).

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

[260] Yaigre & Pillebout, p. 57, 100.
[261] Yaigre & Pillebout, p. 57.
[262] Cour de Cassation de Belgique, Arrêt du 31 janvier 2002, *Institut Professionel des Agents Immobiliers et al v. Notarishuis van het Arrondissement Leuven*.

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).[263] 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.[264] 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.[265]

5.4 Criminal, Civil, and Disciplinary Responsibility

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 guarantee

[263] 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.
[264] Malavet, at p. 487.
[265] Sevilla et al., at 4.

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.

5.4.1 Criminal Responsibility

A notary could theoretically 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 rule—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.[266] It is fairly evident that French law looks more seriously upon forgeries that entail an abuse of the *publica fides* and which 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.

[266] de Poulpiquet, p. 289.

5.4.2 Civil Liability

As is perhaps to be expected, the civil liability of notaries in the examined countries is grounded 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.[267] 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.[268] 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.[269] 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.[270] 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 counsel 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 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.[271] 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

[267] Rodrigues, pp. 22-23.
[268] de Poulpiquet, p. 93.
[269] 3:1 Torts Act (1972:207); 6 § Supervision of Dogs and Cats Act (1943:459).
[270] de Poulepiquet, pp. 95, 105, 117.
[271] Ibid., pp. 95-97.

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.[272]

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^{o} 48 051	Art. 500-501 Art 2-3
Puerto Rico	Código Civil	Art. 1802-1810
Spain	Código Civil	Art. 1902

5.4.3 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 civil liability in that, whereas the civil sanction is designed to compensate third parties from actual injury—most notably economic injury—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

[272] Ibid., p 71-73.

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.[273]

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^{o} 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.[274]

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.[275]

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 Chamber of Notaries. Secondly, the notary may answer before a high court. Art. 6 DO provides that the *syndic* of

[273] Ibid., p. 217.
[274] Ibid., p. 205.
[275] Ibid., p. 238.

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 notaries*[276]

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 *"Discipline Ordinance (DO)"*	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

5.5 Summary

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 counsel in order to tailor the transaction at hand to fit the will and needs of the

[276] For the complete titles of the statutes, see figure 2 above.

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.

6 The Functional Equivalent

The purpose of this dissertation is, as previously stated, to examine and compare the non-litigious legal counsel a buyer or seller of real estate can expect under the Swedish regime and the Latin-German regime. At some point, it is necessary to establish that the Swedish broker and the Latin notary are relevant objects of comparison, i.e. that they are in some way each other's *functional equivalent*.

As to that, it has been established in the previous chapters that the Swedish broker and the Latin notary have distinct legal obligations towards the contracting parties in real estate conveyances, obligations that are very similar. Despite being fundamentally different professions with fundamentally different original purposes, it seems they have come to perform, in part, the same function in real estate conveyances. They are also subject to very similar duties of impartiality in relation to the contracting parties.

Thus, it is already at this stage established that the Swedish broker and the Latin notary both perform the important function of giving counsel to the contracting parties. That function includes drawing up the necessary deeds and tailoring them to fit the needs of the instant transaction. It is also established that they are both bound to a duty of impartiality and integrity. Thus, both professions perform the same important task and have strikingly similar duties with respect to their relation to the contracting parties.

The duty to counsel of each profession has not yet been examined in detail. It can however, be concluded at this stage that both professions have such a duty, and that the respective duties appear to be quite similar. The closer examination of the duty to counsel will take place in part II. Therefore, the comparative analysis of that duty will have to take place in chapter 12. The duty of impartiality, however, will not be examined further in part II, barring a discussion in chapter 11 on its bearing on the duty to advise and on contract-engineering. It would seem appropriate, therefore, to compare the professions' respective duties of impartiality in the present chapter.

Part II: The Duty to Counsel

7 The French Notary's Role – an Overview

7.1 The Conveyance Process

French law does not as a main rule prescribe any formalities for the validity – as regards the buyer-seller relation - of the real estate conveyance. The fundamental provision is C.C. Art. 1583, which stipulates:

"The sale is complete as between the parties, and property passes in law to the purchaser from the seller as soon as both the thing and price have been agreed upon notwithstanding that the thing has not been delivered or the price paid".[277]

The provision describes a consensual agreement with no other requirements than the agreement upon the thing to be sold and its price. Of course, the general requirements for the validity of agreements laid down in C.C. Art 1108 must be met. That being so, buyer and seller are mutually bound by the agreement without the need to observe any particular formalities. There are, however, exceptions to the rule. Art. L 261-11 of the Code de la construction et de l'habitation (CCH), read in conjunction with Art. L 261-1 of the same code, provides that the sale of properties where the seller undertakes to construct one or several buildings within a timeframe specified in the contract is concluded by *acte authentique.* Thus, many sales of newly built homes must be accomplished through notarial intervention.

Although the general rule is that the sale itself can be accomplished without formalities, it is a fact that real estate conveyances entail several formality requirements, both *de jure* and *de facto*. Firstly, as is widely known and intuitively understood, a verbal agreement—though valid and binding as such—is of scant use if one cannot prove its existence or its terms. The more costly the transaction, the less appealing the prospect of taking chances in that regard. Thus, it is common practice in France as in other places for buyers and sellers to use written agreements.

Secondly, as established in Chapter 4, notarial intervention is mandatory in two important parts of the transaction: the mortgage agreement and the *publicité foncière*. As to the mortgage agreement, the seller is of course not a party to that agreement (unless they should also be the buyer's creditor, which is presumably a rare occurrence). However, since most buyers need to finance their purchase with a loan, it seems fair to consider the mortgage agreement as inherent in the transaction. As to the *publicité foncière*, the sale through mutual consent is only binding between buyer and seller. It is not until the sale is recorded at the *bureau des hypothèques* that the sale becomes binding towards third parties.[278] The *bureau des hypothèques*, in turn, will only accept a notarized deed. Thus, the intervention of a notary can certainly be called mandatory in the real estate conveyance despite the lack of prescribed formalities between buyer and seller.

Beyond the requirements of law, notarial intervention has two advantages that make it appealing to buyers and sellers. Firstly, as established in Chapter 4, notarized deeds enjoy full probative value and

[277] Translation from Dyson, p. 25.
[278] The Land Register in France is called the *publicité foncière,* which is made up of a number of *bureaux d'hypotèques*; see Dyson, pp. 20-21.

immediate enforceability. That could certainly be of great practical significance for the buyer should the seller for some reason fail to vacate the property in time, and for the seller if the buyer fails to pay. Secondly, there is the subject matter of this dissertation, namely the notary's obligation to give counsel. Both of these factors are likely to make buyers and sellers turn to a notary even where it is not strictly required by law. Moreover, cultural factors must never be overlooked when it comes to explaining patterns of behavior. In France, like in other countries where the civil law notary system prevails, the notary is an institution in the community. Several events and acts in life—notably those with strong traditional legal implications such as marriage contracts, wills, donations, etc.—involve the notary. It seems natural that the long-run effect is that people turn to the notary in diverse situations, without actually asking themselves whether it is strictly necessary. Thus, the notary's prominent role in real estate conveyances is underpinned by law and custom alike.

Turning to the actual conveyance process, a standard residential real estate conveyance takes place roughly in the following manner. The buyer and seller find each other in the marketplace, either through a real estate broker or in another manner. Brokers are involved in relatively few transactions, merely 25-50 % of all conveyances.[279] The parties sign a sales contract, called the *compromis de vente* (sales agreement) or *avant-contrat* (pre-contract). The *compromis de vente* is a traditional contract. Once agreed upon, buyer and seller are mutually bound to the sale, with the exception that the buyer has a statutory right under the *Loi SRU* to a cooling-off period of at least seven days, during which the buyer is unilaterally entitled to cancel the contract. This right applies where the buyer is a private person, and cannot be contracted out.[280] Further, the contract commonly stipulates one or several contingency clauses, such as mortgage clauses or contingencies related to encumbrances or restrictions due to zoning and planning. The parties are free to draw up the contract themselves, but in actuality notaries account for 80 % of all *avant-contrats*.[281]

As an alternative to the *compromis de vente*, the seller may issue a *promesse de vente*. The *promesse de vente* differs from the *compromis de vente* in that whereas the latter is a mutually binding consensual agreement, the former is a unilateral declaration that only binds the seller. In short, the *promesse de vente* means that the seller pledges, for a specified period of time, to sell the property to a specified party. During that time, the seller cannot sell to another party. The unilateral obligation becomes a mutually binding sales agreement once the seller agrees with a buyer on a sale price; C.C. Art. 1589. No particular formalities are needed. Since the *promesse de vente* is nonetheless by definition an asymmetrical arrangement, to balance the scales it usually specifies a certain sum, called *indemnité d'immobilisation*, to be paid by the beneficiary should they choose not to purchase the property. The sum is usually 10 % of the sale price, which corresponds to the standard deposit sum provided for in mutual sales contracts.[282] This is not mere happenstance. There are three possible outcomes: 1) the completion of the sale, in which case the *indemnité d'immobilisation* is

[279] ZERP Study, p. 115. Interestingly, this is described in the study as "a considerable number of cases", which seems a rather quaint position given the significantly larger numbers in e.g. Sweden, where brokers are involved in roughly 90 % of all conveyances.
[280] The *Loi n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains* (commonly referred to as the "Loi SRU") amended several laws, including the CCH. Through Art. 72 of the Loi SRU, Art. L271-1 and L271-2 of the CCH now stipulate a mandatory seven-day cooling-off period for buyers of residential real estate who are private persons.
[281] ZERP Study, p. 117.
[282] Dyson, p. 51.

discounted from the sale price, 2) the buyer defaulting, in which case the sum is paid to the seller as indemnification, or 3) the non-completion of the sale due to a contingency clause. The mutually binding *compromis de vente* seems to be the most common choice, though there are regional variances throughout France in that respect.[283] Though there is no requirement to do so, the parties are free to avail themselves of the services of a notary to draw up the *compromis de vente*. If they choose to do so, Art. 64.1 of the Règlement National confers the responsibility to draft it on the notary of the seller.

Once the parties have agreed, a notary is contacted. The choice of notary usually falls on the buyer though this is by no means a legal requirement. It is also possible to involve two notaries, one for each contracting party. If this is done, then one of them is understood to be the *notaire instrumentaire* – the drafting notary. However, both notaries are held in to the same duty to counsel.

Once the drafting notary is appointed, a date is set for the *rendez-vous de signature*, when the *acte de vente* is signed by the parties. Prior to that meeting, the notary goes about collecting the information prescribed by law or otherwise needed (see below chapter 8), such as e.g. existing mortgages and other encumbrances, and prepares the *acte de vente*, which is the official conveyance deed. The *acte de vente* is an *acte authentique* with full probative value and immediate enforceability. During the meeting, the notary gives (or is at least legally obliged to give) all relevant information and advice to the parties. Once the *acte de vente* is signed, the buyer pays the remainder of the sale price and receives the keys to the property. After the meeting, the notary sends the *acte de vente* and the rest of the documents to the *bureau d'hypothèques* for recording in the land register.

7.2 The Purpose and Nature of the Duty to Counsel

As is hopefully evident from the previous chapters as well as the previous section, the act of authentication is a core notarial function. This is all the more true in real estate conveyances where authentication is a prerequisite for valid mortgages and other encumbrances, as well as rendering the conveyance binding towards third parties. Authentication confers upon the transaction and the documents used to effectuate it the seal of the state and the principle of full probative value. It would seem intuitive that under a régime where the transaction process has such far-reaching legal implications, safeguarding the validity and efficacy of the transaction is of utmost importance. The task of achieving this end has fallen on the chief orchestrator, the notary. de Poulpiquet views giving counsel as a natural and inevitable consequence of the authentication function: authentication requires ensuring validity and efficacy, which in turn requires giving counsel.[284]

[283] Ibid; see also Bettini & Bettini, pp. 79-82. There are three more options besides the *compromis de vente* and the *promesse de vente.* First there is the *offre d'achat*, which is a unilateral pledge from a prospective buyer to purchase the property at a given price. Then there is the *pacte de préférence*, which is a right of first refusal. Finally, there is the *vente à réméré*, regulated in C.C. Art 1659 to 1670, where the seller is granted the option to repurchase the property within five years. See further Dyson, pp. 55-58.

[284] de Poulpiquet, pp. 11-12.

Validity here means that the transaction is legally valid and binding whereas *efficacy* refers to the possibility to accomplish the desired goal. In other words, the obligation to ensure validity serves to ensure that the contract cannot be declared null and void in the future, whereas the obligation to ensure efficacy serves to ensure that the consequences and implications of the transactions are really those desired by the parties and that their intentions can be realized. If one were to compare the notary to an architect, validity would be the solidity of the structure whereas efficacy would refer to the desired utility.[285]

There is an alternative view, expressed by Aubert, who divides the notary's obligation into two categories: the duty of efficacy and the duty to counsel. The former encompasses both validity and efficacy, whereas the latter, complementary to efficacy, refers to information and advice that are not instrumental to the transaction. As pointed out by Biguenet-Maurel, this view—which would seem to exclude from the duty to counsel all formalities and obligations which are directly necessary to assure validity and efficacy, leaving the duty to counsel to include only informing the parties of the scope and significance of the deed, and alerting them of any existing risks or uncertainties—does not harmonize with that of the courts.[286] As is evident from the language and logic of the case law of the Cour de Cassation, the courts have rather tended to adopt the model presented by de Poulpiquet, where the duty to counsel—the *devoir de conseil*—is the overriding concept, the safeguarding of validity and efficacy merely the two most important aspects of said concept.[287]

The discussion concerning the proper definition and categorization of the duty to counsel is understandable and highly relevant given that French law, from scholars to courts, have elected to define and categorize the notary's tasks with respect to the intended purpose, rather than the activities involved. From an intellectual and analytical perspective, the appeal of such an approach is evident: by establishing an abstract principle, the specific applications of the principle become incidental - mere exemplifications of the object of study rather than the object of study itself. And since the principle is defined and understood by means of intellectual criteria, the exemplifications can be analyzed in a more consistent and coherent manner than is often the case when discussing the specific tasks one by one; such case-by-case analyses and discussions tend to be superficial and to yield less well founded conclusions.[288]

Turning to the subject matter at hand, it is of course possible to approach the duty to counsel of notaries in a practical, hands-on manner, describing the specific tasks to be fulfilled and how the notary should go about fulfilling them—a hand-book description of sorts. Such an approach would have the obvious advantage of a high level of comprehensibility and connection to the practical problems the reader may wish to explore. However, without understanding the principles

[285] Biguenet-Maurel, pp. 172-173.
[286] Ibid.
[287] The model was first presented in her thesis: de Poulpiquet (1974), *La responsabilité civile et disciplinaire des notaires (De l'influence de la profession sur les mécanismes de la responsabilité).* Since then, it has become integral in all her writing on the subject and is evident e.g. in de Poulpiquet 2003, which is referred to in various places in the present dissertation.
[288] The study of the obligations of the real estate broker under the EAA is a perfect example. If a discussion or analysis, as is unfortunately often the case, merely treats the obligations by themselves in a sequence, the impression is that of a (too large) number of tasks and prohibitions, the *raison d'être* of which is elusive at best and incomprehensible at worst. Anybody who has spent time teaching the subject to brokerage students or active brokers can attest to this.

underpinning the concrete rules, one would not gain any deeper understanding as to the standpoint of the law. Thus, one would merely be describing a number of practical exemplifications of the law, but not the law itself. To make valid analyses of the law—irrespective of whether one sees the law as predictive or prescriptive—it is necessary to capture the essence of the substantive rules. To that end, mere practical exemplifications are but pale proxies to the law itself.

The described phenomenon is by no means unique to the study of the legal obligations of professionals. On the contrary, it goes deep into the heart of the law and of legal science: the formulation of abstract principles governing the substantive fields of law—whether those principles are embedded in the law as a whole or simply in the given field of law—serve to promote a more coherent understanding, and hopefully application, of the law.

On the other hand, the downside of a principle-based approach, which could be labeled a deductive approach, is the risk that terms and their assigned definitions are given priority above the practical reality they are meant to describe, or for which they are meant to prescribe a solution. Moreover, while abstract principles are undeniably helpful—I daresay even instrumental—in gaining a proper understanding of a legal topic no matter the field of law, the relevance of those abstract principles is contingent on the existence of a connection on some level to a practical reality. The ideal would therefore seem to be to combine the analytical potential of a principle-based approach with the connection to a practical reality of a hands-on approach. How, then, can such a compromise be accomplished?

This problem need perhaps not cast so great a shadow. The legal foundation is fairly straightforward: from the act of authentication, with all its implications, is derived the obligation on the part of the notary to take such measures as are necessary to ensure the validity and efficacy of the deeds. While not explicitly stipulated in any statute, this principle is firmly settled in both case law and jurisprudence. Ensuring validity and efficacy, in turn, presupposes a certain amount of counsel. Through the years, as the principle of consumer protection has gained ever more importance in society as a whole, the duty to counsel has expanded from that which is strictly necessary to effectuate the transaction to ensuring that the parties are not unduly prejudiced. Whether safeguarding the interests of consumers constitutes a duty separate from that of ensuring validity and efficacy, as some would seem to hold[289], or whether it is an inherent part of that pursuit, is arguably a mere matter of definition. After all, it is indisputable that the obligation exists, no matter how one chooses to categorize it. That said, it is difficult to see how lending particular assistance to consumers, e.g. by giving more extensive advice, could be regarded as anything else than an intrinsic part of the notarial function. To name but one simple example, the first validity requirement laid down in C.C. Art 1108 is the consent of all parties who undertake an obligation. In a mutual agreement such as a sales contract, that means both buyer and seller. How could one possibly hold that there is consent from all parties unless one is certain that all parties have understood the obligations they are about to undertake? And how can one be certain of that without giving proper counsel? It seems clear that whatever extra efforts may be required on the part of the notary when dealing with consumers or other less informed parties, the obligation emanates from the notarial function itself.

[289] See the summarized discussion in Biguenet-Maurel, p. 173.

Arguably, an obligation can only exist if the non-performance of said obligation is or could be followed by some kind of sanction. In the case of the notary's duty to counsel, that sanction is civil liability. Indeed, the duty to counsel is from the very beginning a product of the law of torts. C.C. Art 1382 provides that a person who, in whatever manner, causes damage to another is obliged to repair the damage. Art. 1383 provides that this applies not only to damage caused intentionally but also to damages caused by negligence or imprudence. It is on this legal basis that the notary's duty to counsel has evolved in the case law of the Cour de Cassation.[290]

From the foregoing, it seems clear that the key word is *ensure*: the notary must *ensure* the validity and efficacy of the deed. Merriam-Webster's Dictionary defines the word as "to make a thing or person sure". By definition, then, the notary's duty is to see to it that the validity and efficacy of the deed are not endangered or neglected. This amounts to a rule of prudence and due care: to do what is in one's power to promote something and to prevent it from coming to harm.

Now, the fact that tort law has been - and still is - instrumental in shaping the notarial duties, implies that there are limits to the efforts required on the part of the notary: civil liability presupposes some level of negligence or imprudence. Thus, the notary must take such measures as can be reasonably expected, the key question being: "what would the good and prudent notary do"? Most people would probably find it intuitive, given the inherent fallibility of humankind, that there are limits to the expectations one can reasonably place on another. However, from a legal point of view it is quite possible to impose strict liability; that is, liability that does not require any kind of culpability. It is clear from the foregoing that such is not the case here.

In sum, the notary's has a duty to do what is in his power and can reasonably be expected to ensure the validity and efficacy of the deeds. That rule of due care is the foundation of the notarial duty to counsel. The next question is what practical activities—what tasks—this general rule gives rise to in real estate conveyances. That will be discussed in the following section.

7.3 The Tasks Derived from the Duty to Counsel

The definition described in the previous section of the duty to counsel as a rule of due care, which emanates from the notarial function and gives rise to a number of specific obligations, is not very far from that of Biguenet-Maurel, who proposes the following definition: *"[t]he name given the implicit obligation that the notarial function lays down on [the notary] to counsel their clients in their choices and to inform them of the contents and the consequences of the commitments to which they subscribe or which they envisage."*[291]

The author then goes on to describe the tasks derived from that definition:

[290] Biguenet-Maurel, p. 1; see also de Poulpiquet, pp. 17-18, as well as the table of contents, from which it is evident that the duty to counsel is defined as falling under the notary's civil responsibility. As to case law, most judgments of the Cour de Cassation make explicit reference to C.C. Art. 1382, underscoring the paramount importance of that provision.

[291] Biguenet-Maurel, p. 7.

"This obligation entails the accessory obligations to ascertain relevant facts, to explain, and to adapt to each operation in which one takes part".[292]

Is this a fair and reasonable description? The short answer must be yes. Again, the act of authentication confers a duty to ensure the validity and efficacy of the deeds. How, then, should the notary go about safeguarding these fundamental values whilst effectuating the transactions put before him? As to validity, C.C. Art. 1108 lays down four requirements for the general validity of a contract:

1) the consent of all parties who undertake an obligation;
2) the legal capacity of said parties to undertake obligations;
3) a specified subject matter; and
4) a licit cause.

The first step in ensuring validity would seem to be to ascertain that these requirements are met. Whether this is accomplished through inquiries, investigations, or checking public registers, it is a matter of logic that ensuring validity presupposes ascertaining that these and other essential facts are at hand. There are of course more factors than those just mentioned that could render a transaction invalid. For now, however, it is enough to conclude that the notarial duty to counsel must entail an obligation to ascertain facts.

While admittedly superfluous—at least from a strictly logical perspective—given the last paragraph, it bears noting that ascertaining facts is also necessary to ensure *efficacy*. To ensure that the effectuated transaction really reflects the will of the parties, and accomplishes the goals envisaged by them, one must first know what that will and those goals are.

Logic further dictates that merely collecting information, e.g. by asking questions, does not suffice to ensure validity and efficacy. To illustrate this, let us ponder the matter of the parties' consent. Intuitively, one would probably go about it by e.g. reading the contract out loud and inquire of the parties whether they consented to its contents. However, even if the parties express their consent without hesitation (and in all probability they usually do in practice), to be able to conclude that the parties do in fact consent to the contract as it stands, one must assume that they are well informed of the consequences of the contract as it stands, as well as the alternatives available to them and the consequences of those alternatives. It is safe to assume that the contracting parties are rarely that well informed. In order to truly ascertain that the parties have given their *informed consent*, the notary must also explain and give advice.

Granted, the distinction between expressed consent and informed consent might be understood as boiling down to risk allocation: if the buyer or the seller in a real estate conveyance says "yes" to a certain contract clause, who should bear the risk that the buyer has not fully understood? From a neutral legal point of view, it is conceivable that the whole risk be borne by the buyer. *Prima facie*, such an approach would seem to carry the advantage of lowering transaction costs. Moreover, even if the buyer receives the best information and advice imaginable, there is no guarantee that they will

[292] *Ibid.*; "Cette obligation comporte les obligations accessoires de s'informer, d'expliquer et de s'adapter à chaque operation à laquelle il prête son ministère".

understand it, let alone act rationally upon it.[293] However, as a legal matter that is a moot question since French case law and jurisprudence have taken the view that it is the informed will that counts. As will be demonstrated below (chapter 10), the notary who does not give sufficient advice assumes the risk that the buyer or seller incurs losses as a result of choosing an inadequate option.

Thus, there is no doubt that the notary is obliged to provide information and advice on a number of issues. Here, it is important to stress that the mere communication of standardized information does not suffice to fulfill the obligation. While providing information need not in itself entail more than handing over a brochure or making information available on a website, the overriding purpose is to ensure validity and efficacy. Doing so requires some kind of efforts to ascertain that the parties have really understood the information.

Another distinction, that is perhaps not intuitive but which will nonetheless be made here, is that between information and advice. The distinction can be explained as the separation of the fact from its significance. For instance, if the property for sale is situated in a ZAD (*Zone d'aménagement differé*), that is a fact. However, the fact itself is not worth much without knowing that properties in such zones are subject to pre-emption rights. Now, it is possible to hold that the notary ought to be obliged to inform the buyer in a conveyance of the zoning and planning situation without subscribing to the idea that he ought also to be obliged to explain the implications. Therefore, it is not merely relevant but rather vital to distinguish between the obligation to provide information, which essentially consists in the disclosure of facts, and the obligation to give advice.

One more obligation is needed to complete the picture. To put it bluntly: "if you want something done properly, you're better off doing it yourself". Given the duty to ensure validity and efficacy, it cannot be enough to collect information and convey it in the form of information disclosure and advice. There must also be an obligation to draw up the necessary documents, and to adapt them to the specific circumstances in the transaction at hand. Granted, there could of course be individual cases where the parties are capable of drawing up, for instance, the sales contract on their own. They may find it helpful to receive some good advice so that they do not miss anything important, but do not need help with the "handiwork". However, it would be naïve at best to assume that such situations are common. In a qualified majority of all transactions, one can rather safely assume the opposite. Thus, the last of the obligations emanating from the duty to ensure validity and efficacy, completing the picture of the notary's duty to counsel, is that to draw up all necessary contracts and other documents, and to adapt them to the transaction at hand.

[293] This argument is sometimes voiced while discussing (deficient) contract clauses used by brokers. Even if the clause is clearly subpar, how can one be sure that it does not correctly express the will of the parties? And even if it does not, how can one be sure that the parties would act differently, let alone in a more desirable manner, with more information?

8 Ascertaining Facts

8.1 The Swedish Broker

8.1.1 The Duty to Verify

17 § EAA stipulates that the broker must verify which person(s) are entitled to dispose of the property and the extent to which the property is encumbered by mortgages, easements, and other rights. This is called the duty to *verify*. The choice of the word "verify" seems to imply that the provision is not intended to typically call for extensive investigations or inspections on the part of the broker. On the contrary, most of the information encompassed by the provision is easily accessible, primarily through the land register. On the other hand, the word would also seem to imply a strict, nigh on absolute, obligation to actually ascertain the facts, which would be more far-reaching than e.g. a superficial investigation. Two main questions arise here:

1. What information does the duty to verify encompass?
2. How far must the broker go in her endeavor to obtain said information?

As to the first question, the information specified in the provision can be divided into two sections: who is entitled to dispose of the property on the one hand, and the extent to which it is encumbered by easements, mortgages, and other rights on the other. Both categories consist in information that has direct bearing on the validity and legal certainty of the conveyance.

The person or persons who is/are entitled to dispose of the property is normally the owner. Thus, the broker must first of all ascertain that the would-be seller is the rightful owner of the property, which is normally the person or party who holds the title in the land register. There are exceptions, however, and the broker may therefore be required to investigate a chain of acquisitions that has not been recorded in the land register.[294] Where the property is owned by a legal person, or two or more people jointly, it follows from the wording of the provision that the broker must ascertain that the person she is dealing with has any and all necessary powers of attorney in order to dispose of the property. For instance, if the owner is the estate of a deceased person, 18:1 of the Inheritance Code requires the consent of all estate owners to dispose of the estate's property.

A question that may not follow linguistically from the foregoing, but is nonetheless intrinsically connected to it, is whether there are any limitations to the owner's right of disposal. After all, knowing *who* may dispose of the property is no good in itself unless one is certain *if* that person may dispose of it. While the wording of the provision is admittedly somewhat opaque in this regard, there is no doubt that limitations on the right of disposal are included in the provision.[295] Indeed, not including limitations on the right of disposal would arguably render the provision practically meaningless: merely knowing that the seller is the rightful owner of the property is not very helpful to buyer nor broker if the owner cannot also enter into a valid sales contract.

[294] Prop. 1983/84:16, p. 39.
[295] Melin, p. 204.

As to the second question, three things must first be noted. Firstly, by definition the duty to verify entails obtaining *correct* information, not merely information. It follows that that the broker cannot simply rely on statements given to her by the seller or a third party. Even if the information seems reasonable enough in itself, the broker is irrefutably required to verify it.[296] Secondly, even if in a particular case the broker deems the existence of an encumbrance or a limitation on the owner's right of disposal unlikely, that does not exonerate the broker from the obligation to verify. Thirdly, the broker cannot blame her failure to obtain the necessary information on technical problems.

> In **FMN 2008-11-19:4**, the broker failed to include information regarding existing mortgages in the unit description. As is common, the broker subscribed to the real estate information service provided by the Survey Agency, through which information from the land register becomes accessible in the broker's application program for contracts and other documents. Normally, the needed information is transferred automatically to the unit description. For some technical reason the broker could not explain, information regarding mortgages did not appear in the unit description despite existing in the land register. The FMN held that the broker had acted in breach of an explicit provision and issued a warning.

At a glance, since most of the information encompassed by the provision is easily accessible, it would seem reasonable to demand complete certainty. For instance, if the correct information can found in the land register, there should be no excuse but to obtain it. However, not all information specified in the provision can be found by such means. For instance, there may be older easements on the property that are legally binding for the buyer but cannot be found in the land register. In the case of tenant ownership homes, there may be legally valid mortgage encumbrances even if they do not appear in the ownership association's register. Under such circumstances, an absolute duty to ascertain the facts would appear somewhat harsh.

Thus, it would seem that the scope of the obligation must balance two interests. On the one hand, the wording of the provision is to *verify*. The specified information is also of prime importance in the transaction, and the potential damage should the information be overlooked is severe. Suppose, for instance, that the buyer has already sold their current property. Suppose, further, that that the seller needs the consent of their spouse to sell the property but that this fact is overlooked and the property is sold without such consent. Suppose the spouse refuses to consent to the contract and sues for invalidity under 7:9 of the Marriage Code. Suppose, finally, that the court declares the sale invalid. Unless another property can be found with haste, the buyer may suffer substantial damages. On the other hand, an absolute obligation would make the broker liable even in situations where the information is impossible to obtain. How, then, to balance the two? The answer would seem to lie in a strict but not absolute rule: the easier it is to obtain the correct information, the stricter the duty to obtain it. It would further seem reasonable that the duty to verify is not fulfilled until the broker has either obtained the correct information, or exhausted all means at her disposal to do so.

To shed further light on the scope of the duty to verify, the following sections will deal more closely with most important categories of information. To provide a substantive backdrop for the discussion,

[296] Prop. 1983/84:16, p. 39. It is hard to reconcile the requirement to verify information by checking public registers and other sources of information with the notion that it might suffice to obtain an answer from the seller.

each section will begin with a brief summary of the applicable law and its implications in real estate conveyances.

8.1.1.1 Right of disposal

Estates

As to estates of deceased persons, 18:1 of the Inheritance Code provides that, unless an estate administrator has been appointed under Chapter 19 of the same Code, the surviving spouse or cohabitee, heirs, and residuary legatees (beneficiaries) shall jointly administer the estate of the deceased and jointly represent the estate in relation to third parties. Thus, the consent of all beneficiaries is a prerequisite for a binding sale agreement. It is not uncommon for one person, e.g. a son or daughter of the deceased, to represent the estate. In order to legally sell property owned by the estate, that person must first obtain a written power of attorney from all other beneficiaries; 27 § of the Contracts Act. The beneficiaries are specified in the estate inventory, which must be drawn up within three months upon the decease and submitted to the Tax Agency for registration. To enter a legally valid sales agreement, it is enough that all beneficiaries either sign the contract themselves or are represented by power of attorney. For the buyer to obtain title registration, however, the estate must first obtain title registration. This, in turn, presupposes the registration of the estate inventory; 20:2, 5 and 7 LC. Thus, while the property may well be *sold* before the estate inventory is registered—in the sense that a sales contract has been signed—the buyer cannot obtain title registration until the inventory is registered and the estate has been granted title registration.

As to the obligations of the broker, 17 § EAA requires her to ascertain that the person or persons who wish to sell the property are entitled to do so. To that end, the broker must by necessity check the estate inventory to see whether any additional powers of attorney must be obtained. So as not to cause unnecessary delays, it is usually held that the broker need not await the registration of the estate inventory; it is enough that the broker is presented with a *drawn-up* estate inventory.[297] By the same token, it has been suggested that it is permissible for the broker to sign a brokerage agreement with the known beneficiaries without first seeing an estate inventory.[298] That position, however, is practically meaningless in view of the EAA. Since the duty to verify is absolute as long as it is possible to obtain correct information about right of disposal—which is the case once the estate inventory has been drawn up—it would hardly seem compatible with the due care obligation to begin brokering the property without knowing whether the principal is actually entitled to sell it.

> The question was part of the subject matter in **FMN 2009-12-16:11**, where spouse A had previously died and left a wife B and two sisters. The sisters were A:s legal heirs under 2:2 p. 2 IC. However, under 18:1 p. 2 of the same Code, they were not beneficiaries in his estate but rather in that of his surviving wife B. Upon B:s subsequent decease, the sisters were therefore beneficiaries in her estate. This fact was not, however, mentioned on 17 March, 2008 when the broker was contracted to negotiate the sale of the estate's properties. The brokerage contract was entered between the broker and a representative

[297] Grauers, F. 2009, p. 67-68.

[298] Grauers, F. 2009, p. 68.

> for eight universal legatees. The two sisters had not been contacted and had not granted a power of attorney. The broker began brokering the properties without any estate inventory having been drawn up. In April, 2008 the sisters approached the broker, *inter alia* in connection to a showing, and informed him that they were beneficiaries of the estate, demanding that the brokerage be stopped immediately. The broker did not comply. Instead, a sales contract for the two properties was signed on 8 May, 2008—at which time the broker had neither asked for nor seen an estate inventory. The representative for the eight legatees signed the sales contract on behalf of the estate. It was not until between the signing of the sales contract and the agreed date of possession that the broker finally read the estate inventory, which had been drawn up on 2 May 2008, i.e. six days prior to the sale. The estate inventory listed the two sisters as beneficiaries. To avoid the sales contract being declared null and void under 18:1 IC, the broker contacted the sisters and persuaded them to ratify the sale. Both sisters signed the presented document but reported the broker to the FMN. The FMN concluded that the broker had acted in breach of the duty to verify and issued a warning.

In the cited case, the broker not only began brokering the property without seeing an estate inventory; he drew up the sales contract and had the parties sign it. Given that the estate inventory was drawn up six days prior to the signing of the sales contract, it can also be safely assumed that the broker did not make any inquiries before the signing of the sales contract as to whether the estate inventory was drawn up. As the FMN concluded, the actions of the broker clearly constitute a breach of the duty to verify. What is not clear from the decision, however, is whether it would have been acceptable for the broker to begin brokering the property before seeing the estate inventory, as long as he did not conclude the transaction with the signing of the sales contract before seeing the inventory.

The question must be answered in the negative. If the broker begins brokering the property—advertising and showing it—there is no guarantee that the parties will not draw up and sign a sales contract without the assistance of the broker. Thus, even beginning to broker the property can be enough to expose potential buyers and estate beneficiaries alike to tangible risks. Granted, it is possible that these risks could be alleviated by a warning statement informing the reader that there could be additional estate beneficiaries who must either sign the sales contract or consent by power of attorney. Indeed, it is no bold statement that the due care obligation in 8 § EAA and 5, 6, 8, and 10 §§ MA make such a statement mandatory since all marketing measures must be in accordance with sound marketing practice and must not be misleading. In particular, important information must not be omitted; 10 § MA.[299] However, even if the broker were to include a perfectly clear warning statement in the advertisements, the safe conclusion is that it would not be enough. The EAA constitutes consumer protection legislation, the logic of which is that the professional has a responsibility towards society not to expose consumers to risks that can be avoided without unreasonable costs. If a broker puts out a property for sale, the public will assume that the property can be sold. Even if a warning statement is included in the advertisement, there is a clear danger that the risks are perceived as lower than they actually are. For these reasons, the prudent conclusion is

[299] Presumably, an advertisement with a warning statement of that nature would not be particularly appealing to any of the parties involved. That, however, is a matter of business and preferences, not law.

that it is not permissible under the EAA for the broker to advertise the property without first seeing the estate inventory.

A question still unanswered is whether it is permissible under the EAA for the broker to sign a brokerage contract, and possibly take preparatory measures that are not visible to the public, e.g. begin taking photographs of the property, before the estate inventory is drawn up.[300] That, however, is a moot question due to the requirements of Act (2009:62) on Measures against Money Laundering and Terrorist Financing (Money Laundering Act, MLA).[301] Pursuant to 2:2 MLA, the professional is required to apply customer due diligence measures, *inter alia*, whilst establishing a business relationship and whilst carrying out occasional transactions amounting to € 15,000 or more. The former situation applies to the broker's principal (usually the seller) and the latter to the principal's counterpart (usually the buyer). Basic due diligence measures must always be applied and involve, *inter alia*, verifying the identity of the customer and, where applicable, the beneficial owner; 2:3 MLA. Under 2:9, these measures must be applied prior to establishing the business relationship or carrying out the occasional transaction. Therefore, the broker must verify the identity of the customer and the beneficial owner prior to signing a brokerage contract. In order to do so, the broker must first ascertain who the estate beneficiaries are. This, in turn, presupposes a drawn-up estate inventory. Thus, if the EAA leaves any doubt whatsoever, the MLA makes it perfectly clear that the broker *must not* sign a brokerage contract without first studying the estate inventory.

Spouses and Cohabitees

7:5 of the Marriage Code bars spouses from selling, mortgaging, letting, or in any other way encumbering property that is the domicile of both spouses without the consent of the other spouse. The consent must be given in writing; 7:5 p. 4 MC. Consent is needed even if the unit is the non-marital property of either spouse by virtue of a prenuptial agreement; 7:5 p.2 in conjunction with 7:2 p. 1. 1-6.[302] If the property is sold without proper consent, the sale is not instantly null and void, but the other spouse is entitled to sue for invalidity within three months; 7:9. Since in the absence of the spouse's consent the sale could be declared invalid, the buyer will not be able to obtain full title registration; 20:7 LC, and will therefore not be able to mortgage the property, which will typically cause problems as to the financing of the purchase. Of course, if the spouse sues and the sale is declared invalid, then there is by definition no purchase at all. If the spouse cannot give valid consent, or if his or her consent cannot be obtained within reasonable time, no consent is needed; 7:7 MC. The same applies where division and distribution of marital property has already taken place; ibid. A spouse who for whatever reason cannot obtain consent to dispose of the property can seek the court's permission to do so; 7:8.

What has been said of spouses applies in most parts to cohabitees, whose financial relationship is governed by the Cohabitees Act (2003:376). 23 § CA provides that the other cohabitee's consent is needed in order to sell, mortgage, let or in any other way encumber property that is cohabitee

[300] It has been so suggested; see Grauers, F. 2009, p. 68.

[301] The Act implements Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

[302] The exception in 7:5 p. 2 encompasses property that is non-marital by virtue of a provision in a will or gift deed. However, if such property is sold and substituted for new property, disposing of that new property will require the consent of the other spouse.

property under 3-7 §§. The basic requirement in 3 § is that the property has been purchased for use by both cohabitees. Thus, even if a tenant-ownership home is the home of both cohabitees, no consent is needed to dispose of it if it is owned by one of the cohabitees and was not originally purchased to serve as the cohabitees' home.

As to the obligations of the broker, 17 § requires that she verifies whether the consent of either a spouse or a cohabitee is necessary. This requirement actually consists in two quite distinct requirements: to verify, firstly, whether there is a spouse or cohabitee and, secondly, whether the consent of that spouse or cohabitee is needed for a valid conveyance of the property. The first requirement is usually fairly straightforward to comply with since most people have no interest in concealing the fact that they have a spouse or cohabitee. There are, however, instances where that is not the case. Again, the duty to verify is absolute as long as it is possible to obtain the necessary information, and the broker is not entitled to simply trust the information given to her by the seller. Therefore, the broker must always inquire of the seller whether there is a spouse or cohabitee. If the seller claims to be divorced or separated, the broker must ask them to present documentation to prove that division and distribution of marital or cohabitee property has taken place.

> In **FMN 2011-05-25:7**, the broker visited the apartment of the seller with the aim of obtaining a brokerage contract. In the words of the broker, the apartment was as good as empty, and the seller claimed to have sold most of the household goods since he was moving back to his native country. Asked about his civil status, the seller claimed to be single. The broker claimed not to have noticed anything in the premises to cause suspicion as to the existence of a spouse or cohabitee. On the contrary, the broker claimed that the apartment showed typical signs of a bachelor pad: it was untidy and the kitchen was full of unwashed dishes and empty food containers. The parties could not agree on the commission fee and no brokerage contract was signed.
>
> About a month after said visit, the broker received the seller at her office, and the parties agreed on a contract-drafting assignment.[303] She obtained the standard information sheet from the tenant-ownership association, which stated that the seller was the sole proprietor of the apartment. The broker drew up the sales contract and the buyer and seller signed it.
>
> In actuality, the seller had been misrepresenting the facts. There was in fact a wife who had been forced to move to a shelter for abused women. Upon hearing of the sale, the wife sued - successfully - for invalidity under 7:9 MC. The court ruling was sent to the FMN, who opened disciplinary proceedings against the broker. The FMN cited 8 § EAA[304], 17 § EAA, and 7:5 LC, and held that when brokering a tenant-ownership home, the broker should begin carrying out the duty to verify by contacting a member of the FMN of the tenant-ownership association. To verify whether a spouse's consent is required, the broker should check the national census register, where the marital status is indicated. The FMN further held that, under the due care obligation, the broker is always required to ask the

[303] This is the type of assignment where the broker is hired to draw up the necessary deeds only. The broker's duty to counsel applies equally to such assignments.
[304] The cited provision was actually 12 § of the 1995 Act. In the current Act, the provision has been moved to 8 §.

seller whether there is a spouse or cohabitee whose consent is needed, and to explain the consequences of selling without proper consent. Merely asking the seller about their civil status does not satisfy the duty to verify. For failing to comply with the cited provisions, the broker was issued a warning.

The first requirement, then, is to verify whether the seller has a spouse or cohabitee whose consent *may* be required. The second requirement is to verify whether such consent is actually required. This goes beyond ascertaining the facts; as is evident from the foregoing, the mere fact that the seller has a spouse or cohabitee does not in itself mean that their consent is needed to sell the property. Ascertaining whether or not consent is needed entails going beyond the facts and into law. For instance, the spouse's consent is not needed if the property is the seller's non-marital property by virtue of a will. But knowing this requires the broker to know the law, not merely the facts. In fact, to be certain of whether consent is needed, the broker must know 1) whether there is a spouse or cohabitee, 2) whether the property constitutes marital property, non-marital property by virtue of prenuptial agreement, non-marital property that substitutes other non-marital property, or cohabitee property, and 3) the legal implications of the former two.

Thus, the broker's obligations with regard to spouse's or cohabitee's consent is nothing short of a legal investigation. The broker must ask the relevant questions and use her legal knowledge to draw the correct conclusions. The legally accepted margin of error appears to be virtually non-existent. As is evident from the aforementioned FMN case, the same knowledge and the same conclusions also form the base of the broker's legal counsel to the parties.

Co-Ownership

It is not uncommon for real estate to be owned by two or more people by co-ownership. Among married couples, joint ownership is the rule. Joint ownership is regulated by the Co-Ownership Act (1904:48). In the absence of an agreement that stipulates otherwise, all co-tenants have equal shares in the property. All co-owners must give their consent for a valid conveyance to take place. More specifically, all co-owners must either sign the sales contract or give another party power of attorney to sign on their behalf.[305]
As to the broker, given that the situation here is quite similar to that concerning estates described above, the same rules apply. Thus, it follows from the duty to verify and the general due care requirement that the broker must obtain the written consent of all co-owners before the property is put out for sale. Given the risks involved, particularly for the buyer, it cannot be considered permissible for the broker to put out the property first and obtain consent later.

Resale Restrictions and Right of First Refusal

A seller or donor may want to bar the buyer/donee from selling or letting the property. A typical case is where a family property is given to a younger member of the family and the donor does not want the donee to trade the property for money (and, presumably, spend it in a less-than-prudent

[305] Under Section 6, a co-tenant also has the option to obtain a court order to sell the property through public auction. However, such a situation would not typically entail a real estate broker.

manner). A seller, on the other hand, usually has no interest in limiting the buyer's right of disposal, but it can and does occur. For instance, many municipalities in Sweden own land that from time to time they sell as vacant lots to private persons with the intention that the buyer build a home on the purchased lot. To ensure fair and equal treatment to all, the municipality usually has a queue system. To further ensure that the sold lots are used for the intended purpose - and not for quick resale profits - the sales contracts contain an explicit obligation for the buyer to begin building a home on the purchased lot within a specified time frame, and a resale restriction clause, whereby the buyer is barred from reselling the property for a specified period of time.

A limitation of the buyer's/donee's right of disposal must be included in the sales contract in order to be valid; 4:3 and 4:29 LC. When the acquirer applies for title registration, the resale restriction will be recorded in the land register; 20:14 LC. Once recorded into the register, the limitation becomes binding towards third parties. Thus, if the owner sells the property in violation of a resale restriction that has been recorded in the register, the buyer cannot make a good faith acquisition; 18:8 LC. Consequently, the buyer cannot obtain ownership registration; 20:5 p 5 LC. Thus, suppose that A sells a property to B with a two-year resale restriction clause. Suppose, further, that B resells the property after one year, in breach of the clause. C cannot make a good faith acquisition and will be denied title registration.

There is no express provision regulating the status of the conveyance made in breach of a resale restriction. However, given that the buyer can neither make a good faith acquisition nor obtain title registration, the only logical conclusion is that the purchase (B to C) is null and void.

It has been the subject of some debate whether resale restrictions made in remunerative conveyances are or should be binding to third parties.[306] There is come case law from the Supreme Court concerning resale restrictions that supports the notion that such restrictions are only binding in non-remunerative conveyances.[307] However, that case law addresses a completely different issue, namely where the buyer B becomes insolvent after the purchase. The question, then, is whether B should be able to cite the resale restriction against their creditors to avoid distraint or foreclosure. That question has been answered in the negative where the conveyance from A to B was remunerative. However, those rulings have no bearing whatsoever on the validity of the resale restriction in relation to B's buyer C. Again, the logical conclusion is that the conveyance from B to C is invalid.

As to the obligations of the broker, discovering a restriction in the owner's right of disposal, such as a resale restriction, will normally not cause problems since such restrictions are recorded in the land register. In exceptional cases, where the seller has not yet obtained title registration, the broker will have to study his purchase or gift deed to ascertain whether there are any restrictions in the right of disposal. Upon discovering a restriction, the broker must not proceed with the sale unless the restriction is rescinded. This entails obtaining the written consent of the former donor or seller. In **FMN 2006-11-15:4**, the broker failed to discontinue the sale despite knowledge of the prohibition to sell. The broker was given a warning.[308]

[306] Grauers, F. 2010, p. 64, Håstad, p. 449, SOU 1988:66, p. 81.
[307] NJA 1991 s. 376, NJA 1993 s. 468, NJA 2010 s. 390.
[308] The warning was not issued on account of failure to gather information; on the contrary, the broker had gathered the necessary information. Instead, the warning was issued for failure to act diligently upon receiving

Right of first refusal is a restriction of the owner's right of disposal that is akin to the resale restriction. The right of first refusal means that before selling the property, the seller must first offer the property for sale to a specific individual or group of individuals, e.g. family members. A typical example is where a donor or testator wishes a property to remain in the possession of the family.

> **FMN 2009-04-22:8** concerned a property that had been given in to five siblings (then between the ages of 34 and 50) in equal shares by their mother. The gift deed contained a right of first refusal clause that read:
>
> *"I want the property to remain within the possession of the family. Should any sibling, or their child, wish to sell their share, they are obliged to offer, in writing, the right of first refusal to the remaining siblings and their children."*[309]
>
> 26 years later, the siblings—who were all still alive—wished to sell the property. The broker was given access to all existing documents, including the gift deed. Since all owners were in agreement to sell the property, the broker did not pursue the issue further, and the property was sold. However, the buyers were denied title registration. The Land Registry[310] required, by virtue of the right of first refusal, the written consent of all the sellers' children (i.e. the grandchildren of the donor). The broker had interpreted the clause as granting the right of first refusal to the donor's grandchildren merely as a right of succession; that is, only where the original done—the parent—was deceased. The Land Registry did not subscribe to that interpretation. A grandchild, whose written consent was solicited and granted, reported the broker to the FMN. The FMN concluded that the broker should have understood the significance of the gift deed and obtained the consent of all grandchildren before proceeding with the sale. The broker was given a warning.

8.1.1.2 Encumbrances

Easements

There are two main categories of easements in Swedish property law: involuntary easements and voluntary easements. Involuntary easements are created by decision of a public surveyor and registered in the land register.[311] Since the practice of recording involuntary easements in the land register did not did not come into full force until around 1973, a there could be involuntary

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said information. This clearly illustrates the connection between possessing information and acting upon it, which will be discussed below (7.3, 7.4, and 7.5)

[309] The original version in Swedish read: *"Jag vill att fastigheten skall förbli i släktens ägo. Skulle något syskon eller syskonbarn vilja avyttra sin andel har vederbörande skyldighet att skriftligen hembjuda sin andel till de övriga syskonen resp. syskonbarnen. Kan överenskommelse icke träffas om köpeskillingen (vederlaget) skall den avgöras av skiljemän enligt gällande lag härom".* The wording is confusing since it would seem to grant the right of refusal to the siblings, nieces, and nephews of the donor. However, it is clear from the preceding paragraphs that donees are in fact the children of the donor, and their children consequently the grandchildren of the donor.

[310] Before June, 2008, registration of ownership and encumbrances was conducted by seven District Courts throughout the country. The tasks are now carried out by the Swedish Mapping, Cadastral, and Land Registration Authority; www.lantmateriet.se.

[311] Involuntary easements can be created under several statutes, among them the Real Property Formation Act (1970:988) and the Utility Easements Act (1973:1144).

easements on a given property that are not visible in the register. Such easements must be sought in the archives of the national Survey Agency or the local survey authority. Whether recorded in the land register or not, involuntary easements are always binding to third parties and will therefore survive the sale of the servient property.[312]

Voluntary easements, also referred to as contract easements, are created by mutual agreement between two land owners. The parties may opt to register such easements in the Land Register; 7:10 LC. Doing so is in the best interest of the owner of the dominant property, since this makes the easement binding to third parties. Without being registered, the voluntary easement is only binding between the parties. 7:14 LC provides if the servient property is sold, the easement is only binding to the buyer 1) if the easement is recorded in the land register, 2) if the seller of the servient property safeguards the easement right on behalf of the dominant property, e.g. by means of a proviso in the sales contract, or 3) if the buyer for some other reason is aware, or ought to be aware, of the easement. As to 2), the seller is obliged under 7:11 LC to make such a reservation to the benefit of the right holder, either in writing or orally. However, failure do so does not make the easement binding to the buyer; it merely entitles the owner of the dominant property to damages from the seller; 7:18 LC.

In most conveyances, the easements should not cause insurmountable problems to the broker, since most easements are in all probability recorded in the land register. However, there are at least two plausible situations where that is not the case: involuntary easements predating 1973 and non-recorded voluntary easements. Again, the broker is required to exhaust all possibilities to find all existing encumbrances and the mere improbability in a given case that an easement exist does not exonerate the broker from this duty. Rather, in order to fulfill her obligations the broker must always ask the seller whether, to the best of his knowledge, there are any non-recorded easement rights on the property. Even in the event of a negative answer from the seller, if the broker has reason to believe that there may be encumbrances that are not visible in the land register, she must contact the competent authority to obtain correct information.[313]

> The question of non-recorded involuntary easements was the question at hand in **case T 3278-00 of the Western Sweden Court of Appeals**.[314] The case concerned a rural property on which there was a graveled road that led to the adjacent property, a manor. The road was originally the southern exit from the manor, but in connection with a partition of the property in the 1940's, part of the road came to cross the new property. The latter property was purchased in 1994 by the plaintiffs. There was no easement recorded in the land register. The broker had not consulted the Survey Agency's archives and had thus not studied the survey documents where mutual easements between the two properties were specified. Consequently, the buyers received no information from the broker with respect to the easement. After the purchase, the buyers – who had purchased the property with the express intent of living in a quiet and secluded environment – attempted to close off the road but were informed by the neighbors of the existing easement rights. The buyers sued the broker for negligent counsel on account of his failure to identify the easement and disclose its existence to them. The District Court held that the broker was obliged by

[312] Nilsson & Sjödin, p. 16.
[313] Prop. 1983/84:16, p. 39.
[314] Ruling of June 18th, 2002.

law to identify all existing easements and that the non-compliance with said obligation was negligent. The buyers were therefore awarded damages. The broker appealed the ruling, and the Appellate Court assessed the matter differently. The court concurred with the District Court insofar as that the broker was indeed required to identify the existing easement. However, the Appellate Court did not find it established that the buyers had suffered any financial damage that could be linked to the broker's negligence. Thus, despite finding the broker in breach of the EAA, it ruled in favor of the broker and denied the buyers indemnification.

FMN 2007-06-20:1 concerned a summer house property. During one of the visits at the premises prior to the sale, the buyers were informed by the neighbors that "some people" were entitled to use an old timber road that crossed the property. Asked to clarify the matter, the broker presented a survey map from the Survey Agency. According to said map, the road in question did not cross the property at all. From this, and from the fact that there was no registered easement in the land register, the broker concluded that no such easement encumbered the property. Just to make sure, the buyers contacted the Survey Agency, from whom they obtained a survey map that confirmed the broker's conclusion. The sales contract, drawn up by the broker, included a clause that certified that there was no road easement. Upon taking possession of the property, the buyers learned that there was indeed a road easement dating back to 1937. It was not registered in the land register, but it was to be found in the Survey Agency's archive.

The case was first brought before the private dispute resolution body FRN, who held that the broker had been negligent in his investigation and awarded damages to the buyers. However, the FMN for its part did not find it unequivocally established[315] that the broker had failed to fulfill his obligations under the EAA, and acquitted the broker.

It is not entirely clear on what grounds the FMN based its decision, which was at odds with the decision of the FRN as well as the recommendation of the presenting official. As the decision is worded, it was lack of evidence that acquitted the broker. The only plausible meaning of this is that the FMN did not find it established that the broker had not exhausted all means to ascertain the facts. Based on the facts of the case, including the broker's own admissions, that would seem a mistaken view. It bears reminding that the duty to verify is absolute in the sense that the broker cannot justify her failure to identify all existing encumbrances by arguing that the encumbrance in question could not be found in the Land Register.[316] The broker is only exonerated from the duty to verify where it is *impossible* for the broker to find and identify the encumbrance.[317] The decision is all the more questionable in view of the statement in the *travaux préparatoires* of the 1983 Act that the broker should actively seek to clarify whether the property is encumbered by non-registered easements, e.g. easements created in connection to parceling or partition. Where the matter cannot

[315] The burden of proof is always borne by the FMN. As to the prerequisite standard of proof, it follows from RÅ 1996 ref. 65 that the incriminating facts of the case must be "unequivocally established" for a disciplinary sanction to be meted out. This is very similar to the "beyond reasonable doubt" standard of criminal cases.
[316] Prop. 1983/84:16, p. 39.
[317] For the sake of honesty and propriety, it should be noted that I was on the FMN and took part in the cited decision. It may therefore seem odd, even inappropriate, that some years later I should turn and criticize the decision. However, I sincerely believe today that the decision was wrong. Full disclosure strikes me as the lesser evil compared to covering up one's tracks.

be clarified by means of the cadastral map provided by the seller, it is incumbent on the broker to contact the competent authority (namely the municipal or national Survey Agency).[318] Even if the broker receives opaque or ambiguous information—or no information at all—from the authority, letting go of the matter is simply not a viable option since involuntary easements are always binding to new owners. Given that the broker in the present case had reason to believe that such an easement existed, he should have made a more diligent effort to ascertain the facts.

> **FMN 2009-04-22:5** concerned the sale of an empty lot of land intended for building a residential house. Prior to signing the contract, the buyer inquired of the broker whether there were any encumbrances on the property. The broker answered no. A week after taking possession of the property, a neighbor observed that the buyer had commenced digging for the house construction, and approached the buyer, claiming that they were digging where the neighbor had an easement for water pipes. Later that day, a representative of the municipal housing and construction committee informed the buyer via telephone that the construction had to be stopped because of the easement. The buyer reported the broker to the FMN. The broker objected that she had conducted the usual check for encumbrances in the land register. Additionally, she claimed to have contacted both the Survey Agency and the Land Registry[319] to enquire whether there were encumbrances that were not visible in the resister. Having received a negative answer, the broker had proceeded with the sale. The FMN concluded that the broker had not acted in breach of the duty to verify.

The reviewed cases illustrate that the duty to verify has both an absolute and a relative nature. On the one hand, where the information is possible to obtain, the broker must obtain it. On the other hand, she is entitled to assume that information obtained from a competent authority is correct. In the absence of indications to the contrary, the broker is therefore not obliged to pursue the issue further once the information is obtained. However, that amounts to nothing more than a rule of presumption: where the broker has reason to suspect the existence of an encumbrance, she may have to investigate the matter further despite receiving information that there is none. Thus, while the obligation to *obtain* information is absolute, the obligation to investigate its veracity is relative.

Tenant Ownership Mortgages

The foregoing is true for real estate, i.e. houses. Unfortunately, there is no equivalent register for tenant ownerships. There have been plans for the creation of such a register, but they have been abandoned.[320] Nonetheless, the duty to verify applies to tenant ownerships, which are used as security for mortgage loans in the same way as real estate. It must be borne in mind, however, that mortgaging tenant ownership homes differs from mortgaging real estate in two important respects. Firstly, the tenant ownership does not confer full ownership of the apartment or house. Rather, the tenant ownership holder owns a share in the tenant ownership association that owns the property

[318] Prop. 1983/84:16, p. 39.

[319] At the time, the Land Registry was operated by seven designated district courts. Today, it is operated by the national Survey Agency.

[320] The plans progressed as far as a commission report: Ds. 2007:12 *"Tenant Ownership Register – Models for the Registration of Tenant Ownership Homes"* (*"Bostadsrättsregister – några modeller för registrering av bostadsrätter"*)

where the apartment or house is located. Attached to that share is a right to use the apartment or house in question; a right to use that governed by the Tenant Ownership Act and that is similar, but not identical, to a lease right. Therefore, the tenant ownership holder cannot technically mortgage the apartment as security. They can, however, pledge their share in the association, which by analogy with 31 § of the Act of Notes (1936:18) is accomplished in two steps. First, the debtor must pledge the share as security. Next, the creditor must notify the tenant ownership association of the pledge. The association is required by 9:8-11 of the Tenant Ownership Act to keep a register of all its apartments. It is further required under 9:10 TOA to, *inter alia*, record all security pledges regarding the apartments that are notified to them. For practical purposes, despite these fundamental differences, pledges of tenant ownership homes will be referred to as mortgages.

The broker must therefore consult the FMN of the tenant ownership association to obtain information of ownership, right to dispose, and encumbrances, or the third party to whom the economic administration of the association may have been outsourced. In most cases the broker will be able to obtain all the necessary information. However, the system is by no means fool-proof. The problem lies in the nature of the tenant ownership: if the share has been pledged as security, a valid mortgage (both between the parties and towards third parties) is accomplished as soon as the creditor notifies the association.[321] Should the association fail to record the mortgage in its register, the mortgage is nonetheless valid.[322] Thus, it is always possible (and unfortunately not completely improbable) that there may be a valid mortgage that is not recorded in the register.

> **RÅ 2003 ref. 51** concerned the sale of a tenant ownership apartment. Prior to the sale, the broker was contacted by the seller's creditor who claimed to have a mortgage right on the apartment and had a contract to prove it. However, the tenant ownership association could not find any records of the claimed mortgage right in its register, and the broker concluded that there was no valid encumbrance. For the sake of prudence, the broker included a contingency clause that made the validity of the sale conditional upon the creditor's approval, whether active or by acquiescence. The FMN observed that the mortgage is valid once the creditor has notified the association, and that the failure of the association to observe its obligation to record the mortgage in its register does not affect its validity. The FMN further held that the broker had been obliged to inform the contracting parties about the possibility that there was a valid mortgage, as well as the risk involved. For the failure to do so, the broker was issued a warning. The decision was upheld by the Administrative Court but overturned by the Administrative Court of Appeals, who held that the contingency clause proved that the contracting parties were aware of the risk of a valid mortgage. The Supreme Administrative Court concurred with the Administrative Court of Appeals, albeit on slightly different grounds, and upheld the acquittal.

The ruling is unfortunate insofar as it appears to be based on a misconception. The ruling of the Supreme Administrative Court includes, *inter alia*, the following passage: "[a]fter the broker had informed the buyer and the seller of the absence of a mortgage that was valid towards third parties (…)". The passage reveals one of two things, none of them reassuring. Either the court believes that

[321] It is actually enough that the notification has reached the association's mailbox.

[322] It is another thing entirely that the board members may face liability under Chapter 10 of the Tenant Ownership Act for not recording the pledge.

the validity of a mortgage is conditional upon being recorded in the association's register—which is blatantly incorrect—or the statement is merely to be understood as summarizing the broker's information to the parties—in which case the court accepts without comment that the broker has given incorrect information to the parties. In the latter case, the court should by rights at least have raised the question of a disciplinary sanction for incorrect counsel.

The person envisaged in 17 § who is entitled to dispose of the property is normally the owner. Arguably, ascertaining that the seller-principal is in fact the rightful owner of the property is the single most important task assigned to the broker. However, there are instances where the owner does not have full right of disposal of the property. This is the case, for instance, where the principal is not the sole proprietor, where he/she is married or lives in cohabitation, and where the property is part of the estate of a deceased person. To satisfy the general due care obligation, it is incumbent upon the broker to ascertain that all legal stakeholders have given their consent before putting out the property for sale. In the most common situations, the broker must observe the following.

It should be noted here that 17 § only requires the broker to check for *encumbrances*; rights that *benefit* the commissioned property falls outside the scope of the provision. In **FMN 2008-12-17:11**, the FMN held that the broker was not obliged to verify the validity of a land lease contract, on the grounds that the land lease in question was to the benefit of the commissioned property. Naturally, disclosing favorable information is in the best interest of the seller, and the broker is thus required under 16 § to advise the seller to do so (to which the seller is, presumably, normally happy to oblige). However, the broker cannot be held accountable under 17 § should the seller refrain from disclosing such information.[323]

Information that is not explicitly mentioned in 17 § is *prima facie* understood to fall outside the scope of the duty to verify. However, there are situations where the broker is required to gather other kinds of information as well. It must be acknowledged that there are situations where it would seem reasonable and equitable to extend the broker's duty to gather information. This is particularly the case in relation to consumers, who typically do not possess the necessary knowledge and experience and therefore do not know what information to look for. The EAA is not static, and the broker's obligations can be extended through case law, primarily based on the general due care duty in 8 §. The extent to which additional obligations can come about through interpretation and case law will have to be decided by weighing the due care obligation and the legitimate interests of the buyer, the seller, or other interested parties (where consumer rights are in themselves considered a legitimate interest) on the one hand, against due process and foreseeability on the other.

When brokering tenant-ownership homes, the broker must, additionally, obtain the tenant-ownership association's latest annual financial report. She must also check for any formally approved membership fee increases. Increases that are planned, but not decided, fall outside the scope of the obligation. These obligations, which originally emanated from the case law of the FMN, were entered specifically in 18 § of the current statute.[324] That provision obliges the broker to provide the buyer with a unit description (*objektsbeskrivning*), making the obligation mainly one of conveying

[323] If the broker fulfills her obligations under 16 § to give adequate advice, it seems unlikely that the seller will refrain from disclosing favorable information. Since, presumably, most sellers will want to disclose favorable information notwithstanding, the matter should not present insurmountable problems.
[324] Prop. 2010/11:15, pp. 8, 32.

information. However, before one is able to convey a piece of information, one must necessarily first obtain it. The difference between the information mentioned in 17 § and all other information is that, as regards the latter category, the broker cannot be faulted for not verifying the veracity of the information unless in the individual case she has reason to suspect that it is incorrect.[325]

It has been the subject of some debate whether brokers should be required to check zoning and planning regulations, granted building permits in the vicinity, and the like. The interest of the buyer is self-evident: picture purchasing a property with a view of the sea, only to have that view blocked by a building on the neighboring property! Since zoning, planning, and building permits are not explicitly mentioned in 17 §, the strict interpretation is that they are not included in the duty to verify. However, it has been demonstrated that the EAA is not static and that the due care obligation opens the door for more extensive interpretations. There are several arguments *in favor* of such an interpretation. Firstly, there is the consumer protection aspect. As an expert with experience in the field, the broker should experience considerable less difficulty in finding the relevant information than would the buyer or seller. Secondly, making the collecting of such information mandatory should serve the interest of preventing future disputes since the information is then revealed at an early stage of the transaction. Thirdly, it should not unduly burden the broker since brokers would presumably develop routines and contacts at the relevant authorities. Three arguments speak *against* such an interpretation. Firstly, it could be argued that it harmonizes poorly with the principle of legality and foreseeability. This is particularly the case with regard to disciplinary sanctions.[326] Secondly, new mandatory tasks would be tantamount to an increase in transaction costs. Thirdly, the question of including zoning and planning in the duty to verify has been broached several times over the years without results. The latest example is the legislative process behind the new EAA, where the suggestion did not even make it to the commission report.[327] The conclusion, therefore, would seem to be that zoning and planning falls outside the scope of the duty to verify. As a purely *de lege ferenda* matter, that is lamentable since the arguments in favor of such an obligation greatly outweigh the arguments against.

It is a matter of general consensus that the broker is not obliged to conduct an inspection of the physical state of the commissioned property.[328] Consequently, as a general rule the broker cannot be held accountable for not possessing knowledge of a certain physical defect. However, traditional brokerage—which, despite attempts to launch web-based services on the market, is still predominant—entails physically visiting the property at some point. Typically, the broker will visit the prospective client in their home before a brokerage contract is entered. This gives the broker the opportunity to gauge the property and its vicinity, and thus gain and understanding of, among other things, its physical condition. While the broker is undeniably not required to perform a close inspection of the property, the suitably diligent broker cannot simply ignore defects that are evident from a superficial inspection.[329] As a professional in the field, it could be argued that the bar should

[325] See below, 8.1.2.
[326] The principle of legality is not as pronounced in the law of torts, since such cases are “horizontal”, as opposed to disciplinary or criminal proceedings which are “vertical”. See also Melin, pp. 107-108, where the issue is discussed from the perspective that the standard of proof is higher in disciplinary cases than in civil procedures.
[327] SOU 2008:6.
[328] SOU 1981:102, p. 202, prop. 1983/84:16 p. 14; see also Melin, p. 193, and Zacharias, p. 284.
[329] Melin, pp. 193-194.

be set somewhat higher than what a layperson would have discovered. This notion is supported by the due care obligation. Thus, there are legal grounds for asserting that the broker is required to perform a superficial inspection of the property and, consequently, that she is expected to possess some knowledge of its physical condition.

However, that conclusion is ultimately based on the traditional, albeit still predominant, custom of actually visiting the property. The question is: is it mandatory for the broker to visit the property? Two new service models challenge that notion. The first is the web based model, where the client assumes tasks that are normally performed by the broker, such as showing the property. All necessary documents are downloaded from the broker's website and both the brokerage contract, and all contact with the broker is conducted either by telephone or through the Internet. The second model, the proliferation of which is admittedly not entirely certain, is a traditional "analogue" brokerage service with the exception that it is not the broker who visits the property but a person hired for the specific task of procuring new commissions. The common denominator of these two models is that the broker does not necessarily visit the property herself. As a consequence, she cannot make the kind of observations that brokers normally make, and will not possess the same knowledge of the property as traditional brokers. Does this constitute a breach of the broker's obligations?

It has been so asserted. In June, 2008, the FMN issued a statement expressing its view on online brokerage, that there are several legal obligations that either cannot, or can only with great difficulty, be carried out without actually visiting the property and meeting the buyer and seller in person.[330] The *travaux préparatoires* of the 1984 EAA, which are still applicable since the duty to disclose information has been left unchanged, hold that the broker must disclose to the buyer such defects as can be discovered by examining the property superficially. While there is no obligation on the part of the broker to conduct a *thorough* inspection of the property, the *e contrario* conclusion would seem to be that the broker is required to at least inspect the property superficially.[331] The task of visiting the property and conducting a superficial inspection is possible to delegate to an employee or a third party. However, the broker must ensure that the person who is assigned the task is competent and that there is satisfactory documentation and communication between that person and the broker. In short, the broker is free to hire a stand-in, but will be held accountable for any errors committed.[332] The logical conclusion would seem to be---and this is the view taken by the FMN—that if the employee or agent fails to discover a defect that a suitably diligent broker would have discovered during a superficial inspection (i.e. by visiting the premises and looking around), the broker will be in breach of the due care obligation. The requirement of satisfactory communication means that the broker must ensure that she is informed of any and all observations made by the employee/agent; the buyer can hardly be expected to turn to the person hired by the broker for information that the broker is obliged to gather in the first place.

> **KamR 7171-10**[333] concerned an online broker who did not visit the commissioned properties. Nor did he hire another person to do so in his stead. The FMN issued a warning,

[330] FMN Minutes 6/2008; the FMN referred in its statement to its previous decision FMN 2000-12-20:4.
[331] Prop. 1983/84:16 p. 14; see also Melin, p. 193-194.
[332] In FMN 2000-12-20:4, two Board members were of a stricter view and wrote in their dissenting opinion that the broker is required to visit the property herself.
[333] Ruling of December 6th, 2011.

not on the grounds that he had not personally visited the property, but on the grounds that he had not even had another person do so. The broker appealed to the Administrative Court of First Instance, who held that the *travaux préparatoires* cited by the FMN—more precisely prop. 1983/84:16, p. 14, were insufficient support for the notion of an obligation on the part of the broker to visit the property. The court also dismissed the FMN decision 2000-12-20:4, and ruled in favor of the broker.

The FMN appealed to the Administrative Court of Appeals, who held that, by virtue of the cited *travaux préparatoires*, the broker is obliged to inform the buyer of such defects as can be detected by examining the property superficially. That obligation, held the court, is not contingent on the broker actually inspecting the property. Consequently—since the broker is under any circumstances obliged to disclose the existence of such defects—the broker must visit the property and conduct at least a superficial inspection. The court overturned the ruling of the Administrative Court of First Instance and upheld the warning.

It seems clear that brokerage cannot be conducted completely online or otherwise from long distance. If the broker is unable to visit the property herself, she must hire another to do so in her stead. In such cases, it is the responsibility of the broker to ensure that the hired person conveys all relevant information.

8.1.2 The Duty to Investigate

The verifying duty as described in the foregoing – encompassing both the explicit obligations in 17 § and the implicit obligation to conduct a superficial examination of the property – sums up the information the broker is required to obtain in every conveyance. However, the general due care obligation renders impossible the view that the broker is entitled to completely overlook all other kinds of information. Suppose the broker has reason to suspect the existence of a certain fact. Suppose, further, that the existence of the fact would lead to financial, legal or other losses for the buyer or the seller. Suppose, finally, that it would not be unduly cumbersome for the broker to obtain correct information to settle the matter. Under such circumstances, could it be deemed consistent with the due care obligation if the broker were to cross her arms and refuse to act, on the grounds that there is no specific provision in the EAA to force her?

As will be demonstrated in the following, that question must be answered in the negative.

8.1.2.1 Information from the Seller or Third Party

Much of the information concerning the property that the broker communicates to prospective buyers emanates from the seller. It can be written information in advertisements or unit descriptions, or verbal information conveyed by the broker at various stages of the transaction. What responsibility does the broker have as to the veracity of said information?

In the case of information that the broker must collect on her own initiative under the duty to verify, it is clear that the broker can normally accept the information as given without questioning the veracity. It could hardly be expected from the broker that she should speculate as to whether information from the Land Register is in fact correct. Her chances of refuting such information are all but non-existent. As a general rule, the same applies to information from the seller or a third party such as the tenant-ownership association: the broker is normally justified in assuming that the information given to her is correct. However, this does not mean that the broker is entitled to *uncritically* convey any and all information to the buyer. For instance, most people would probably find it odd, perhaps even offensive, if the broker were allowed to convey information that she knew or suspected to be false. The former case is quite straightforward: if the broker *knows* the information to be incorrect, she is obliged under 16 § to disclose the correct information to the buyer.[334] This follows from the general duty do disclose. A somewhat more complex issue is how the broker is expected to act upon information she suspects, or has reason to suspect, to be incorrect. The *travaux préparatoires* have held from the beginning that there is a general obligation to examine information provided from the seller or third parties before passing it on.[335] However, it is through case law that a more specific obligation has taken shape.

> In **NJA 1991 s. 729**, the seller of a tenant-ownership apartment told the broker that it was uncertain whether the size of the apartment was 46 m^2 or 48 m^2. The broker took no measure whatsoever concerning this information, and included both numbers in the property description, along with the caveat that it was uncertain which one was correct. At the contract signing meeting, the broker urged the seller to give a more specific statement, but the seller declined to do so. The Court of Appeals held that the question of apartment area is of great significance to buyers and that the broker, being a professional, could easily have verified the seller's statement by checking the tenant-ownership association's apartment register. The broker was therefore found negligent and sentenced to pay damages. The Supreme Court upheld the ruling.
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> **NJA 1997 s. 667** concerned the sale of a tenant-ownership apartment. At the time of sale, there was a valuation report, according to which the apartment area was "about 125 m^2". The advertisement read 125 m^2, but the broker told the buyers verbally that the area was "about 125 m^2". Four years after the sale, the buyers found out that the association's apartment register stated 110 m^2. A measuring in 1994 indicated an area of 115 m^2 or 118 m^2, depending on measuring standard. The buyers sued the broker for damages for not verifying the information on apartment area. The Supreme Court held that the broker must not uncritically convey information from the seller; rather, where there is reason to believe

[334] Naturally, if the broker does not have the correct information but still knows that the information given to her is incorrect, she must inform the buyer of what she knows. In some instances, the correct thing to do may even be not to convey the information at all. After all, what could possibly be gained by spreading information that the broker knows to be false? In fact, if, for instance, the seller wants to include a certain statement in the marketing, and the broker knows the statement to be false, the broker is barred under Section 16 from complying with the seller's wish. She must instead counsel the seller, explaining the risks of spreading false information, e.g. that the seller will become liable for misrepresentation.

[335] SOU 1981:102, p.202, prop. 1983/84:16, p.

that the information is incorrect, the broker must verify it. This obligation increases where it is relatively easy to gather correct information. In the case at hand, however, the court observed that the building where the apartment in question was situated was old and that in such cases information concerning area will normally be less reliable. Under those circumstances, it was deemed acceptable for the broker to give an approximate area measure. The court also observed that the broker had not merely relied on information from the seller, but also on an existing valuation report, issued by a professional inspector. The failure to verify the veracity of the given information was therefore not deemed negligent.

In **FMN 2005-03-16:1**, which concerned the sale of a row house built on land leased from the municipality, an inspection was conducted in connection with the sale. The inspection revealed that the roof needed extensive reparations, which would be quite costly. The buyers, however, did not act upon this information since it was stated in the property description that the home owner association was responsible for the physical condition of the roof. After the purchase, the buyers learned that this was incorrect and that each home owner was responsible for their own part of the roof. The FMN pointed out that it is quite unusual for home owner associations to assume responsibility for the condition of the roof, and that the statement from the seller was therefore such as to give the broker reason to question its veracity. The matter was of great importance to the parties, given the high costs involved. It would also have been quite easy for the broker to ascertain whether the information was correct; a simple telephone call would most likely have sufficed. The broker was given a warning.

It would seem that case law has developed a three-step model. The broker is obliged to verify the veracity of information given to her, where

1. the information is uncertain, unlikely, unusual, or in any other way remarkable,
2. the issue at hand is of importance to the buyer and/or the seller, e.g. given the economic risk at stake or the complexity of the issue, and
3. verifying the information does not place undue burden on the broker.

Of these three criteria, the first could be labeled the *uncertainty criterion*. It is absolute in the sense that there has to be something in the situation at hand that should make the diligent broker uncertain as to the veracity of the information. It could be the information itself, was the case in the aforementioned **FMN 2005-03-16:1**. Anybody who is least bit acquainted with home owner associations will know that they typically do not assume responsibility for the physical condition of the roof. A professional in the field, such as a broker, is expected to possess this knowledge. The uncertainty could also be the result of a combination of the information itself and other circumstances in the situation at hand. For instance, if the broker receives information that the area of a three-room apartment is 90 m^2, that number is perhaps not unusual in itself. However, if it is evident to the broker just by visiting the apartment and taking a look that the number is exaggerated, the veracity of the information must be considered uncertain.

It should be noted, here, that the uncertainty criterion is governed by the due care obligation. It can, and does, occur that brokers (on the advice of their attorney) defend their failure to verify information by simply stating that the information had been given to them by the seller and that there was no reason to question it. This is often worded in a single sentence and without further explanation, implying that as long as the information is given by the seller, it is by definition to be trusted. That is a false assumption. The mere fact that a piece of information emanates from the seller, or from the tenant-ownership association, does not in itself mean that it is reliable, and does not expunge the broker's due care obligation. In fact, it bears noting that the seller is by no means impartial but rather the opposite. The seller has incentive to either conceal information altogether, or at least make it appear less problematic than it is. Furthermore, the seller is usually not an expert and may not possess the necessary knowledge to give a correct account. Therefore, a statement from the seller could be sincere but nonetheless incorrect. It is incumbent on the broker to stay alert and detect any uncertainties. In sum, it may well be the case that brokers most of the time do not have reason to question the information given to them.[336] If so, however, it is not because the information is given by the seller, but because of the absence of circumstances in the individual cases that objectively should make the diligent broker question its veracity.

The second criterion can be labeled the *importance criterion*. It is intuitive that the more important the issue, the more important it is that all information is correct. What issues, then, are more important than others? To some extent, the buyer and the seller determine what issues they find important and let the broker know. However, the mere fact that a party brings up an issue does not in itself give the issue such importance that the broker is required by law to verify information given to her. The importance of an issue must be measured against criteria that the broker can observe. Intuitively, four factors spring to mind: 1) the amount of money at stake, and 2) the level of complexity of the issue at hand, 3) the extent to which the issue may affect the validity of the sale, and 4) the extent to which the issue may affect the buyer's ownership, right of disposal or the intended use of the property.

The first factor is fairly straightforward: like it or not, money bestows significance. For instance, if the property needs extensive reparations, as in the aforementioned **FMN 2005-03-16:1**, the allocation of responsibility is of great significance. The same is often said to be the case concerning living area. In some markets, it has become customary to discuss prices in terms of price per area unit, in the marketing as well as in the bargaining. In fact, when suing for damages on the grounds that the actual area is subsequently found to be smaller than had been advertised prior to the sale, plaintiffs often simply demand the sale price divided by m^2, multiplied by the number of "missing" square meters. To accept such reasoning is to accept that area is the single most important attribute in a unit, and the one that single-handedly determines the unit's value. This is patently at odds with most value concepts and valuation methods. Nevertheless, if the players on a local market behave, and can be expected to behave, as though area alone is enough to determine value, then area is to be reckoned with. Therefore, area becomes a more important attribute than it deserves to be.

As to the second factor, in highly complex issues, people cannot generally be expected to understand the implications of the information given to them. For instance, as will be seen further on in this

[336] It should be observed that the seller is by no means impartial, but rather the opposite. This fact alone should give the diligent broker reason to stay alert.

section, converting tenant-ownership homes to separate properties has several important legal and financial aspects and consequences of which most people are not very well informed.

The validity of the sale is of prime importance to all parties involved (including the broker). Therefore, any signal that the validity is at risk increases the broker's obligation to act upon uncertain information. For instance, if the seller claims to be living alone in the house or apartment, but the broker happens to discover signals of a co-resident - such as mail addressed to another name, clothes appearing to belong to somebody else, etc. - there is a certain probability that there is in fact a co-resident. As previously stated, if that co-resident is a cohabitee under the Cohabitee Act he or she must give their consent to the sale. If the property is sold without their consent, the cohabitee can sue within three months to have the sale declared invalid. Needless to say, that must count as an important issue.

The fourth factor addresses the question of what the buyer actually purchases, and thus becomes owner to, as well as their possibilities to use it. An important example is where the physical boundaries of the property are uncertain. In the case of tenant-ownership homes, the owner does not own the apartment or house, but rather a share of the tenant-ownership association. To that share is attached the right to use and reside in a certain unit on the property owned by the association, a right that is similar to but not the same as ownership. Regarding units with access to garden, a terrace, or a roof, it is often interesting to know whether the tenant-owner is entitled to use the space in question. For instance, it may be interesting to furnish a terrace and use it as an outdoor room or a sundeck. Perhaps the space is even included in the unit, in which case the tenant-owner has exclusive right to the space in question? Further, waterfront properties in rural areas sometimes have small wooden jetties for swimming and/or for docking boats. Not all such jetties are actually owned by the property owner, however. It is often the case that a neighbor of the waterfront property has been granted an easement with a right to construct and use a wooden pier, as well as moving to and from the pier in order to use it. If said easement is not registered (a fact that should be known to the broker after performing her duty to check the Land Register), it will not be valid after the sale of the dominant property unless a transfer of the easement is agreed upon with the owner of the servient property. It could be, therefore, that the buyer of the dominant property becomes the owner of a jetty on the neighbor's property that he has no right to use. Even where it is clear that the buyer becomes full owner of a property without encumbrances, there could be limitations in the right to use the property as intended. For instance, the buyer could wish to make additions that require a building permit. In some cases, the purchase is worthless to the buyer without the possibility to make additions. Obtaining a building permit may require the consent of a neighbor or home owner association. Issues such as these are clearly of great significance to the parties.

The third, and last, criterion can be named the *information availability* criterion. It is self-evident that where it is impossible for the broker to obtain correct information, she cannot be expected to do so. It is also intuitive that where obtaining said information is so burdensome that it clearly exceeds what could reasonably be expected from the broker, requiring her to do so nonetheless would be to take the due care obligation too far. By contrast, where the correct information is readily available, and obtaining it is consequently straightforward, it seems reasonable to demand that the broker obtain the correct information in order to fulfill her due care obligation. The question is, how easily

accessible must the information be for the broker to be required to obtain it? It must be stressed, here, that the mere fact that the correct information is readily available does not in itself mean that the broker is obliged to obtain it. The first two criteria must also be met. The information availability criterion is a gatekeeper of sorts: it may serve to exonerate a broker who has failed to verify information in a situation where the two first criteria are met but where obtaining correct information, all things considered, would place undue burden on the broker.

At what point, then, does the burden become undue? The boundary is bound to be a bit fuzzy, but the following should be factored into the equation. On the one hand, where the buyer and/or seller is a private person, i.e. a consumer, that person will typically be less informed and more likely to experience difficulties in obtaining the correct information on their own. The broker, being a professional in the field, should be better informed. Consequently, it will typically be substantially less onerous for the broker to obtain the information. Therefore, laying the burden of obtaining the correct information on the broker, rather than the buyer or seller, would seem the most efficient solution for the transaction as a whole since it makes available the most information at the lowest cost. Further, where the buyer and/or seller is a consumer, it is consistent with the spirit of consumer protection inherent in the EAA for the broker to obtain the information rather than leaving it up to the parties. Finally, it could be argued that possessing relevant knowledge of the goods or property for sale is inherent in the business of brokerage. After all, how good an intermediary is a broker who does not know the product? On the other hand, it is undeniable that making a task mandatory—even where, as in the present case, it would only be mandatory under specific circumstances—could be construed as an additional cost for the broker and hence something for which she will ultimately compensate herself in one way or another.

What cannot, however, be factored into the equation is the commission fee the individual broker has agreed upon with her client. Presumably, a broker who charges a lower fee will be less inclined to perform another task without being compensated. However, one cannot take such issues into consideration when determining the scope of legal obligations; rather, it is the broker who must adapt and charge a commission fee that reflects the level of diligence and prudence involved.[337]

In sum, it is impossible to specify a universally applicable line where collecting correct information becomes unduly burdensome for the broker. Obviously, since the criterion is one of equity, the circumstances in the individual case must be considered. Intuitively, the importance of the issue at hand is a key determinant. After all, the more important the issue, the more reasonable it is for the broker to "go the extra mile".

8.1.2.2 Observations Made by the Broker

The previous section concerned situations where the broker had received information from the client or a third party, and the extent to which the broker is required in such situations to verify its veracity

[337] This illustrates a general problem with consumer protection: when the state imposes mandatory tasks on producers or service providers, it may serve to make the product or service more costly. In that sense, determining the adequate scope of consumer protection could in the long term be construed as a trade-off between protection/information and price.

or to obtain extra information to clarify the matter at hand. However, any uncertainty surrounding the transaction need not emanate from information given to the broker. As previously stated, the prudent and diligent broker must always remain alert to any potential problems, and must take appropriate measures to detect them. For instance, as likewise stated, the broker must visit the property or hire an agent to do so. This will inevitably (unless the job is performed with remarkable incompetence) lead to an assessment of the risks involved. Some properties involve few problems: there are few observable defects, the construction standard is satisfactory, and the legal issues are straightforward. However, some properties are more troublesome than that. For instance, it often happens that the broker observes symptoms indicating physical defects such as moisture damage or rot. In other cases the client's right of disposal is uncertain, or there are uncertainties as to legal encumbrances. If the facts are clear, e.g. that there is in fact moisture damage, then the case is likewise clear: the broker is obliged under 16 § to inform both parties of her observations, and to advise them as to the prudent course of action. However, it is not clear how the broker is required to act in cases of uncertainty. If, for instance, the broker has reason to suspect that a particular problem is at hand, is she then required to investigate the matter? If so, what is the required level of diligence and prudence?

As to physical defects, the case is clear: as previously stated, the broker is under no obligation to inspect the property beyond the superficial inspection inherent in visiting the premises. The law is less clear on the issue of legal or financial problems that are not explicitly covered by 17 §.

A particularly delicate matter of a legal and financial nature that brokers may come across is the process of converting tenant-ownership associations to separate properties. One of the main ideas behind conversions is that it is financially advantageous to the homeowners: the mortgage interest costs are tax-deductible for them as private persons, giving rise to a 30 % relief, whereas the association may not deduct interest costs since it is exempt from income tax under Chapter 39 of the Income Tax Act (1999:1229); 42:1 and 39:15 ITA respectively. The process is conducted in several steps (oftentimes chronologically interlaced). First, the board or assembly of the association takes a preliminary decision to proceed with conversion, and an expert - who is often a broker – is hired to assess the value of the members' shares in the association. Suppose, for instance, that the members' shares are deemed of equal value and set at SEK 1,000,000. The next step is to obtain the consent of the members, and a formal decision to liquidate the association, which requires either a unanimous vote or a decision by two separate member’s meetings. At the second meeting, the decision to liquidate must be supported by a qualified majority; 9:29-30 TOA and Chapter 11 of the Economic Associations Act (1987:667).

Next, the association files for parceling/partitioning at the Survey Agency, whereby the association's property/properties is/are divided into several new properties corresponding to the homes where the members are still residing. Next, the members sell their shares in the association back to the association. Pending the decision of the Survey Agency, the members continue for some period of time – which could be one day or several weeks - residing in their homes as tenants in a traditional tenant-landlord relation. The conversion is then completed by the members purchasing the newly created properties at a previously set price, which is of course higher than the price at which they sold back their respective shares in the association, since the property includes land. A conceivable price for the home in our example might be, say, SEK 2,400,000. When the newly created properties have been sold, the association is no longer needed, and is therefore liquidated.

From the member/homeowner perspective, conversion entails selling the share in the association and then purchasing back a newly created property. The process has two major financial consequences for the homeowner. Firstly, the process is *fiscally significant* since the sale gives rise to capital gains taxation. In our example, if the homeowner has paid less than SEK 1,000,000 for their share in the association, they will make a profit. If the apartment has been used as a private residence, fulfilling the requirement in 2:8 ITA, that profit is taxable at a rate of 22 %; 42:1, Chapter 46 and 65:7 ITA in conjunction. Conversely, if the member has purchased the unit at a higher price, or made improvements so that the aggregated purchase and improvement cost exceeds SEK 1,000,000, they will incur a loss. That loss is deductible at 50 %, giving rise to a tax reduction worth 15 % of the total lost; 42:1, Chapter 46 and 65:7 ITA in conjunction. If the share is sold at a profit, the member may be eligible for a tax credit under Chapter 47 of the ITA.[338] Secondly, since most homeowners must borrow to complete the purchase, the process will result in a higher level of debt. Since total costs usually end up lower, which is a key driving factor behind the conversion in the first place, that may not be considered an insurmountable problem. It should not, however, be ignored. A more acute problem for some homeowners is that they may not be granted the necessary credit. Suppose, for instance, that a particular member purchased their unit/share some years ago at SEK 600,000. The remaining mortgage is SEK 400,000. Selling the share at SEK 1,000,000 will therefore yield a surplus of SEK 600,000. If the price to buy "back" the new property is set at SEK 2,400,000, the homeowner will need to borrow SEK 1,800,000 — a substantially larger sum than the previous mortgage. But will the loan be granted? That is by no means certain.

> In **FMN 4-2192-08**[339], the seller of a tenant-ownership home, who was also on the board of the tenant-ownership association, informed the broker that the association had discussed the matter of conversion, but that no decision had been made. The seller promised to let the broker know if such a decision was made, but the broker did not receive any message to that effect. At a showing, the broker passed on the seller's claim that the matter of conversion had been discussed but not decided. The home was purchased at a price of SEK 775,000. After the purchase, it turned out that the seller's information had been incorrect and that the association had indeed decided to go through with the conversion. The price at which the shares were to be sold to the association had been set at SEK 475,000, and the price to buy "back" the newly created properties at SEK 1,350,000. With minimal majority (four votes against three), the FMN held that the broker had not had reason to question the information received from the seller, on the grounds that the seller was on the association board and hence, from the perspective of the broker, a reliable source of information. In its dissent, the minority held that the issue of conversion of tenant-ownership homes to separate properties is one of utmost significance and that such issues demand of the broker a higher standard of diligence and prudence. The broker, held the minority, should therefore at least have attempted to ascertain whether a conversion was

[338] Eligibility for credit under Chapter 47 presupposes, apart from a profit, that the unit has been the private residence of the seller for no less than 12 months and that the credit sum – i.e. the profit combined with any previous capital gains tax credits – does not fall short of SEK 50,000.

[339] Decision of 22 April, 2009. For reasons unknown, the decision was not included in the FMN:s yearbook for 2009.

imminent, by asking a member of the association board who was not a party to the transaction at hand.

It could be argued that the legal problem in the case just mentioned is the broker's obligation to verify information given by the seller, as discussed in the previous section. However, that issue addresses more specifically the situation where the broker receives information from the seller with the intent of passing it on to prospective buyers, oftentimes in the property description. The question of conversion is, however, typically not something the broker discusses with prospective buyers unless a conversion is imminent. Suppose, for instance, that the broker had made inquiries and found out that the association had voted *against* conversion, and that a conversion would therefore not take place in a foreseeable future. Under such circumstances, what reason would there be for the broker to discuss the matter with prospective buyers? Yet, it is undeniable that conversion is a matter of utmost significance due to its economic consequences for the homeowners. It is hardly reconcilable with the due care obligation for the broker to remain completely passive in a situation where such values are at stake; where the broker receives information that the issue of conversion has been discussed, it is reasonable to demand that the broker investigate the matter. Applying the three-step model to the aforementioned case, it can be concluded 1) that the state of affairs regarding the possible conversion was uncertain, 2) that the matter was of great significance due to the substantial legal and financial consequences in the event of a conversion, and 3) that it the broker could easily have obtained correct information to clarify the situation.

It follows from the foregoing that there are indeed situations where the broker has a duty to investigate that is based on her own observations. The observation may consist in a statement from the seller or a third party, but it could just as well be an observation made whilst visiting the property. This is not a question of extending the broker's duty to verify; it is not a question of an *a priori* obligation. It is merely a question of diligence and prudence: the broker cannot remain passive where the interests of the parties are at risk.

8.2 The French Notary

As stated in the previous section, ensuring the validity and efficacy of the transaction is the overriding principle governing the duty to counsel. As likewise stated, *ensuring* that something is naturally presupposes *ascertaining* that it is so, giving rise to an obligation on the part of the notary to take measures to ascertain certain essential facts. Having established the existence of the obligation, the next step is to define its scope and nature.

First of all, it should be fairly straightforward to conclude that not all information is necessary to ensure validity and efficacy. In theory, it is possible to require the notary to obtain all kinds of information, but not all information is necessary to achieve the overriding goal of the duty to counsel. Moreover, for every piece of information the law requires the notary to obtain, the more cumbersome the transaction becomes. Whether one chooses to express it in terms of transaction costs or equity, it seems reasonable to assume that there is a limit beyond which further requirements would not be defensible. It seems that two factors help determine the scope of the

obligation to obtain information: firstly, the requirement applies only to information that serves to ensure validity and efficacy. Secondly, the effort required to obtain the necessary information must not place undue burden on the notary. This would seem to amount to a proportionality test: the efforts required must be both necessary and adequate.

Without succumbing to a philosophical discussion about facts and the extent to which the human mind is capable of knowing with certainty what is and what is not, it is fairly straightforward to conclude that ascertaining the facts will entail a combination of practical efforts such as research, investigations, and inquiry. Since the duty to counsel is a general rule of due care, the efforts must be conducted in a diligent manner, obliging the notary to take all measures necessary to obtain the information necessary to ascertain the facts. However, even the most diligent efforts could possibly yield either nothing at all or incorrect information. This is of course intuitive: for instance, if the notary asks questions to the parties, there are no guarantees that the answers given are correct. There are a number of possible reasons why the parties could give incorrect answers—incentives to lie or withhold information and simply being misinformed ranking among them—but it is sufficient for now to conclude that the notary *might* receive incorrect information. The same applies to information obtained from government authorities, e.g. from public registers. While such information is no doubt correct in most cases—it is even possible that the expression "virtually all cases" is merited – there is always some margin of error, however small.

Thus, no matter how the notary goes about obtaining the necessary information, there is always a certain probability that even the most diligent search results in failure. The question is: who should bear the risk for said failure? Should the duty to ascertain facts be understood as *absolute*, meaning that the notary is always obliged to possess (and act upon) correct information—in which case failing to obtain it would constitute a breach of the duty to counsel—or *relative*, meaning that there are or could be instances where it is acceptable for the notary not to possess said information?

In view of the foregoing, the following subsections will focus on the following questions. Firstly, what information does the obligation to ascertain facts encompass? Secondly, is the duty to ascertain facts absolute or relative? Lastly, in recognition of the fact that abstract principles are and must be connected to a practical reality: how and from where is the necessary information obtained?

8.2.1 The Required Information

It follows from the foregoing that the notary's obligation to ascertain facts entails obtaining such information as 1) is necessary to ensure the validity and efficacy of the transaction, and 2) can reasonably be required of the notary to obtain.

As to the *validity* of the transactions, there are numerous factors that could possibly make a deed invalid. In real estate conveyances, the sales contract is the instrumental deed. As a result, validity firstly requires that the basic requirements for a binding contract under contract law be met. As previously stated, the requirements laid down in C.C. Art. 1108 are: 1) the consent of all parties who undertake an obligation, 2) the legal capacity of said parties to undertake obligations, 3) a specified subject matter, and 4) a licit cause.

The consent of the parties involved is normally a question of inquiring of the parties whether they consent to the deed. Informed consent, as opposed to uninformed consent, presupposes adequate information and advice. With that in place, however, the ascertaining itself of whether the buyer and seller in a real estate conveyance really consent to the deed is straightforward, since the parties generally are present at the *rendez-vous de signature* at the notary's office. Still, there are instances when not all parties are present.

> **Cass. 1re Civ., Bull. I 1994 No 6 p. 5**[340] concerned a possible falsification of a power of attorney. Mr. and Mme. Z had obtained a loan for their business, as security for which the creditor received a personal guarantee from Mr. and Mme. Y. The latter two were represented by V by a power of attorney that had been issued *sous seing privé*, i.e. without notarial intervention. The loan agreement was notarized by notary X. Subsequently, upon the failure of Mr. and Mme. Z to pay, the creditor turned to Mme Y by virtue of the personal guarantee. Mme Y contested liability, alleging that her signature had been falsified and that the power of attorney and, consequently, the personal guarantee, were null and void. The creditor sued Mme Y but the court ruled in favor of the defendant, holding that there was no resemblance whatsoever between Mme Y's signature and that on the power of attorney. The creditor then proceeded to sue notary X for failing to verify the authenticity of the signature on the power of attorney.
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> The Cour d'Appel held that the notary is under no obligation to authenticate acts, which have been issued or drawn up *sous seing privé*, that are submitted to him as accessory documents. Imposing on the notary an obligation to verify signatures would, held the court, render useless the utilization of powers of attorney issued *sous seing privé*, which would be tantamount to making notarial intervention mandatory for such acts. The court therefore ruled in favor of the notary. The ruling was appealed to the Cour de Cassation, who held that the notary is required to verify the necessary facts and conditions to ensure the validity and efficacy of the intended deed. Consequently, held the court, where a contracting party is represented by an agent by virtue of a power of attorney, it is incumbent on the notary to at least verify the "apparent sincerity" of the signatures. The court ruled against the notary and remitted the case to the Cour d'Appel.

The Cour de Cassation did not specify in its ruling how the verification is to be conducted in practice, though it seems logic to suggest comparing the signature on the power of attorney with an identity card or some other identification document. That suggestion well founded, as is confirmed in **Cass Civ. 1re, Bull 1998 I no 21, p. 14**.[341]

Reflecting on these rulings, it would seem a matter of pure logic that the notary must not place blind faith in people's sincerity. Again, the duty to counsel is one of due care, obliging the notary to remain alert to any and all potential problems. In the case of documents, there is always a possibility that they are forged. A person claiming to represent another may have every incentive in the world to deceive the notary and their counterpart. Therefore, the notary must perform such verifications as

[340] Ruling of January 6th, 1994.
[341] Ruling of January 20th, 1998.

are possible. One possible measure is to compare the signature of the principal on the power of attorney and the one on their identification documents.[342]

Spousal consent is a crucial factor where the seller is married. C.C. Art. 1424 stipulates that neither spouse may dispose of or encumber, *inter alia*, real estate without the consent of the other spouse. Art. 1427 further provides that if a spouse disposes of or encumbers property without proper consent, the other spouse is entitled to obtain the annulment of the transaction. Therefore, ascertaining that spousal consent is at hand is a core task for a notary. Given the natural ability for humankind to invent creative solutions to achieve their goals, it is advisable for notaries to remain vigilant on this point.

> The latter point is underscored in **Cass 1re civ., Bull. 1979 1 no 45 p. 39**[343], where a married man wished to sell a property that constituted marital property. Failing to obtain the prerequisite consent from his wife, he brought his mistress (!) to the notary's office and had her masquerade as his wife. The only identification presented to the notary consisted in a *livret de famille* and a marriage contract – neither of which contained any photograph. Nonetheless, the notary was satisfied and effectuated the sale. Subsequently, upon discovering the subterfuge, the seller's wife successfully sued for annulment of the sale pursuant to C.C. Art 1424 and 1427. The buyer, evicted from the property, sued both the notary and the fraudulent seller: both were sentenced to pay, *in solidum*, damages equivalent to the paid sale price.

The power of attorney case and the spousal consent case both highlight, albeit indirectly, the necessity to check the identity of the contracting parties. This must be regarded as a matter of course given, *inter alia*, the far-reaching consequences of authentication. Indeed, checking the parties' identity is a statutory obligation, provided for in **D. 26 nov 1971**.[344] Art. 5 in that statute provides that the identity, the marital status, and the domicile of the parties must, unless already known to the notary, be established by verifying all necessary documents. In exceptional cases, the identity can be testified to by two witnesses. As of the third Money Laundering Directive[345], effectuated in France by Décret n° 2009-1087 du 2 septembre 2009, this obligation is not only confirmed but rather accentuated. Under the current régime, it is not enough to simply ascertain the parties' identity. The notary (like the other designated professionals) must also assess the risk of money laundering or terrorist financing in each individual case.

Where the parties are present at the notary's office, checking their identities should normally pose no practical problems. The same applies where a party is represented by an agent, if the notary is a present or previous client, in which case the notary already possesses a copy of some identification document.[346] It can and does occur, however, that the principal is somebody whose identity the

[342] The requirement pursuant to the Money Laundering Directive to verify the identity of the parties applies not only to those present but also, whenever one party acts on behalf of another, that of the principal.
[343] Ruling of February 6th, 1979.
[344] Décret no 71-941 du 26 novembre 1971.
[345] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
[346] Of course, this presupposes that the notary properly verified the concerned party's identity in that previous instance.

notary has not already verified in the past. In such cases, the notary must demand to see a certified copy of the principal's identity card, or the actual identity card itself.[347]

Thus far, this section has treated the parties' consent and the intrinsic need to verify the identity of the contracting parties. However, the spousal consent case touches upon another, equally crucial, matter—namely the right of the seller to dispose of the property. Unless the seller is entitled to dispose of the property, there can be no valid conveyance. The first and foremost requirement is of course that the seller is the rightful owner, i.e. that the seller has title. The second requirement is that the owner's right of disposal is not restricted; or, if it is restricted, that the consent of all whose consent is needed is at hand.

As to the necessity of title, this intuitive and arguably self-evident principle is expressly stipulated in C.C. Art. 1599, which provides that the sale of that which belongs to others is null and void. The most basic requirement in this regard would seem to be to ascertain that the seller is indeed the rightful owner of the property. To that end, the notary is obliged to conduct a systematic verification of previous titles tracing the chain of title 30 years back in time. This is commonly referred to as the *origine de proprieté trentenaire*. The choice of 30 years is no mere happenstance: it coincides with the prerequisite period of time, laid down in C.C. Art. 2262, for acquisition of ownership through prescription.[348]

The need for spousal consent is by definition a restriction on the owner's disposition right. The existence of a spouse is ascertained whilst carrying out the obligation laid down in D. 26 Nov 1971 Art. 5 to verify the identity and marital status of the seller. The existence of the consent of that spouse is ascertained by inquiry and the spouse's signature.

Pre-emption rights, or rights of first refusal, are another example of restrictions on the owner's right of disposal. Whether statutory or emanating from a contract, a gift deeds, or a will, a pre-emption right renders any conveyance invalid without the consent of the beneficiaries.[349] Needless to say, it is of crucial importance to ascertain that any existing pre-emption rights are identified prior to the sale.

> **Cass Civ. 1re, Appeal no 10-26219**[350] concerned the sale of an empty lot. The seller, a real estate firm, sold the lot through a contract *sous seing privé* at the office of notary M.X. on April 8th, 1994[351] to M.Y. and Mme Z. The contract (which technically was a *compromis de vente*) included a contingency clause whereby the sale was made conditional on a subsequent notarization no later than June 15th, 1994. By September 15th, 1999, no such notarization had taken place. On that day, instead, notary M.X. effectuated the sale of the lot to a real estate firm owned by Mme Z. Upon hearing of the sale, M.Y. sued the notary for negligence, arguing that the notary should not have effectuated the sale since the original sale from 1994 was still valid.

[347] de Poulpiquet, p. 76.
[348] de Poulpiquet, pp. 77-78.
[349] There could also be formalities that must be observed, such as offering to sell the property at a certain price.
[350] Ruling of December 15th, 2011.
[351] While the arrangement may seem irregular, it is quite possible to enter a contract *sous seing privé* with the assistance of a notary. The only difference is that no authentication is involved.

The court of first instance ruled in favor of the notary. In his appeal to the Cour d'Appel, M.Y. argued that the seller had waived the right to cite the contingency clause, given that it was evident from the seller's own statements that they believed, in 1999, they were contracting with the buyers in the original *compromis de vente*. The Cour d'Appel did not heed those arguments, concluding instead that the *compromis de vente* had become obsolete as of June 15th, 1994 due to the non-realization of the contingency clause. Therefore, the notary had committed no fault in effectuating the sale to another buyer in 1999.

M.Y. appealed to the Cour de Cassation, who observed that the Cour d'Appel had failed to properly address questions raised by M.Y. with respect to the alleged waiver of the contingency clause. In doing so, the ruling of the Cour d'Appel was in breach of Art. 455 of the Code of Civil Procedure, pursuant to which the court must state its reasons with due reference to the claims of the parties. The case was remitted to the Cour d'Appel.

Encumbrances such as mortgages, easements, and other rights with respect to the property are, needless to say, of great importance to the transaction. Besides being important to the buyer, they also have considerable implications as to the validity and efficacy of the conveyance: validity, because the seller may not be entitled to sell, and because non-disclosure of encumbrances could render the conveyance null and void; efficacy, because if the property is more heavily encumbered than the buyer expects, the buyer's intentions with the property may not be realized. In other words, the buyer's utility will fall short of the expectations. It is a matter of logic, therefore, that the notary be obliged to obtain information concerning mortgages and other encumbrances. This is done by obtaining an *état hypothécaire* from the *bureau des hypothèques* (Land Registry).[352]

It is clear from **Cass 1re civ., JCP N 1966, II, 14590**[353] that the notary is required in all conveyances to verify, prior to the sale, the property's status with respect to mortgages and other encumbrances. In the case at hand, the notary had effectuated the sale without first obtaining a mortgage status certificate.[354] Had he done so, he would have discovered a notification, recorded by the *bureau des hypothèques*, that a third party had sued for the annulment of the seller's title. Thus, the notary would have been able to counsel the buyer and seller accordingly.[355]

In **Cass. 1re civ., Bull. I 1985 no 268 p. 238**[356], the notary limited his research to obtaining a *certificat d'urbanisme*.[357] After the sale, it turned out that the property had been the subject of a partition. The Cour de Cassation held that a notary is not required to investigate the veracity of the information contained in the obtained *certificat d'urbanisme*, unless in the particular case he has reason to suspect that the information is either erroneous or incomplete. In the case at hand, the court found that the notary had been entitled to trust the veracity of the *certificat d'urbanisme* and that he had therefore not committed any professional error on that count. However, the notary would have been

[352] Dyson, p. 66.
[353] Ruling of January 4th, 1966.
[354] *État hors formalité*.
[355] For earlier cases, see Dyson, p. 66.
[356] Ruling of October 22nd, 1985.
[357] See 8.2.3 below.

made aware of the partition prior to the sale if he had carried out his duty to obtain an *état hypothécaire*. Since the notary did not do so until after the sale, the court found not only that he had committed a professional error, but also that he had been negligent in not obtaining the correct information concerning the partition.

Cass. Civ. 1r^e^, Appeal n^o^ 94-14436[358] concerned a contract whereby M.Z. lent 300,000 francs to Mr. and Mme A, in return of which the spouses promised to take out a mortgage on their property. The loan agreement was entered privately between the parties on May 11th, 1989. On the same day, the parties approached the notary, M.Y., asking him to authenticate the deed. The parties – particularly, it would seem, the spouses A – expressed a strong wish to finalize the deal with haste. Ostensibly to save time, the spouses provided the notary with an *état hypothécaire* that showed no encumbrances. The authentication was finalized on the next day, May 12th. It was subsequently revealed that the mortgage inscription, which was made as promised, was outranked by a previously taken mortgage and thus did not provide the intended security. The creditor sued the notary for the failure to verify existing inscriptions. The Cour d'Appel held that the parties' express wish to finalize the deal with haste did not exonerate the notary from the obligation to carry out all necessary verifications to ensure the efficacy of the transaction. By accepting the *état hypothécaire* provided by one of the parties [notably the borrower!] and not obtaining a fresh one, the notary had acted negligently and in breach of his obligations. The notary appealed the ruling to the Cour de Cassation, arguing that the parties' haste rendered the normal execution of the notarial duties impossible. The court rejected the notary's arguments and upheld the ruling of the Cour d'Appel.

As to *easements*, it is of course neither possible nor desirable to give anything resembling a full account of that particular subfield of French real estate law here. However, the following rudiments should be noted. Easements are regulated in C.C. Art. 637-710, the Code de l'Urbanisme, the Code Forestier, and the Code Rural. French law distinguishes between several different kinds of easements, the three main categories being 1) easements resulting from the natural location of the premises – *servitudes qui dérivent de la situation des lieux*, 2) statutory easements - *servitudes légales,* and 3) easements created by agreements between owners - *servitudes établies "par le fait de l'homme"*.[359] Voluntary easements – i.e. those belonging to the third category – are created through contract and must be in in *authentique* form to be binding towards third parties, C.C. Art 710-1. They are recorded at the *bureau des hypothèques.* Easements of the other two categories are found in the cadaster and/or apparent from the *certificat d'urbanisme* that can be obtained from the municipal authorities.

In **Cass 1re civ., Appeal no 88-10448**[360], the seller declared prior to the sale that the property was not encumbered by any easements. Since the *certificat d'urbanisme* also did not mention the existence of any easements, the notary assumed that there were none. However, it turned out after the sale that the seller's declaration had been fraudulent and that the property was in fact encumbered by a *non aedificandi* easement. Said easement was in fact specified in the notarial deeds from previous ownership transfers—to which the

[358] Ruling of March 7th, 1995.
[359] The three categories are regulated in C.C. Art, 640-648, Art. 649-685, and Art. 686-710 respectively.
[360] Ruling of November 15th, 1989.

notary had access. This, held the Cour de Cassation, should have alerted the notary of the risk that the seller's statement might be incorrect and the *certificat d'urbanisme* incomplete, and that the notary should have investigated the matter. The notary was found negligent.

In **Cass. 1re civ., Bull. III 1994 no 38 p. 23**[361]**,** it turned out after the sale that the property sold was encumbered by a pipeline easement that had not been disclosed to the buyer. The notary had, prior to the sale, not only obtained an *état hypothécaire* but also verified the deeds from previous ownership transfers. Nowhere was any mention made of a pipeline easement. Notwithstanding, the Cour de Cassation held that since the notary was established in the region, he must be assumed to be informed through his work of the existence of an oil pipeline and its legal implications in the form of easements. The notary was therefore held negligent for not investigating the matter.

In **Cass 3me Civ., Appeal no 10-16954**[362], a construction firm had purchased, through a conveyance effectuated by notary X, a property situated in a housing development area with the aim of constructing an apartment building. To that end, the firm obtained a building permit. The responsible official, who retained the application documents, was architect Y. A fact that was overlooked by both notary X and architect Y was that the property was encumbered by an easement, specified in the *cahier des charges* of the developing area, that rendered impossible the kind of construction intended by the buyer. The buyer sued the notary for failing to conduct the necessary verifications prior to the sale; the notary, in turn, sued the architect, arguing that part of the damages incurred by the buyer were in fact caused by the latter's negligent failure to observe the legal situation before granting the building permit.

The Cour d'Appel observed that the notary's obligations are distinct from those of other officials. The non-adherence of the architect to the proper level of prudence could not, held the court, exonerate the notary from the obligation to take all appropriate measures to ensure the efficacy of the deeds. The notary's failure to conduct the necessary investigations prior to the sale was deemed negligent, and the court awarded full damages to be paid by notary X. The ruling was appealed to the Cour de Cassation. While not disputing his own professional responsibility, the notary argued that the Cour d'Appel had been wrong in not properly addressing, as asked, to what extent the negligence of architect Y had contributed to the damages incurred by the buyer. The Cour de Cassation agreed with that argument and ruled in favor of the notary, remitting the case, as regards the contributory liability of the architect, to the Cour d'Appel.

Cass 1re Civ., Appeal no 90-18775[363] concerned a recognizance of debt drawn up by notary A in 1983, whereby Mr. F extended a loan amounting to 210,000 Francs to Mr. and Mme C. with a mortgage inscription on the couple's property as security. The recognizance indicated that the property was free of any encumbrances, and that Mr. and Mme C were "farming owners". Both statements proved incorrect. As to Mr. C's profession, he owned

[361] Ruling of February 23rd, 1994.
[362] Ruling of June 21st, 2011.
[363] Ruling of January 6th, 1994.

and operated a trade company. Apparently as a result of poor business results, Mr. C had was declared bankrupt in 1986. At that point it became apparent that the couple's property was in fact encumbered by several mortgages. Notary A had failed to verify the mortgage status prior to notarizing the recognizance of debt, relying instead on the (fraudulent) statements of Mr. C. Nor had notary A questioned Mr. C's claim with regard to his profession. As there were several higher-ranking claims in the bankruptcy estate, the debt to Mr. F was not covered. Mr. F proceeded to sue notary A to receive compensation for the loss incurred.

The Tribunal de Grande Instance held that the notary had failed in his duty to counsel but awarded only 25,000 Francs in damages, arguing that since Mr. F had transferred the funds to an agent before the loan agreement was notarized, he could no longer dispose of them at the time of notarization and could therefore not have acted differently had the notary performed his duty correctly. Full damages could therefore not, held the court, be awarded.

The ruling was appealed to the Cour d'appel, who upheld the ruling insofar as they found the notary negligent and in breach of his duty to counsel. However, the court raised the damages to 835,598 Francs. Not surprisingly, the ruling was appealed to the Cour de cassation. The Cour de cassation found the appeal unfounded with respect to the notary's responsibility, pointing out that it is incumbent on notaries to investigate whether the prerequisite conditions for the efficacy of the deeds are met. In the case at hand, notwithstanding the fact that Mr. F was a lawyer—a fact that the court blankly dismissed as having no bearing on the notary's liability—the notary should have verified the mortgage status of the property. The court further held that the notary should have realized that Mr. F, in the presence of a notary, rightfully trusted in the efficacy of the deeds. The notary was therefore also held responsible for the incorrect indication of Mr. C's profession. However, the court did not concur with the Cour d'appel with respect to the awarded damages, and remitted the case in that part.

Zoning and planning is of great significance to, and has direct bearing on, the efficacy of the deed. Since zoning and planning affects the possible and permissible use of the property, it conditions the possibility to realize the buyer's intentions with the purchase. The term zoning and planning, here, refers both to 1) the laws and policies that regulate the use of the property, and 2) the specific public decisions made with respect to the particular property sold, such as public-interest easements. Such information can be obtained from the municipal authorities by means of the *certificat d'urbanisme*. It seems logical that the notary be obliged to obtain a *certificat d'urbanisme*. The obligation has developed through case law, first appearing in a 1942 ruling in the Tribunal Civil de la Seine, evolving into what is today an indispensable routine for notaries.[364]

Cass 1re civ., Bull. 1980 I no 112[365] concerned the sale of a vacant lot. The notary performed the usual duty of requisitioning a *certificat d'urbanisme*, and effectuated the sale. It was revealed after the sale, however, that the property was situated within a ZAD[366], granting

[364] de Poulpiquet, pp. 89-90.
[365] Ruling of April 15th, 1980.
[366] *Zone d'aménagement differé*.

the state a pre-emption right. This information should by rights have been specified in the *certificat d'urbanisme* upon which the notary had acted, but had mistakenly been omitted.

The Cour d'Appel de Rennes held that it was incumbent on the notary responsible for effectuating the sale to make use of all available documents to verify the seller's right of disposal, with the aim of ensuring the legal efficacy of the transaction. By limiting the research to obtaining a *certificat d'urbanisme*, held the court, the notary had acted in breach of his obligations.

The notary appealed the ruling to the Cour de Cassation, who pointed out that the *certificat d'urbanisme* ought to have specified all existing zoning and planning dispositions and administrative limitations applicable to the property. Consequently, held the court, the notary had had no reason to doubt the veracity of the obtained certificate. Therefore, the notary had not acted in breach of his obligations in concluding, without further investigations, that the property was not situated within a ZAD. The ruling of the Cour d' Appel was overturned.

In **Cass. 1re Civ., Bull. I 1990 No 160 p. 114**[367], M.G. sold a vacant lot to Mr. and Mrs. R in February, 1981. The *acte de vente*, drawn up and authenticated by notary M.X., included a statement that the lot was "*constructible mais non aménagé*", meaning that though it was possible to construct a house on the property, the property was not connected to the supply systems for electricity, gas, sewer, etc. The parties declared before the notary that the intention was for the buyer to construct a residential house on the property. In December, 1983, the buyer received a *certificat d'urbanisme* indicating that the intended construction was not permissible. The buyers proceeded to sue notary M.X. for damages, citing negligent counsel. The Cour d'Appel concurred with the plaintiffs regarding the passivity of the notary, holding that by not obtaining a *certificat d'urbanisme* in connection to the transaction, the notary had acted in breach of his obligations. However, held the court, since the buyers had been aware of the nature of the lot, there was no line of causality between the notary's non-performance and their cited damages.

The ruling was appealed to the Cour de Cassation, who held that it is incumbent on a notary who effectuates a real estate conveyance, knowing that the buyer's intention is to build a residential house on the property—said purpose being specified in the *acte de vente*—to alert the buyer of the inefficacy of the deed with regard to the intended use. That obligation is in no way, held the court, mitigated even where it could be argued that, due to their knowledge of the state of the purchased lot, the buyer ought to understand the risks without receiving said advice.

It is straightforward to conclude that *the legal and administrative situation* has great bearing on both the validity and the efficacy of the transaction.

As is natural given that the notary is a trained jurist, it is a professional duty, inherent in the notarial function itself, to possess knowledge of and be perfectly versed in all fields of law and regulations governing, or in any other way having bearing on, the transactions before him. Consequently, a

[367] Ruling of June 12th, 1990.

notary who fails to correctly interpret and apply e.g. a statutory provision or a relevant court case acts in breach of his obligations.[368]

> In **Cass. 1re Civ., Bull. I 1985 no 340 p. 305**[369], the notary had effectuated the sale of a bar/restaurant/cabaret with the name "1900 Little Bunny". The *acte de vente* specified that the sale included "the right to the license of Category 4 granted to the sellers"; that is, a full license under Art. L-3331-1 of the Public Health Code to sell and serve alcoholic beverages.[370] After the sale, as the buyer proceeded to apply for the transfer of the license, it turned out that the establishment had been shut down by order of the Cour d'Appel on the grounds that it had been run illegally by the seller's son (who, incidentally, was the one to sign the sales agreement on behalf of his parents, the sellers), despite the license being granted to his mother only. The court order had been appealed to the Cour de Cassation. Should it be upheld, the shutdown would come into force, causing the permanent revocation of the license.
>
> Allegedly as a result of these problems, the buyer was subsequently declared bankrupt. The bankruptcy trustee sued the notary for damages on the grounds of negligent counsel, arguing that the notary should have verified the existence of any restrictions. As a result of the notary's failure to act, the buyer had mistakenly overpaid for the restaurant. The Cour de Cassation held that, given that establishments such as the present one were subject to legislation entailing, inter alia, the possibility of restrictions and the revocation of the compulsory license, the notary is in such transactions obliged to verify, prior to the sale, the legal and administrative situation of the establishment for sale. Therefore, held the court, the notary should have made inquiries with the public prosecutor as well as the competent fiscal authority to ascertain that the establishment was not burdened by any decisions restricting or barring its normal exploitation.

8.2.2 An Absolute or Relative Obligation?

Here, as in the case of the broker, it is important to distinguish between the end and the means to reach it. The objective is to achieve the highest possible degree of certainty that the authenticated acts really reflect the actual facts, the optimal degree of certainty of course being 100 %. However, in the forever flawed physical world, the possible and the optimal rarely coincide. One can only do what is in one's power to close the gap between the two.

Turning to the notary and the actual process of obtaining the necessary information, there are essentially two categories of information: on the one hand, such information as is readily available to the notary, e.g. from public registers or documents provided by government authorities at different levels, and all other information on the other. Information falling within the first category is straightforward for the notary to collect; as a consequence, it seems reasonable to demand the

[368] de Poulpiquet, p. 71.
[369] Ruling of December 10th, 1985.
[370] *Code de la santé publique*. As to obtaining the license, see http://www.interieur.gouv.fr/sections/a_votre_service/vos_demarches/debits-boissons (2011-12-07).

highest degree of certainty. To be blunt, where a piece of information can be found in e.g. a public register, such as mortgages, there is no excuse not to obtain it. In these instances, the obligation of the notary is truly to *ascertain* the facts. Consequently, in such instances, failing to obtain the correct information (and, where applicable, acting upon it by passing it on to the parties, giving adequate advice and/or adjusting the contract and other documents accordingly) constitutes a breach of the notary's obligations. Thus, within the constraints of what is physically possible, in the first category the duty to ascertain is *absolute*.

"Absolute" is of course a rather far-reaching term and needs to be nuanced. Suppose the notary performs a routine verification and finds nothing out of the ordinary. Suppose, however, that the documents provided to him by the competent authority are incomplete or incorrect. Should the notary's duty be understood as absolute in the sense that he bears the risk of incomplete or incorrect information in official documents? As attested to by **Cass 1re civ., Bull. 1980 I no 112**, reviewed above (8.2.1), the answer is no. The Cour de Cassation made it clear that documents produced and provided by the competent authorities, such as the *certificat d'urbanisme*, must be presumed to be complete and correct, and that the notary is under no obligation to second-guess their veracity.

That principle was again upheld in **Cass. 1re civ., Bull. I 2003 no 62 p. 47**.[371] In that case, the Cour de Cassation held that all administrative acts are presumed to be legal and the information given by the authority presumed to be exact. In the absence of particular circumstances that would give the notary reason to question the veracity of the given information, the notary cannot be faulted for not verifying it.

However, a presumption rule is only just that: a presumption. As such, it can be overturned by contrary information. For instance, while it is perhaps—or perhaps even probably—not exceedingly common, it is conceivable that the notary in a particular case knows or has reason to suspect that the information provided in an official document is incomplete or incorrect. Should the notary *know* that the information is incorrect, that invokes the duty to disclose which will be treated below (chapter 9). The question, however, is how the notary is expected to act where he does not know about the inaccuracy, but *has reason to suspect* it. The following ruling sheds some light on the issue.

In **Cass. 1re civ., Bull. III 1994 no 38 p. 23**, reviewed above (8.2.1), it was indisputable that the notary had conducted the required routine verifications, and that these had not revealed any encumbrances. Nonetheless, the Cour de cassation held that the notary, as a professional and resident in the area, ought to have known about the oil pipeline. Consequently, as a legal professional in the field of real estate the notary should have realized that the existence of a pipeline presupposes easements on properties in the area. Thus, the fact that the notary lived and worked in the area, combined with the notary's professional skills and knowledge, were deemed enough to require the notary to go investigate the matter more closely.

> The house on the property that had been sold in **Cass. 1re civ., Appeal no 99-12216**[372] had been partly constructed on the neighbor's property, a fact that became apparent to the buyer when, after taking possession, they were sued by the neighbor. The court ruled in favor of the neighbor and ordered the buyer to tear down the part of the building that

[371] Ruling of March 4th, 2003.
[372] Ruling of May 7th, 2002.

infringed on the neighbor's property. The buyer proceeded to sue the notary for not disclosing the disturbing information. The Cour d'Appel pointed out that damages resulting from the inefficacy of notarial deeds can only invoke liability on the part of the notary if there has been a breach of the professional obligations. In the case at hand, the notary had verified the seller's title and the administrative regularity of the construction. The notary had had no reason, held the court, to suspect any irregularity. Consequently, there had been no obligation to go beyond the verifications conducted. The Cour de Cassation upheld the ruling.

In **Cass. com. 12 nov 1969 N 328**[373] the seller E had been declared bankrupt, as a result of which the bankruptcy trustee obtained a mortgage inscription on a property owned by E and situated in Antony, Hauts-de-Seine. Sometime after, E proceeded to sell the property—without consulting the bankruptcy trustee—to Mr. and Mme A. The sale was subsequently declared non-binding in relation to E's creditors by the Cour d'Appel on the grounds that as per the declaration of bankruptcy, E was no longer entitled to dispose of the property. The court also found the notary C, who effectuated the contested sale, negligent and in breach of his duty to counsel, for which he was sentenced to pay damages to the Mr. and Mme A, who had been evicted from the property and bereft of their home once the sale was declared non-binding by the court of first instance. The notary, held the Cour d'Appel, should have made inquiries as to the would-be seller's right of disposal.

The ruling was appealed to the Cour de Cassation. As concerns the binding nature of the sale, the court upheld the ruling of the Cour d'Appel, holding that the lower court had been right in its assessment that the sale had been valid per se but non-binding to E's creditors.[374] As to the notary, the Cour de Cassation noted that there had at the time of the sale been several factors that should have aroused suspicion on the part of the notary: 1) that the seller E was a bigamist (!), 2) that the seller professed to be an M.D. while being denoted as "industrialist" in a power of attorney, and 3) that E solicited the services of a notary in Seine-et-Oise to effectuate the sale of a property situated in the *département* of Seine (a different *département*), where E was also domiciled. The notary, held the court, ought to have reacted to these factors and made inquiries with the *Tribunal de Commerce* of the *département* of Seine to ascertain whether the seller retained full legal capacity. For the failure to do so, the court found the notary negligent and upheld the ruling of the Cour d'Appel with respect to the awarded damages.

Cass 1re Civ., Appeal no 10-25583[375] concerned the sale of a property in the municipality of Mirepoix that was revealed after the sale to be encumbered by a voluntary road easement. The easement was created by contract in 1893 and encumbered lots D 168 and 448, to the benefit of lots D 169 and 170. When lot D 168 was sold in 1999, the responsible notary performed the usual verification of encumbrances but found no easement. Soon after the sale, the buyers became aware of the road easement, as a result of which they were forced

[373] Ruling of November 12th, 1969.
[374] It had also been held in the case that the sale was null and void on the grounds that the consent of the heirs of E's spouse, who had deceased shortly after the property had been purchased in the first place, had to be obtained before the sale. That argument, however, was rejected by the courts.
[375] Ruling of November 17th, 2011.

to accept traffic on their property. They sued the notary for not disclosing the existence of the easement to them prior to the sale.

The Cour D'Appel held that the efficacy of a real estate conveyance presupposes the absence of unforeseen easements, mortgages, or other encumbrances. Therefore, held the court, the notary must conduct investigations to ascertain that all encumbrances are known before the deed is signed. In the case at hand, the lots had been part of the same property, and subsequently partitioned. For whatever reason, the easement was not recorded for the property sold. However, it was recorded in the deeds for the neighboring property. Had the notary but verified the deeds for the neighboring property, the easement would have been found and the injury suffered by the buyers avoided. The court found the notary negligent and awarded damages to the buyers.

The notary appealed to the Cour de Cassation arguing, inter alia, that the notary is only required to check for encumbrances concerning the property the sale of which he is called on to effectuate. Thus, verifying the deeds for neighboring properties goes beyond the notary's obligations. The Cour de Cassation held that it is only under exceptional circumstances that the notary is obliged to verify deeds older than thirty years. Since it had not even been claimed that such circumstances were at hand, the notary could not be faulted for not discovering the disputed easement. The court ruled in favor of the notary.

While cases **Cass 1r^{e} civ., Bull. III 1994 n^{o} 38 p. 23**, **Cass. 1re civ., Appeal n^{o} 99-12216**, **Cass. com. 12 nov 1969 N 328**, and **Cass Civ. 1re, Appeal n^{o} 10-25583** had different outcomes, they illustrate the same principle, namely that the notary is not entitled to claim ignorance under any circumstances merely because he has performed the routine verifications. Where he has reason to suspect that the information obtained from those routine verifications is incomplete or incorrect, he must make further investigations.

As to the second—admittedly vast—category, since that information is not as easily accessible to the notary, the level of certainty required by law will have to be somewhat lower. Of course, even in these instances it is conceivable to demand of the notary to obtain the information as long as it not impossible to obtain it. However, the less accessible the information the greater the efforts required to obtain it, and at some point the onus ceases to appear justified. Therefore, it seems reasonable to add another factor into the equation, thus obliging the notary to obtain the correct information to the extent it is possible *and does not place undue burden* on the notary. As stated in the previous paragraph, in the category of easily accessible information the obligation to obtain correct information extends to all instances where it is possible to obtain it. In the category of less accessible information, by contrast, it could well be in a given situation that although it is *possible* to obtain the correct information, doing so would require efforts that go beyond what could reasonably be expected of the notary.

To illustrate the difference between easily accessible and less accessible information, let us return to **Cass 1re civ., Bull. 1979 1 n^{o} 45 p. 39**, where the seller had his mistress masquerade as his wife, and **Cass. Civ. 1re, Bull. I 1994 N^{o} 6 p. 5**, where the signature on the power of attorney had been forged. In the wife-mistress case, it could be argued that the notary should be aware that it is by no means an uncommon phenomenon that a spouse may want to sell off marital property without spousal consent. Therefore, it could be argued that the notary must be particularly alert to such disloyal

behavior. In that case, the notary could easily have achieved certainty regarding the mistress's identity by demanding to see proper identification that contained a photograph. Consequently, the Cour de Cassation held the notary negligent. By contrast, in the forgery case it would not have been nearly as straightforward to discover the forgery, even though it could just as easily be argued in this case that the notary should have been aware that there is a general risk that powers of attorney are forged. Consequently, while the Cour de Cassation found the notary negligent in that case as well, it did so because the notary had not performed even the most basic verification of the signature's authenticity, e.g. by demanding to see identification documents with respect to the alleged principal to compare the signatures. Suppose, however, that the notary had performed such a verification and found the signatures identical or at least similar enough as to raise no suspicions of forgery. Given that the court only demanded that the notary verify the "apparent sincerity" of the signatures, it seems safe to conclude that more extensive investigations, such as hiring an expert, would go beyond what can be expected of the notary.

Thus, where the information is not easily accessible, the duty to ascertain is *relative*.

8.2.3 Obtaining the Relevant Information

As is evident from the previous subsections, the routine verifications to be conducted by the notary boil down to obtaining, first and foremost, two important documents related specifically to the property: the *état hypothécaire* and the *certificat d'urbanisme*.

The *état hypothécaire* is obtained from the Land Registry, i.e. the *bureau des hypothèques.* Despite its name, the *bureau des hypothèques* does not only record information regarding mortgages – though it does of course record mortgages. As mentioned earlier, upon the finalization of the deed, the notary submits all documents to the *bureau des hypothèques*, including the *acte de vente*, its appended documents, and the mortgage agreement, etc. As a result, the *bureau des hypothèques* has information regarding title, easements and other encumbrances, as well as mortgages.

The *certificat d'urbanisme* is obtained from the local government, the *mairie*. It contains information concerning

1) all zoning and planning regulations concerning the property,
2) all administrative restrictions to the ownership rights, such as public utility easements and preemption rights, and
3) all taxes/fees and connections regarding public utilities such as public sewers, roads and their maintenance, and telephone network.[376]

In addition to these documents, the routine verifications include the *origines de propriété*, also referred to as *propriété trentenaire*. These are found in the files from previous conveyances, kept by the *bureau des hypothèques*.

[376] http://vosdroits.service-public.fr/F1633.xhtml# (2012-10-23).

9 Information Disclosure

9.1 The Swedish Broker

The broker's duty to disclose information is laid down in 16 § EAA. Reading the provision in detail, the duty applies:

1. to the extent it is required by "sound estate agency practice",

2. to information the parties "may need",

3. with regard to the property itself and other matters pertaining to the sale.

In this section, the boundaries of the disclosure information will first be examined against the backdrop of these three criteria (9.1.1-9.1.3). Following that I will treat the extent to which disclosure must be done in a certain format (9.1.4), cases of uncertain information (9.1.5), and the damages reduction rule (9.1.6).

9.1.1 "Sound Estate Agency Practice"

The reference to "sound estate agency practice" is more than a little opaque. Since, by definition, any additional criterion will always serve to limit the scope of a rule, it follows that the present reference is—or should in any case, in the absence of evidence to the contrary, be interpreted as being–intended as a limitation of the broker's obligation to disclose information. Admittedly, such a limitation has the potential of being reasonable since an obligation without a "safety valve" could at times prove overly rigid. However, there is plenty of reason to find fault with the chosen wording. As previously discussed (7.1.2), the meaning of SEAP is quite elusive, which makes it a poor criterion of interpretation. Therefore, as concerns the broker's performance in relation to safeguarding the interests of the parties, the overriding criterion of interpretation of the broker's duties is the due care duty, not SEAP.

In this manner, the significance of the reference to SEAP in 16 § becomes clearer: the scope of broker's obligation to disclose information is neither reduced, nor in any other way determined, by extra-legal sources such as dispute resolution boards or statements from trade organizations. The determining factor is the due care duty. Hence, the phrase "to the extent it is required by sound estate agency practice" should be read as "to the extent it is required to comply with the due care duty".

9.1.2 "Information the Parties May Need"

The phrase "information (…) that the buyer and seller may need" clearly limits the scope of the provision to information that is, or may be, necessary or at least of interest in the situation at hand. On the surface, this may seem only to give voice to the intuitive notion that the broker need only provide information that is of importance to the transaction. However, the chosen words "that the buyer and seller may need" must be interpreted as more than that. Again, the key determinant is the due care obligation, according to which the broker must prudently and diligently safeguard the interests of both parties. In a situation where the broker identifies, or ought to identify, a potential problem, she is required to take appropriate measures in order to prevent the parties from suffering legal or financial losses. Suppose, now, that the broker realizes that the seller in a given transaction is completely ignorant with regard to legal and financial issues—even more so than the average consumer. There may be a number of things of which the average consumer need not be informed but which must be brought to the particularly clueless seller's attention lest they be unduly prejudiced in the sale. Should the broker be required to be more vigilant in such cases, and "walk the extra mile" in order to safeguard the clueless seller's interests? The prudent answer would seem to be yes.[377]

By contrast, could the reverse be true? If the broker need only provide information that the parties "may need", it would seem that if the broker knows that the buyer or seller is already aware of a certain fact, she need not trouble that party in that respect. This point is perhaps more relevant with regard to advice than to information disclosure, and will be discussed below (chapter 10). However, since the broker's duty is limited to information that the parties "may need", the door is ajar to hold that the broker need not provide as detailed information where the buyer or seller is generally well-informed. After all, if the buyer is a construction engineer, they may be expected to discover more on their own than if they are laymen in construction technology. Under such circumstances, it may even at times seem odd if the broker were to inform the buyer of things the latter is obviously knows more about.

However, two things must be observed here. Firstly, the wording "may need" excludes the possibility that the broker might be exonerated from the obligation to disclose facts that the buyer or seller *may* already know. In fact, even where the broker finds it highly probable that the fact in question is known to the concerned party, the disclosure obligation remains. Only facts that are unquestionably known to the concerned party can be omitted. Secondly, the situation where the broker *knows* that the buyer or seller is already aware of a certain fact must be deemed rather rare. Even where it appears obvious to the broker that the buyer or seller must know of a given fact, that is not certainty but merely a subjective assessment of high probability. Therefore, it seems advisable for brokers not to explore this option too frivolously.

Limiting the disclosure obligation to information the parties may need also means that the broker need not emphasize information that the any buyer or seller can reasonably be assumed to find out on their own. In this connection, especially in the case of information to the buyer, it must be taken

[377] Needless to say, there must be limits. For instance, one might suggest that there is some level of general knowledge that buyers and sellers can be expected to possess. It seems advisable, however, not to exaggerate this suggestion. The safest suggestion to the broker is to turn to the due care obligation and ask oneself: "Is it consistent with being diligent to let the seller or buyer figure this one out for themselves?".

into consideration that the broker is required to safeguard the interests of both parties. It is intuitive that it is not always in the best interest of the seller that the buyer be informed of a particular fact. Suppose, for instance, that the property has a certain serious defect. If the buyer is informed of the defect, they may not be willing to pay as much for the property, or may not wish to purchase it at all. Now, the broker is not entitled to cite the impartiality rule to escape the obligation to disclose relevant information. Simply put, the *lex specialis* principle means that 16 § EAA overrides 8 §. However, to the extent it is consistent with the due care obligation, the broker is entitled—indeed obliged—to consider the interests of the seller when deciding whether or not to inform the buyer of a particular fact. Suppose the property for sale is in need of renovation: the wallpaper is old and has scratch marks from the seller's cat, and the doors and outside walls need to be repainted. Should the broker be required to call these observations to the buyer's attention? Most people with any experience with selling a property would probably say no—an assessment that seems consistent with the general view on the subject, which is that the broker need not inform buyers of defects that are "obvious to anybody who visits the property".[378]

The exception regarding obvious defects seems intuitive; it is hard to see why the broker should be obliged to call attention to defects that are *obvious* to *anybody* who visits the property. By definition, such defects are already, or ought already to be, known to the buyer. Granted, there are cases where the broker must be more than usually diligent and prudent, e.g. where the broker knows that the buyer is very inexperienced. However, if in a given case it is true that the buyer fails to observe "obvious" defects, then either the defects are not obvious to anyone—in which case it could at least be argued that the broker *is* indeed obliged to bring them to the buyer's attention—or the buyer *ought* to observe it. Either way, the conclusion is that obvious defects fall outside the scope of the obligation. Of course, whether a particular defect should be considered obvious or non-obvious is another matter entirely.

Let us consider a less clear-cut example. Suppose the seller is the estate of a deceased person, and that the deceased passed away inside the house. Now, there are people who—justifiably or no—are sensitive to such things and would not even consider buying a house inside which somebody has recently died. Others are not as sensitive. Should the broker be required to alert the buyer to the fact that the deceased passed away inside the house, and suffer the risk that the buyer is of the sensitive kind and withdraws from the sale? I would wager that a reader who is of the sensitive kind will probably answer "yes, without question", whereas a reader of the less sensitive kind may even find the whole question absurd. All that can be said for certain is that the problem is real—brokers do in fact face it from time to time—and that it is not a clear-cut case.

It would seem that the interests of the buyer and seller must be weighed against each other. One the one hand, the seller may not want particular emphasis placed on a disturbing fact, whereas, on the other hand, the buyer may certainly want to be informed. The question is, does the buyer *need* to be informed? Weighing the interest of the seller in non-disclosure against the buyer's interest in disclosure, it seems that *needing* to be informed, as envisaged in the provision, goes beyond *wanting*

[378] Melin, pp. 195-196. The wording in 1983/84:16, p. 38, where it is stated that the broker is required to disclose any defects known to her "*at least* [italic added] where the defect is not obvious (…)", seems to imply that there could be cases where even obvious defects are encompassed by the disclosure obligation. As Melin rightly asserts, that door must be deemed closed since not even the FMN seems to share it (see footnote 298 on p. 196).

to be informed. Needing to know implies an objective—and thus legitimate—interest that can be assumed to be shared by all or most buyers, such as needing to know how the electrical installations have been done or whether a particular wall is a supporting wall, whereas wanting to know implies a subjective interest such as satisfying personal preferences. The problem of drawing the line boils down to a judgment call and cannot be resolved here. However, the general rule must be that, in cases where the seller has a *legitimate* interest in non-disclosure—which rules out cases of actual defects or damages—it should be weighed against the buyer's interest in disclosure. If the buyer's interest in disclosure is based on personal preferences, which are in any case not necessarily known to the broker, it seems reasonable that that interest is given less weight than if it is based on a more objective necessity.[379] However, if the broker is informed of the buyer's personal preferences, the opposite would seem to apply.

9.1.3 "Information regarding the property or other relevant circumstances"

Given that the broker's activity concerns the conveyance of a property, be it real estate, tenant ownership or other legal entity, it would seem intuitive that the obligation to disclose information will first and foremost concern information about the property itself. It is evident from the foregoing that such information falls under the obligation, and it has never been seriously disputed that it is so. Notwithstanding, the legislator saw fit to clarify the matter in the 2011 EAA, by introducing a new sentence in 16 § p. 3:

"If the broker has observed or in any other way become aware of, or given the circumstances has particular reason to suspect, anything concerning the physical condition of the property that can be assumed to be of importance to a buyer, the broker shall specifically inform the buyer thereof."[380]

If there ever was any doubt concerning the status of information on the property itself—which, again, would be totally unfounded—the matter must now be deemed settled. However, the choice to codify, and thus call particular attention to, the obligation with respect to information concerning the property itself raises the question whether the intention is to abolish the obligation to disclose other information that is relevant to the transaction. Indeed, the question is foreseen in the *travaux préparatoires*, where it is admitted that the codification/clarification is partial and non-exhaustive. It is expressly pointed out that the obligation, present in the 1995 EAA, to disclose information concerning e.g. changes in zoning and planning, or concerning the types of construction permitted on the property, is in no way changed in the 2011 EAA. Thus, the scope of the provision is in no way altered by the new paragraph.[381]

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[379] I am fully aware that "need" and "necessity" are relative terms; hence the semantically imperfect formulation "more objective". Perhaps "information that most buyers will typically want to be informed of" or the like could be more adequate, but even that phrase does not quite grasp the concept.

[380] My own unofficial translation.

[381] Prop. 2010/11:15, pp. 29-30, 56-57. Given that no alteration was intended, one might raise the question whether the new paragraph was really necessary. After all, the perceived problem seemed to be that the obligation to disclose information concerning the physical condition of the property was only expressed in the old *travaux préparatoires* (prop. 1994/95:14, p. 81) and not the statute itself. Now, that position could itself be contested. But even if one is prepared to accept that argument, why it not just as great a problem that the equivalent obligation concerning other relevant information is not expressly specified in the provision? The

A question that is sometimes raised is whether the broker is obliged to inform buyers of facts concerning the physical condition of the property that do not constitute defects within the meaning of the Land Code or, where applicable, the Sales Act. It could well be that a given "defect" is such that the buyer has reason to expect it. In such cases, unless the contract stipulates that the property must be free of such defects by the day the buyer takes possession, it is not a defect under the law and the buyer has no claims on the seller. Given that the reason the buyer cannot raise claims with respect to the defect is that the buyer had reason to expect it, requiring the broker to inform the buyer about it might be perceived as inconsistent. However, the wording of 16 § clearly contradicts that notion since the obligation applies to information "that the parties may need concerning the property and other relevant circumstances". There is no reference whatsoever to the rules governing the contractual relation between buyer and seller. The reasonable interpretation, therefore, is that the obligation to disclose information applies no matter how a given fact or defect would or should be labeled in the relation between buyer and seller. However, the idea has at times been suggested.

> **RÅ 2006 ref 53** concerned a property situated 85 meters from a portside industrial area and fishing village. In February, 2002, the city had passed a new zoning plan for the area, entailing residential and, to some extent, commercial buildings. The new plan could be assumed to cause increased future disturbances around the property at hand due to increased traffic. The seller informed the broker of the plans in the so called "question list".[382] The buyer did not receive a copy of the question list until the day of the signing of the sales contract, and the broker did not inform them in any other way of the zoning plan. The FMN held that information of such importance must be disclosed to the buyer in good time before the signing of the sales contract, and issued a warning. The broker, who maintained that he had not been obliged to inform the buyer of the zoning plan, appealed first to the Administrative Court of First Instance and then to the Administrative Court of Appeals, who both upheld the FMN:s decision. In the Supreme Administrative Court, the broker brought forward two new arguments in support of his position. Firstly, the broker claimed that the obligation to disclose information applies only to defects within the meaning of the Land Code or Sales Act. Since the new zoning plan did not constitute such a defect, held the broker, he had not been obliged to inform the buyer of it. Secondly, the broker claimed that the new zoning plan was not detrimental but rather advantageous to the buyer; consequently, the buyer did not *need* to be informed and the broker was not obliged to inform them. The Supreme Administrative Court rejected both arguments. As to the first claim, the court held that the broker's information disclosure obligation applies to all information that can be assumed to be of importance to the buyer and/or the seller. As to the second claim, the court held that it is not for the broker to decide whether a particular piece of information is good news or bad news, since that is a subjective assessment; what is perceived as advantageous to one buyer may be detrimental to another. Again, held the court, the crucial factor is whether the information can be assumed to be of importance. The warning was upheld.

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chosen path seems ill-conceived and ill-advised: where a non-exhaustive exemplification is intended, that intention should be clear. In the interest of foreseeability, that means it should be expressed in the statute itself.

[382] It is common practice among many, perhaps most (though not all), brokers to ask the seller to fill out a form with questions concerning the property. The form is commonly referred to as the question list ("frågelistan").

The case clarifies three things. Firstly—although on this point there should really not have been any doubts—the duty to disclose information does indeed apply to facts and circumstances beyond those concerning the property itself. Secondly, the duty to disclose information is in no way limited to facts that constitute defects within the meaning of the Land Code or Sales Act. Thirdly, the fact that the broker may deem a particular piece of information to be advantageous rather than detrimental to the buyer does not exonerate the broker from the obligation to disclose it.

The fact that the information disclosure obligation is in no way limited to facts concerning the property itself has subsequently been further underscored by the case law of the FMN.

> **FMN 2008-04-23:1** concerned a property in the Stockholm archipelago. At a late stage in the transaction – a bidding process was already in progress – the seller received information from the municipal authorities that the plan to build a helicopter station not far from the property, which was to be used for multiple purposes, had been approved. The helicopter station could be assumed to cause noise disturbances in the area. The seller inquired of the broker whether the prospective buyers needed to be informed. The broker answered in the negative. This was, of course, incorrect in two senses. Firstly, after NJA 2007 s. 86, sellers stand the risk of being held liable for defects—including noise disturbances—that the seller knew about prior to the sale but failed to disclose. In that sense, the broker's answer constituted incorrect, in all probability negligent, counsel. Secondly, the broker is herself obliged under 16 § EAA to disclose the information in question. Neither the seller nor the broker informed the buyer—much less the prospective buyers who lost the bidding—of the planned helicopter station. The case was brought before the FMN who held that the information at hand was of crucial importance and that the broker had been obliged to disclose it to the buyer. The broker was issued a warning.
>
> The property for sale in **FMN 2008-11-19:9** was situated on a cliff ledge above a ferry berth in the archipelago on the Swedish west coast. A few months prior to the sale, a new and larger ferry was brought into use on trial. A few months after the sale it replaced the old ferry altogether, with considerable effects on the living conditions near the ferry berth; the new ferry was four meters taller than the old, with the result both that the ferry crew were able to see into the house and garden, and that the sea view from the property—which constituted a substantial part of the property's market value—was ruined. The property was sold without anybody informing the buyers of the plans to introduce a new and larger ferry. The buyers reported the broker to the FMN, arguing that the broker and the seller had both been aware of the plans and had still not disclosed them to the buyers. The broker admitted to not having informed the buyers of said plans, but insisted that he had been under no obligation to do so. Firstly, at the time of the sale it was not yet decided whether the larger ferry V or the smaller ferry C (which was, however, also substantially larger than the old ferry that was about to be replaced) would eventually be brought into permanent use. Secondly, held the broker, the possibility of the kind of change that the new ferry constituted is something that must always be taken into account when purchasing a property a mere 40 meters from a ferry berth.
>
> The FMN held that the broker must have been aware of the plans to introduce a new and larger ferry, and found it unlikely that the broker had not been aware that the sale took

place as a direct consequence thereof. The FMN therefore held that the broker had been obliged to ensure that the buyers, who were from out of town, were informed of the fact that new solutions for the ferry traffic was being investigated and that the matter was of high importance to the property for sale. For the failure to disclose relevant information, the broker was issued a warning.

9.1.4 Formalized and Non-Formalized Disclosure

A question that is sometimes raised is whether the information envisaged in 16 § EAA must be given in a particular form. For instance, must the information be given in writing or is it acceptable to give it verbally? In this regard, there are two categories of information: firstly, the formalized category where the EAA specifically provides that the information must be given in writing and, secondly, all other kind of information, for which the only guidance is case law and the general due care obligation in 8 §. Let us for the sake of it refer to these categories as formalized and non-formalized disclosure.[383]

The most obvious example of formalized disclosure is the unit description (*objektsbeskrivning*), prescribed in 18 § EAA. Pursuant to said provision, when brokering to consumers, the broker must provide prospective buyers with a written description of the property. The property description must include:

- property designation,
- taxation value,
- area,
- operating costs,
- any existing mortgages, easements and/or other encumbrances,
- any existing joint facilities of which the property takes part, and
- the age, dimensions, and manner of construction of the building.

In the case of tenant ownership homes, the description must further include:

- the name of the tenant ownership association,
- any existing mortgages in the tenant ownership[384],
- the tenant ownership's share (as a fraction or percentage) in the association,
- information on land included in the tenant ownership,
- the apartment number,
- the apartment's area,
- annual fee to the association,

[383] "Formalized" could be interpreted as "expressly mentioned in the statute". However, that is not the intended meaning here. Rather, the expression should be understood as an obligation to observe a certain format, such as giving the information in writing instead of verbally.
[384] It is only mortgages in the apartment itself that is of interest; the provision does not apply to mortgages the association may have taken on the property itself.

- any decided changes of the annual fee, and
- operating costs.

Apart from the property description, the broker is required to provide prospective buyers with the association's latest available annual report. If no such report exists, the broker must instead provide the association's financial plan.

A novelty in the 2011 EAA is the obligation, laid down in 20 §, for the broker to document all offers that the broker has received for the property. The document, which is already commonly referred to as the "bidding list", must include:

- the name and contact information of all bidders,
- the amounts offered,
- the time the offer was received, and
- any conditions attached to the offers.

There has been a relatively strong reluctance among brokers to disclose the identity of the bidders, the main argument being that doing so violates their right to privacy. The Personal Data Act (1998:204) has been cited as a legal impediment. However, there is no need for brokers to fear that the bidding list constitutes a breach of that Act, since 10 § b) permits the use of the personal data of others where it is necessary in order to comply with a legal obligation.

The seller and the buyer (notably not the prospective buyers who did not purchase the property) are both to receive a copy of the bidding list when the transaction is finalized. This is normally the day of possession.

Under the same 20 §, the broker is required to take notes of all relevant activities that take place during the transaction. According to the *travaux préparatoires*, the notes should include information on when the brokerage contract was entered, when and in what manner a certain measure has been taken, and when the brokerage contract was concluded. Information of particular importance is that pertaining to information disclosure and counsel (16 §), title and encumbrances (17 §), and providing a unit description.[385]

Apart from the examples just mentioned, there are no specific provisions prescribing a particular format for information disclosure. However, that is not to say that the broker could not in a particular instances be obliged to provide information in writing and not merely verbally. It must be remembered that the general due care obligation governs all aspects of the broker's work. Consequently, the manner in which the broker carries out, or ought to carry out, her tasks must be interpreted in the light of that general rule. Therefore, the basic questions must be asked: what would the diligent and prudent broker do? Is it sufficiently diligent and prudent, in view of the circumstances in the particular case, to give a particular piece of information verbally? It is important to note, here, that the manner in which information is conveyed affects the way it is perceived by the recipient. As it is sometimes put, communication is not the conveyance of information—it is how the

[385] Prop. 2010/11:15, pp. 60-61.

information is received. Therefore, it could well be that in a particular case it is of crucial importance that the buyer or seller really understands and acts upon information conveyed by the broker. In such instances, it is doubtful if it could really be called diligent and prudent to merely convey the information verbally since that may not reflect the severity of the situation.

> In **FR 15631-10**[386], the buyer had construction plans for the property. However, prior to the sale, the broker received a formal letter from the neighbor's legal representative, stating that the neighbor would oppose the granting of a building permit for the commissioned property unless the owner approved the neighbor's construction plans.[387] The background was that the neighbor had applied for a building permit to replace the current building, which was seven meters high, with one that was ten meters high. The seller of the now commissioned property had refused to give their consent, with the result that the neighbor's building permit application was denied. In what appears to have been an act of vengeance, the neighbor decided to refuse to consent to any future construction plans on the now commissioned property unless the owner first gave their consent to the neighbor's plans.
>
> The broker claimed that she informed the buyer forthwith of the neighbor's position, and that she explained to the buyer that ultimately it is the municipal housing committee that decides whether or not to grant building permits. With minimal majority, a divided FMN held that the broker had been obliged to hand over the letter to the buyer and issued a warning.[388]
>
> The broker appealed the decision to the Administrative Court of First Instance, who held that the information concerning the neighbor's position was such that the broker was obliged under 16 § EAA to disclose it to the buyer. However, the court rejected the view taken by the FMN majority that the broker was obliged to present the actual letter to the buyer, holding instead that neither the EAA itself nor the *travaux préparatoires* support any other conclusion than that said information could be given verbally. Since there was not enough evidence to refute the broker's claims that she had verbally informed the buyer of the situation at hand, the decision of the FMN was overturned and the broker acquitted.

At a glance, the ruling appears sensible and reasonable. Meting out disciplinary sanctions brings to the fore the principles of legality and due process. Thus, if there is no support in the applicable sources of law for the existence of a claimed obligation, then no sanction should be issued. However, there is indeed support for the notion that the broker could be obliged to convey information in a certain manner—such as by presenting a letter to the buyer—if in a particular case doing so is necessary to comply with the general due care obligation. Thus, it could be argued that the information received by the broker - that the neighbor would not consent to a building permit unless

[386] Ruling of January 27th, 2011.

[387] Neighbors' consent is a prerequisite for obtaining building permits.

[388] The vote was 4-4, the president having the casting vote. As rightly pointed out by the broker's legal counsel in the appeal, this cast of votes would have yielded the opposite result in the administrative courts since the voting rules for criminal cases is used in administrative proceedings that may result in a public sanction (such as e.g. oversight cases). Applying, as the FMN did, the rules of 18 § p. 2 of the Administrative Procedure Act, therefore admittedly seems questionable.

the buyer consented to the neighbor's plan—was of particular importance. It could be argued that the fact that the neighbor had hired an attorney to write the letter should be understood as a warning sign, and that the broker should therefore have taken measures to ensure that the buyer was really aware of the gravity of the situation. Of course, even with due regard to these arguments, one might arrive at the same conclusion in substance as did the court. However, in the absence of any kind of discussion—and in view of the court's inaccurate assertion that there was no support in the sources of law for the notion that the broker could be obliged to present the letter to the buyer—the ruling cannot be considered sufficiently substantiated.

That said, the discussed case does seem to be consistent with the following ruling from the Administrative Court of Appeals.

> **RK 8375-04**[389] concerned, *inter alia*, whether the broker had fulfilled the duty to disclose a malfunction in the chimney and fireplace.[390] The relevant facts of the case were the following. In connection to the brokerage of a tenant-ownership apartment in 2003, the unit description drawn up by 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 FMN, 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 FMN found the broker in breach of 16 § for not disclosing to the buyer all available—and highly relevant—information about the chimney and issued a warning. The broker appealed to the Administrative Court of First Instance, 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 Administrative Court of Appeals, who concluded that the broker had received information of the malfunction of the chimney after the prospect was produced. The FMN did not even contest that the broker had informed the prospective buyers verbally 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 information to the unit description, it nevertheless did not find him in breach of the EAA. The court ruled in favor of the broker.

In view of the two cases just reviewed, it would seem that there is good support for the position that the disclosure of information need not be in writing unless it is specifically provided. However, the due care duty lends support to the position that there *can* in some instances be a requirement to inform the buyer or seller in writing even if it is not explicitly provided in the EAA. That position is lent further support by the following ruling by the Svea Court of Appeals.

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[389] Ruling of July 4th, 2005.

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

Svea HovR T 10086-10[391] concerned the sale of a home built on leased land. The seller was the estate of a deceased person, and the land owner was the municipality of Stockholm. Technically, the sale comprised the house itself and the land lease right. However, the land lease contract stipulated that the land lease must not be recorded in the land register. Such clauses are binding with respect to land leases; 7:10 LC. Unregistered rights are at risk of being extinguished in the event that the land is sold. As in the case of easements, the seller is required under 7:12 LC to reserve the rights of the lessee in relation to the buyer. However, if the seller fails to do so, and if the buyer is not at the time of the purchase aware of the land lease, or at least aware of circumstances that would give them reason to suspect it, then the lease right is extinguished under 7:14 LC. For this reason, banks and other creditors are usually loath to accept unregistered land lease rights as security for house loans.

The buyer in the transaction at hand had received a loan promise from a bank, a fact of which she informed the broker when asked whether she had arranged for the financing of the purchase. The final sale price was SEK 4,550,000. She signed the contract, which contained no mortgage clause that would permit her to terminate the contract without liability, but was subsequently denied the loan on account of the clause in the land lease agreement. Since the buyer could not finance the purchase, the contract was cancelled. The estate proceeded to sell the house and lease right at the significantly lower price of SEK 2,225,000 (which would hardly seem surprising in view of the fact that the lease right could not be used as security), after which they sued the buyer for the difference of SEK 2,325,000. The parties made a settlement according to which the estate received SEK 1,000,000 in damages.

The buyer sued the broker at Solna District Court for negligent counsel in the form of non-disclosure of facts that were crucial to the purchase and that were known to the broker at that time, alleging that the broker had been obliged under 16 § EAA to make the buyer aware of the unlikelihood that the lease right would be accepted as security. The broker contested all claims, holding, inter alia, that he had not advertised the house incorrectly and that the buyer had received correct information regarding the land lease agreement. He denied having had any knowledge of whether or not the building and/or the land lease could be mortgaged, but confessed to remembering the seller telling him that borrowing money to finance the purchase could prove difficult.

The court found that the broker had had reason to assume that the buyer intended to finance the purchase by using the house and land lease as security. It was also made evident from two testimonies that the broker had been informed, prior to the signing of the sales contract, of the fact that the land lease could not be used as security. Therefore, held the court, it could be concluded that the broker had been aware that there would at the very least be substantial difficulties in using the land lease as security. The court therefore held that the broker had been obliged under 16 § EAA to inform the buyer that the clause in the land lease agreement either prevented the financing of the purchase, or

[391] Ruling of September 9th, 2011.

at least created substantial difficulties in that pursuit. Moreover, the court found it indisputable that the broker had not personally presented the buyer with a copy of the land lease agreement. The court also found it established that the broker, when asked by the buyer about the land lease agreement, had merely referred to the property description and urged the buyer to contact the municipality of Stockholm for more specific information concerning the contents of the agreement. The court deemed the broker's behavior unsatisfactory and held that he had been obliged, prior to the signing of the sales contract, to present the buyer with a copy of the land lease agreement. The court found the broker's failure to disclose important information and to present a copy of the agreement to be negligent, and awarded the buyer the demanded SEK 1,134,192 plus interest in damages.

The broker appealed the ruling to the Svea Court of Appeals, who upheld the ruling in all parts.

The ruling has a clear advice dimension which will be discussed further below (10.1.2). As to information disclosure, it is interesting to note the position of both courts that the broker should have presented a copy of the land lease agreement to the buyer. The case demonstrates that brokers cannot always rely on giving verbal information. Where presenting an existing document to the buyer or seller gives an additional dimension compared to mere verbal information, it is at least in the court's discretion to deem the broker negligent for not presenting it.

9.1.5 Cases of Uncertain Information

It should raise no eyebrows to hold that there is a general desirability that information given to the parties be correct. It is partly for this very reason that the broker has a duty to ascertain and to investigate facts, as examined in Chapter 8. However, as was made apparent, those duties have their limits. Whether because it was impossible for the broker to obtain a certain piece of information or because doing so could not legally be required of her, there are bound to be situations where the broker simply does not know the answer to a given question. How is the broker to act in such situations of uncertain information?

Given the obligation to disclose all information that the parties "may need", logic would seem to dictate that if there is uncertainty regarding a particular issue of interest (i.e. an issue that is important enough to fulfill the "may need" criterion), the broker is obliged to inform the parties of the uncertainty. To illustrate the point, let us consider the area of the house or apartment for sale. The issue is certainly of great importance to many buyers—in some local markets, notably central Stockholm, so much so that prices are often indicated per m^2. This practice may of course seem patently absurd since value is not derived from area alone.[392] However, it serves to demonstrate the importance bestowed by the players in the marketplace on area. A problem with area is that the measurement methods vary over time. If a particular home has been measured by method A, which was predominant at the time of construction, the area may not be the same as if it were measured by method B, which has subsequently been adopted and is predominant at the time of sale. Thus, it

[392] This is not to say that area is not an important factor when assessing market value. It is just not the *only* factor.

is not only a possibility but rather a certainty that there will at times, in the case of older houses/apartments, be uncertainty as to the area of the home for sale according to the currently employed measurement method. As demonstrated in Chapter 8, the broker is under no obligation to measure the area of the house/apartment. How, then, should the broker act?

> In **FMN 2005-03-16:7**, the broker advertised the property with incorrect information regarding area. According to the constructional drawing from 1987, when the house was built, the house measured 166.1 m^2 in living area and 24.1 m^2 in non-living area. A valuation report from 2003 indicated a living area amounting to 172 m^2 and a non-living area of 18 m^2. An extract from the database of the Survey Agency, dated January, 2004, indicated 156 m^2 and 20 m^2 respectively. In 2004, the broker marketed the property online and in the paper indicating interchangeably 1) 166 m^2 and 24 m^2, 2) 178 m^2 and 7 m^2, and 3) 190 m^2 (!).
>
> The FMN observed, on the one hand, 1) that the actual area of the house could not be established, 2) that the broker is under no obligation to inspect the property or to measure its area, and 3) that unless the broker has reason to suspect that the information on area provided by the seller is incorrect, the broker is entitled to assume that it is correct. On the other hand, the FMN also observed that the question of living area is generally of great importance to the parties. Against the backdrop of these observations, the FMN held that where there is contradictory information concerning area, and it cannot be established which is correct, the broker is obliged to disclose all information, or at least make it clear that there are other area indications that differ from the one that has been disclosed. Since the broker in the case at hand had done neither, a warning was issued.
>
> The rule was upheld in **FMN 2011-01-26:4**. In that case, the broker received information from the Survey Agency database that the living area was 43 m^2. When asked to sign the property description and thus confirm the information therein, the seller protested to the area indication, insisting that the information in the Survey Agency database was incorrect. To accommodate the seller, the broker marketed the property indicating the living area as "roughly 55 m^2". The FMN referred to **FMN 2005-03-16:7** and reiterated that where there are diverging indications or statements on area, the broker must disclose them all or at least make clear that there is diverging information. The broker was issued a warning.

Thus, faced with diverging information on a given issue, if it cannot be established which is correct the broker must disclose all available information or at least make it clear that the information the broker has used is contradicted by other sources. The "escape route" consisting in merely indicating that there is diverging information instead of disclosing all available information is somewhat puzzling. It is hard to conceive of a legitimate interest to disclose the fact that there is diverging information while at the same time withholding the specific information. What could possibly be gained? Nonetheless, the case law is consistent and the rule stands.

The question, then, is whether the case law derived rule just mentioned can be applied to other kinds of information besides area. Again, the logical answer would seem to be yes, since the fact that there is uncertainty on a particular issue constitutes a fact that is decidedly of interest to the parties.

In **FMN 2011-12-14:8**, the owner of a tenant-ownership apartment had had a balcony constructed. The construction work was deficient, giving rise to three water leaks that caused moisture damage on the apartment below. The construction firm that had been employed to construct the balcony repaired the damages. Some months later, the neighbor below wished to sell and commissioned broker X. Broker X received information about the water leaks and of the repair works. The apartment was sold to buyer Y. After taking possession, the buyer discovered additional damage, which the construction firm confirmed to emanate from the water leaks caused by them. Y contacted the other prospective buyers on the bidding list; all claimed not to have been informed by broker X of the moisture damage. Buyer Y reported broker X to the FMN. Broker X admitted to having known of the water leaks and the resulting moisture damages, but insisted that she had had no reason to suspect that the damages had not been repaired in a professional manner. Therefore, argued the broker, she had not been obliged to inform the buyer(s) of the water leaks.

The FMN observed that it was undisputed that the broker had known that the brokered apartment had taken water damage. Such damages, held the FMN, must be deemed as important information to any buyer, notwithstanding that the construction firm that caused the damages had repaired them. The FMN further held that it was not up to the broker to decide whether the buyers were entitled to be informed. Instead, she should have realized the importance of presenting the information at issue to all prospective buyers. The broker was issued a warning.

The water leak case is admittedly not one where the broker had received diverging information on a given issue. However, she had received information 1) that there had been moisture damage caused by water leaks emanating from construction works on a neighboring apartment, and 2) that said damages had been repaired by the responsible construction firm. What makes it a case of uncertain information is that, at the time of the sale, the broker could not be certain whether the repairs had been sufficient. Thus, the broker could not be certain whether there could be future problems. Faced with a situation where it is known that there has been moisture damage and where it is uncertain whether said moisture damage has been sufficiently dealt with or whether future problems may present themselves, most buyers would in all probability want to be informed. Given the potential gravity of such damages, the uncertainty—which could be rephrased as a probability that there may be future problems—must be deemed as information that the buyer “may need”. Thus, the decision of the FMN is correct.

In sum, if certainty cannot be achieved on a particular issue that fulfills the “may need” requirement in 16 § EAA – or which must be included in the property description pursuant to 18 § - the broker must inform the parties of the situation. Where there are diverging statements or indications and it cannot be established which is correct, the broker must disclose all statements and indications, or at the least make it clear that there is information that contradicts that which has been provided.

9.1.6 The Damages Reduction Rule

25 § EAA provides that where it is deemed fair, the damages to be paid in compensation for an injury suffered as a result of the broker's misconduct can be reduced or waived entirely. Thus, if the injured party has contributed to the loss or damage, they will not be entitled to full compensation. This rule is understood to have particular bearing on the broker's duty to disclose information. There is a general consensus in case law, the *travaux préparatoires*, and the literature that if the broker has failed to disclose a defect on the property that was known to her, the damages should be reduced if the buyer has failed to observe their duty to inspect under 4:19 LC.[393] This is an unproblematic conclusion since a buyer who does not inspect the property they are about to purchase must be said to contribute to an injury that consists in the existence of an unknown defect. Thus far, it is a matter of logic.

However, according to a more severe view, merely considering the buyer's failure to inspect as grounds for reduction is not enough. Under this view, such cases should virtually automatically lead to a reduction all the way to 0. The underlying argument is that the broker's civil liability—supported by the mandatory liability insurance—should not be allowed to alter or undermine the risk allocation between buyer and seller under the Land Code. The reduction rule must, under this view, be read in conjunction with 25 § p. 2, which stipulates that if the broker has indemnified the buyer on the grounds that the property deviated from what the buyer had reason to expect [i.e. because of a defect; see 4:19 LC] the broker can claim these damages from the seller to the extent the seller is also liable and it is not unreasonable that the seller should ultimately bear the cost for the injury. The broker's right to claim the damages from the seller thus hinges on whether the seller is also liable, which in turn boils down to whether the defect at issue was a "hidden" or a "discoverable" defect. If the defect was "hidden", i.e. such that the buyer would not have been able to discover it whilst inspecting the property in a manner that was suitable given the circumstances in the individual transaction, then the seller is liable. If so, then the broker is entitled to claim the damages from the seller.

Now, under the severe view, the reduction rule must be consistent with this recourse rule. If the defect at issue is hidden, then the seller should ultimately bear the cost. If not, then by contrast the buyer should ultimately bear the cost. The conclusion is that if the broker has failed to discover a defect, and the defect in question was "discoverable", then the damages should as a rule be reduced to 0.[394]

> In **HovR Skåne BlekingeT 209-04**[395], it was indisputable that the broker had been aware of rust damage on the roof of the house, and that the broker had not disclosed this fact to the buyer. The buyer sued the broker at Lund District Court, who held that by not disclosing the known defect, the broker had acted in breach of the disclosure obligation and that the breach constituted negligence. However, the district court also held that the

[393] Prop. 1983/84, pp. 43, 59, 67; Melin, pp. 265-270.

[394] Prop. 1983/84:16, pp. 59, 67; Grauers, p. 249, Ramberg, p. 143, Zacharias, pp. 741-743. In the *travaux préparatoires*, it was first indicated on p. 43 that the reduction rule should be used sparingly, so as not to undermine the broker's liability. However, it was objected by the parliamentary Law Council that the broker's liability could upset the balance between buyer and seller. As a result, the head of the department seemed to change his mind and subscribe to the view taken by the Law Council; prop. 1983/84:16, p. 67.

[395] Ruling of November 28th, 2004.

> buyer had not fulfilled her duty to inspect. For this reason, the damages were mitigated from SEK 50,000 (which was the assessed cost to repair the roof) to SEK 20,000. Both parties appealed the ruling to the Court of Appeals. Before the Skåne and Blekinge Court of Appeals, the broker argued that the defects on the roof were not defects within the meaning of 4:19 LC, and that the broker had therefore not been obliged to disclose their existence to the buyer. The court did not comment on this assertion *de jure*, holding instead that a party who claims that a given defect is such that the buyer had reason to expect it [i.e. that it is not a defect at all under 4:19 LC] bears the burden of proof for that claim. The court did not find the claim established, and treated the defect as a defect within the meaning of 4:19 LC. In failing to inform the buyer of the defect, held the court, the broker had acted in breach of the disclosure obligation. However, as to the question of whether the damages should be reduced pursuant to 20 § [25 § in the 2011 Act], the court held that the buyer had failed to observe her duty to inspect, and that she had therefore contributed to the injury. The damages were therefore reduced to zero.

The described view cannot escape criticism. Firstly, the whole line of argumentation is fundamentally flawed since it fails to take into account that the broker's duties under the EAA are completely separate from the contractual relation between buyer and seller. As to the broker, she is only liable for negligent breaches of her professional obligations under the EAA. Nowhere in those provisions is there a rule that even resembles assuming the buyer's or seller's responsibilities. If the broker is found liable, it is because she has negligently failed to observe one or several obligations under the EAA, not because she has assumed the seller's liability. Thus, the notion that the broker's liability would undermine the contracting parties' obligations under the Land Code is flawed.

Secondly, to hold that the broker's liability for failing to observe the duty to disclose important information would undermine the parties' responsibility under the Land Code is tantamount to claiming that it is commonplace for brokers to withhold information regarding defects. Again, the broker is only liable if she 1) intentionally or negligently 2) fails to observe an obligation under the EAA, and thus 3) causes injury to the buyer or seller. Now, for a model or system to be "undermined", there must be an adverse phenomenon of considerable proportions. In this case, that would mean that brokers regularly become liable for withholding information. Thus, arguing for a general reduction of damages is tantamount to 1) accusing brokers of regularly acting in breach of their obligations and 2) defending that state of affairs.

Thirdly, the argument that there should be symmetry between the application of the reduction rule and that of the recourse rule is similarly flawed. It is based on the idea that if the broker has failed to disclose a defect known to her, and the buyer has failed to observe their inspection duty, then they have both been negligent.[396] That assertion cannot be accepted. Firstly, whatever duties the buyer has are in relation to the seller, not to third parties. Thus, even if in a given situation the effect at issue is "discoverable" within the meaning of 4:19, that is an argument that can only be used by the *seller* to escape liability. The broker's obligations, governed by the EAA, cannot be mitigated by liability limitations laid down in a completely different statute that governs completely different issues that concern completely different parties. Secondly, it is highly questionable whether the buyer's failure to discover a certain defect could really constitute negligence. It should be observed

[396] Prop. 1983/84:16, p. 59.

that there is no such thing as an actual duty to inspect. The buyer's main contractual obligations are to pay the sale price on time and to assume possession of the property. The "duty to inspect" is in actuality nothing more than an allocation of risk. The buyer is free to choose not to inspect the property, but will face the risk that there may be defects for which the seller is not liable. Suppose that in a given transaction the buyer takes that risk: is that really negligence? That is by no means self-evident, especially when one takes into account that the line between "hidden" and "discoverable" defects is set at a standard that is quite harsh on the buyer. In fact, it is fairly straightforward to conceive of a number of scenarios where the buyer fails to discover a "discoverable" defect without being negligent. To name but one example, if the buyer receives warning signals of a certain defect, then the duty to inspect is understood to be "enlarged". Thus, if there is an inspection report containing a comment such as "deeper inspection recommended", and such a deeper inspection would lead to the discovery of the defect, then the seller is not liable for that defect. Now, such deeper technical inspections can be quite costly. Should it automatically be considered negligent if the buyer refrains from paying for the inspection? That notion seems hard to accept.

The iniquity of defining the failure to inspect—or merely to discover a certain defect—as negligence on the part of the buyer is exacerbated when applied to tenant ownership homes. Since they do not constitute real estate, the sale of tenant ownership homes is governed by the Sales Act. The Sales Act, modeled as it is for movable goods, assumes that the goods are inspected after the sale rather than prior to it. 31 § SA provides that the buyer must inspect the goods after the sale. 32 § bars the buyer from claiming liability on the part of the seller if the buyer fails to make a claim within "reasonable time" after discovering the defect, or after the point where—taken into account obligation to inspect pursuant to 31 § - the buyer ought to have become aware of the defect. There is no general duty to inspect prior to the sale. Under 20 § SA, the buyer cannot cite as a defect that which they must be assumed to have known prior to the sale. Besides that, the buyer has no duty to inspect unless it is "activated". This is accomplished where 1) the buyer has actually inspected the property prior to the sale or 2) the buyer has been urged by the seller to inspect and failed, without acceptable reason, to do so. The opinions are divided as to whether the showing of an apartment constitutes either an inspection or an invitation from the seller to inspect—either of which would activate the buyer's duty to inspect.[397] In any case, there is no *a priori* duty to inspect a tenant ownership home prior to the sale. Contrary to what is sometimes believed, the Land Code is *not* applicable. Since there is no duty to inspect, there can be no doubt that the failure of a buyer to inspect cannot constitute such negligence as to warrant the reduction of damages on those grounds alone. After all, the law is as the law is and the parties will act accordingly. Suppose a given buyer has received advice from their attorney, and been informed that there is no *a priori* duty to inspect. Suppose the buyer, acting on that advice, refrains from inspecting the apartment more closely. Is that negligence? The reasonable answer would appear to be no.

As has been observed in the literature, a general rule stipulating that in cases of negligent non-disclosure on the part of the broker the damages are reduced to 0 if the defect at issue is

[397] Tegelberg holds that keeping the home "available for the buyer" is likely to be enough to constitute an invitation to inspect; Tegelberg in Grauers et al., p. 184. Folke Grauers seems to assume a more explicit invitation; Grauers F. 2010, p. 215. The Svea Court of Appeals held in T 4565-99 (ruling of February 10th, 2000) that a showing should be understood as an implicit invitation to inspect.

"discoverable" creates incentive problems.[398] As will be treated in detail in Chapter 9, the broker is obliged to inform the buyer in writing about their duty to inspect. That obligation entails ensuring that the buyer has understood the information. The broker is likewise obliged to strive to ensure that the buyer inspects the property before the sale. Now, if a broker who knows of a certain defect is free to refrain from disclosing it without facing liability as long as the defect is "discoverable", could that broker be said to have proper incentive to adhere to her obligations? Most would say no.

It bears reminding that the provision only stipulates that the damages *can* be reduced *if it is reasonable*. Thus, with due regard to the aforementioned arguments, it all boils down to equity. Before deciding on reducing the damages, the court must decide that it is equitable to do so. In view of the foregoing, that can hardly be true in all conceivable cases where the defect is "discoverable", simply on the grounds that it is "discoverable". Granted, it is undeniable that the mitigation of damages doctrine applies. However, reducing the damages to 0 merely because the defect is "discoverable" is stretching it quite a bit too far.

9.2 The French Notary

It is hardly to be disputed that, by definition, the concept of giving counsel encompasses the disclosure of relevant information. As a matter or pure logic, then, where there is a duty to give counsel, there is a duty to disclose relevant information. It has been established in the foregoing that the notary does indeed have a duty to give counsel to the parties in a transaction. It follows that the notary is obliged to disclose any and all information that is or potentially could be of importance.

The existence of a notarial duty to disclose information should be settled there. However, as the skeptical reader may feel the urge to observe, the law does not always follow the laws of logic. On the contrary, the law oftentimes resembles a patchwork quilt of different policies, principles, and interpretations rather than a uniform, or even coherent, entity. The fact that something would seem to follow logically from something else is no guarantee that it is so. Therefore, the lofty peaks of logic must yield to the earthy valleys of evidence.

Perhaps the fall need not be so hard. It has been established in the foregoing that the notary is obliged to ensure the validity and efficacy of the transaction. This obligation is firmly rooted in the case law of the Cour de Cassation. Ensuring validity entails preventing anything that would render the transaction invalid, and preventing the parties from pursuing transactions the notary knows will be invalid. To name but one simple example of the latter, if the notary has knowledge of a fact that makes it impossible to enter a valid contract to sell a certain property, the notary must disclose that fact to the parties in order to prevent them from entering into an invalid contract. Granted, that objective could be fulfilled by simply refusing to notarize the conveyance. However, in such a scenario nothing would prevent the parties from simply soliciting the services of another notary that does not possess the damning knowledge and hence sees no problem in effectuating the transaction. Furthermore, it is difficult to conceive of a fact that is so damning as to bar a valid conveyance and, at the same time, so sensitive as to warrant non-disclosure. Hence, it seems safe to conclude that

[398] Melin, pp. 267-268; Stiegler, pp. 82-83.

where the notary is privy to information that renders the transaction invalid, he must disclose that information to prevent the parties from pursuing the transaction. Should he fail to do so, the notary will be liable under C.C. Art. 1382 for any resulting damages.

The obligation to disclose information is hardly mentioned at all in the literature. This may seem odd given the intuitive connection between giving counsel and disclosing important information. However, the lack of coverage in the literature can be explained to some extent by the distinction between information disclosure and advice. In the literature, the two concepts seem rather to be treated as one and the same. Furthermore, the role of the notary is such that, in contrast to the broker, he will typically not be privy to specific facts concerning e.g. the property for sale. To the contrary, it is the parties who provide the notary with that information. The notary's obligation is to process that information and give appropriate advice. It should be noted that this does not in any way mean that a given notary could not possess detailed information about the real estate market and perhaps even the particular property at hand. Indeed, as regards the real estate market it would seem that notaries are generally quite knowledgeable. The fact that notaries are at times involved as agents in real estate conveyances—subject to regulation, such as a cap on fees—lends support to that notion.[399]

However, that is in no way to say that the law does not expect the notary to disclose important information. In the case law reviewed in chapter 8, the key legal issue was whether it constituted a negligent breach of the professional duties not to *obtain* correct information on a particular matter. In virtually all those cases, however, the reason the notary was sued for damages in the first place was not because they had not performed the necessary verifications, but because they had not disclosed important information the plaintiffs felt entitled to receive. In those cases, the reason the notary did not disclose the disputed information was that he had not possessed it at all. The focal point was therefore not the existence of an obligation to disclose information. However, it is clear that information disclosure is an obligation. Again, it is a matter of pure logic. If the notary had an obligation to obtain a certain piece of information, but no obligation to disclose it to the parties, there would be no reason to discuss liability for damages. For instance, in **Cass 1r^{e} civ., Bull. III 1994 n^{o} 38 p. 23** the focal point was whether the notary ought to have understood that there were bound to be easements connected to the oil pipeline, and investigated the matter more closely (which was answered in the affirmative). However, the research that should have taken place would have been of no value to the buyer unless they were informed of any discovered easements. Hence, the failure to obtain information could not be the cause of the damages incurred unless there was also an obligation to disclose any relevant information. It appears the courts deem this self-evident.

> **Cass 1r^{e} civ., Bull. civ. I, n° 6**[400] illustrates the intrinsic connection between obtaining information and disclosing it. In that case, Mme Y, had pledged, in February, 1980, a personal guarantee in favor of M.Y., her husband, for business loans taken by him. In March, 1981, the creditor had judicially obtained a mortgage inscription on the property co-owned by the two spouses. In April, 1982, Mme Y was sentenced to pay a 322,709 Francs [just short of € 100,000 in the current value] to the creditor to honor her personal guarantee. In November the same year, the spouses effectuated a partition of the co-

[399] Dyson, p. 30; ZERP, p. 115.
[400] Ruling of January 6th, 1994.

owned property, after which M.Y. became the sole proprietor. Under C.C. Art. 882, creditors are entitled to intervene in partitions of property to protect their rights. However, to do so the creditor must of course be aware that a partition transaction is imminent. In the case at hand, the responsible notary failed to obtain an *état hypothécaire*, with the result that he failed to discover the mortgage inscription. Consequently, he did not alert the creditor of the imminent partition. In January, 1983, the couple got divorced by mutual consent, thereby ratifying once again the full transfer of the property to M.Y. In September, 1986, the creditor sued M.Y., demanding payment of the debts and citing the mortgage inscription. In response, M.Y. countersued demanding that the mortgage and the debt for which it was security be declared invalid. The court ruled in favor of M.Y, declaring the mortgage "valid but obsolete".

Both M.Y. and the creditor subsequently sued the responsible notary for damages, arguing—independently from each other—that the notary's failure to obtain an *état hypothécaire* constituted a breach of his obligations. The Cour d'Appel held that the notary was only obliged to give counsel to his clients - in the present case the spouses Mme Y and M.Y – and, consequently, that he had been under no obligation to alert the creditor of the imminent partition. The Cour de Cassation held otherwise. As public officers, held the Cour de Cassation, notaries are responsible not only towards to their clients but also to third parties. Consequently, they are liable for damages incurred by third parties resulting from negligent malpractice. The court further held that it is incumbent on the notary to examine the regularity of the deeds they are asked to effectuate, and that the notary must not authenticate a real estate conveyance without first performing the essential formality of verifying the mortgage status. Therefore, the Cour D'Appel had been wrong in holding the notary not liable; the case was remitted in this part.

As previously stated, the efficacy of the transaction and its deeds refers to the possibility to accomplish the desired goals of the parties. As in the case of validity, if the notary is privy to information that affects that possibility, the notary is obliged to disclose said information. For instance, if the notary knows that the property for sale is encumbered by an easement that diminishes its value, or imposes restriction on the buyer's free use of the property, that is something the buyer typically needs to be informed of prior to the sale since their desired goals may be impossible to accomplish, rendering the transaction useless.

The property sold in **Cass. 3^{e} Civ., Appeal n^{o} 00-11411**[401] was encumbered by a gas pipeline easement, a fact that was not mentioned in the *compromis de vente* nor the *acte de vente*. Indeed, the *compromis de vente* contained a statement by the seller that there were no easements apart from those specified in the title deed or the co-ownership deeds[402]. The buyer, who planned to build a swimming pool and a separate building on the property, signed the *compromis de vente* believing that there were no easements to impede his plans. As it turned out, the title deed—which the buyer apparently failed to read carefully—did mention the gas pipeline easement. The responsible notary did not make reference to the easement in the *acte de vente*. However, the *acte de vente* contained a

[401] Ruling of February 20th, 2002.
[402] *Règlement de copropriété*.

clause entitled "Easements", whereby the buyer accepted all easements specified in the cahier des charges, which was appended to the *acte de vente*.

The buyer did not become aware of the existence of the pipeline easement, or at least its significance, until after the sale was finalized. Faced with this insurmountable obstacle, the buyer sued the seller for fraudulent misrepresentation and the responsible notary for breach of his duty to counsel. As concerns the notary, the Cour d'Appel de Lyon did not find it established that the notary had been aware of the buyer's plans for the property. Hence, held the court, the notary could not be deemed negligent in not alerting the buyer of the easement beyond mentioning it in the cahier des charges and referring to it in the acte de vente. The buyer appealed to the Cour de Cassation, who held that, in placing the burden of proof on the plaintiff, the Cour d'Appel had misapplied C.C. Art 1315, under which a party who is legally or contractually obliged to disclose information or to give counsel bears the burden of proof of the proper performance of said obligation. The court further held that by basing its ruling solely on the fact that the notary had not been aware of the buyer's plans, the Cour d'Appel had misapplied C.C. Art 1147, which provides that the party to a contract that has undertaken an obligation is liable for its non-performance (or its delayed performance) unless they can prove that the non-performance of the obligation was caused by an external factor that cannot be ascribed to them.

However, despite disagreeing with the way in which the Cour d'Appel reached its conclusion, the Cour de Cassation did in the end concur with it. Given 1) that the gas pipeline easement was mentioned in the cahier des charges, 2) that the *acte de vente* contained a clause whereby the buyer accepted all easements specified in the *cahier des charges*, 3) that the *cahier des charges* was appended to the *acte de vente*, 4) that the notary was not aware of the buyer's construction plans (and could therefore not be expected take special measures to ensure that they could be effectuated), the court held that the notary could not be faulted for not expressly mentioning the easement in the *acte de vente* itself. The Cour de Cassation thus ruled in favor of the notary.

The decision seems to hinge on two key factors. Firstly, the notary was not deemed to have had reason call particular attention to the disputed easement. Hence, it was enough that the easement was specified in one of the accessory documents, to which reference was made in the deed. Secondly, the authentication had taken place in the usual manner, namely at a meeting where the notary went through the deed and its clauses with the parties. The buyer had therefore had ample opportunity to check the accessory documents before the deed was signed.

Most instances of information disclosure refer to information that is in one way or another detrimental to one of the parties (or both), i.e. “bad news”. It is fairly straightforward to see the merits of disclosing such information. However, how should the opposite, i.e. “good news” be treated? As discussed in the foregoing (7.3.1), the important case RÅ 2006 ref 53 expressly requires the broker to disclose information notwithstanding that the broker may deem it to be advantageous and not detrimental. Could the same apply to notaries? Suppose the notary knows for a fact that, due to circumstances known to the notary but not the buyer, the buyer’s utility would be greater if they pursued alternative B instead of the intended alternative A. The loyal and diligent thing to do would seem to be to disclose the information to the buyer. It is also the course of action most

compatible with a counselor's role. However, even if that is so, and although the notary does have a legally imposed duty to counsel, that does not necessarily mean that the broker is obliged to disclose such information, such that non-disclosure would constitute an infraction of the professional duties. Again, the main objective of the notary's duty to counsel is to ensure the validity and efficacy of the transactions. In other words, the notary must ensure that the transaction is legally valid and that the desired goals of the parties can be fulfilled. To inform the parties of opportunities that would give *more* utility than the parties themselves have envisaged is to go beyond both validity and efficacy. Thus, it seems that the duty to disclose information is mainly aimed at information that constitutes "bad news".

However, just as the sparse coverage in the literature, this conclusion is contingent on the distinction between information disclosure and advice, and the definition given to the two terms. Again, information disclosure refers to facts. Informing the parties of the significance of those facts, or of the substance of a legal provision, constitutes advice and will be treated below (7.4). As will be seen, if the notary knows that alternative B is more fiscally advantageous than the intended alternative A, the notary must inform the concerned party. That, however, is advice not information disclosure.

It would not seem entirely mistaken to conclude that it is quite natural that less attention has been brought to the notary's duty to disclose facts than that to give advice. After all, notwithstanding that notaries may well be expertly informed about the real estate market, the notary cannot typically be expected to possess detailed knowledge of the particular property that is being sold. Nor does the notary's role in the transaction typically warrant visiting the property in person. Therefore, suing the notary for negligent counsel in the event of e.g. a hidden defect does not seem like the most intuitive course of action. This effect may be further boosted by the seller's liability under C.C. Art. 1625 and 1641-1648, which is aggravated where the seller was aware of the defect before the sale.[403] Furthermore, the seven-day cooling-off period prescribed by the *Loi SRU* (see above 7.1) presumably makes buyers even less inclined to turn to the notary in case of hidden defects, since they can default from the sale without consequence during that period. Where there are unacceptable defects, the buyer is free to go and has no reason to sue the notary for not disclosing information. Last, but certainly not least, given the nature of the notary's work it is presumably difficult from a procedural point of view to establish that the notary had in fact been aware of the disputed defect prior to the sale.

An important question is whether the scope of the duty to disclose information varies depending on how well-informed the buyer or seller is. In the case of the Swedish broker, the duty to disclose encompasses only information that the parties "may need". While case law clearly demonstrates that brokers should not overestimate their discretion, the applicable provision does leave the door ajar for a certain degree of relativity. Could it be that notaries have a similar window of relativity, such that the scope of the duty to disclose information is contingent on how well-informed the buyer or seller is? As to that, as will be demonstrated below (10.2.4), the main rule concerning *advice* is that the notary is *not* exonerated from the duty to give advice even if 1) the party in question is represented by a lawyer, 2) there is another notary involved in the transaction, or 3) the party in question is well-informed, e.g. because they are themselves a professional in the field. Only where it

[403] Under Art. 1645, if the seller was aware of the defect at the time of the sale, they will be liable for damages in addition to refunding the sale price.

is established that the client was already possessed the disputed information can the notary escape liability. And even then, it is not because the notary is not obliged to give the advice in question. The failure to give advice is *per se* a breach of the professional obligations. The reason the notary escapes liability where it is established that the client was already informed is that in such cases, there is no line of causation between the non-performance and the damage incurred.

Can the foregoing have direct bearing on the obligation to disclose facts? That question must be answered in the affirmative, not least because several of the instances that are labeled as "advice" here come quite close to constituting disclosure of facts. Again, I have simply chosen to refer to the act of informing the parties of e.g. the existence of a certain statutory provision as "advice" not information disclosure. Hence, it does not seem far-fetched to assume that the conclusions just mentioned are equally applicable to the disclosure of facts.

> **Cass. 1re Civ., Bull. I 1996 No 423 p. 294**[404] concerned a building lease that had been sold through a public auction officiated by notary M.X. on behest of the bankruptcy estate of a real estate firm. After the purchase, the buyer was dissatisfied with the existence of tenants in one of the units on the premises. The existence of tenants had not been mentioned in the *cahier des charges* drawn up by the notary, but had been mentioned in the estate inventory. The buyer sued the notary on two counts: firstly, seeking the cancellation of the sales contract, and secondly, demanding damages for negligent counsel, arguing that they had not been properly informed of the existence of tenants. The lower court and the Cour d'Appel both dismissed the motions and ruled in favor of the notary. The buyer appealed to the Cour de Cassation, citing CC Art. 1626, which obliges the seller to indemnify the buyer for losses suffered by the existence of encumbrances that were not declared prior to the sale.
>
> However, it did not escape the notice of the Cour de Cassation that the buyer was a retail firm active in the same municipality. Nor did the court fail to observe that the buyer had studied the estate inventory prior to the sale and that, in fact, it was by reading the estate inventory that the buyer had become aware of the existence of the building lease and made the decision to purchase it. Thus, the court found it established that the buyer must have been aware of the existence of tenants. Therefore, the court ruled in favor of the notary with respect to the cancellation of the sale as well as damages due to negligent counsel.

The reviewed case is a reminder that the notarial duty to counsel belongs to the realm of tort law. In its ruling, the Cour de Cassation does not claim that the notary was not obliged to provide the disputed information - it merely upholds the intuitive, reasonable and equitable principle that a party is not entitled to damages for not receiving information they already had. If the failure of another to provide information and/or counsel is to give rise to a right to indemnification, it is a natural prerequisite that that the non-performance placed the client in a position where they had less information than they were entitled to, and that said position resulted in a legal and/or financial loss. In a situation where the client already possesses the disputed information, the non-performance of the notary—while, it should be observed, per se constituting a breach of the notary's obligations—

[404] Ruling of November 26th, 1996.

simply cannot be the cause of the damages suffered by the client. Rather, it is in such a case the client's own failure to act upon the information that causes any damages suffered. In the building lease case it is debatable whether the buyer suffered any loss at all, given that they had known before the sale that the purchased lease was encumbered by tenancies. With a generous approach, it could be ventured that the buyer may have overpaid for the lease. If so, however, the excessive price is entirely self-inflicted.

10 The Duty to Advise

I have previously (3.3.) introduced the distinction between disclosing information and giving advice. Reiterating, the distinction is made by separating the fact from its significance. The fact itself is something that merely is; plain and simple. To inform another of a fact requires nothing more than possessing information of it in some form, making the person passing on the information no more than a mere conduit. However, plain information is often devoid of any meaning to the recipient unless they also know and understand its significance. That, in turn, presupposes knowledge of any and all relevant terms, how they are connected, and the context in which they exist. For this reason, the duty to counsel of both the Swedish broker and the French notary encompasses both information disclosure and advice. In practice, they are more often than not intertwined, rendering the distinction difficult to make. It is, however, of great importance to maintain the distinction.

Firstly, it is quite possible to pass on information without giving any regard to its significance. This can often be accomplished without the slightest intellectual effort, e.g. by handing out standardized written material such as brochures or other documents. In such instances, the person disclosing the information is truly acting as a mere conduit. If this is all that is done, then there is no guarantee whatsoever that the recipient has understood the information, much less its significance. Thus, there is no doubt that the concept of advice is separate from that of disclosing information. Therefore, the fact that the broker or notary has given the buyer or seller a certain piece of information, e.g. by handing over a document, does not mean that they have fulfilled their duty to advise. Secondly, from a normative point of view it is possible to hold that the broker or notary should be obliged to disclose information without also holding that they should be obliged to explain its significance. The merits of that position will be discussed later on. For now, it is sufficient to make and maintain the distinction between information disclosure and advice.

It can hardly be overlooked that the word advice carries the connotation of normativity. It implies that one person gives to another person a recommendation as to the adequate course of action in a given situation. That concept seems hard to reconcile with the broker's and the notary's impartiality: a piece of good advice to one party may well be to the detriment of the other. That is a problem per se, and will be discussed later on in this chapter. However, it is clear that advice is much more than that. By distinguishing between information and advice, the definition of advice is clear: *to ensure that the parties are aware of the significance of the facts and processes involved in the transaction*. And let it be said from the beginning: to do so, it is not sufficient to merely inquire of the parties if they have understood, or if they have any questions. Especially in the case of consumers, the parties cannot be expected to understand that there is something that requires understanding.

This chapter will examine how the broker and notary should or must go about making the parties aware of the facts and processes involved in the transaction, as well as the extent to which they are obliged to do so.

10.1 The Swedish Broker

As in the case of the duty to disclose information, the duty to advise laid down in 16 § EAA applies 1) to the extent required by "sound estate agency practice", 2) to advice the parties "may need", 3) concerning the property, and other matters pertaining to the sale. The reference to "sound estate agency practice" has been discussed in the previous section and need not be discussed further here. Here, as in the case of information disclosure, the relevant criterion of interpretation is the duty to exercise due care. The other two criteria are relevant and will be examined. However, as to 3), it would make no sense to focus on distinguishing between advice concerning the property on the one hand and concerning other matters on the other. It is a clear and established rule that the broker is obliged to give advice on legal, technical, and financial issues.[405] The main question that arises is ultimately how the broker is expected to act to comply with the provision. To answer that, one must address a few issues one at a time.

Firstly, what does it mean for a real estate broker to give advice? After all, a broker is not like an attorney-at-law or a medical doctor, whom it is natural to ask for guidance. The main reason a broker is commissioned is to find a counterpart for her principal. To complicate matters, the Swedish real estate broker must safeguard the interests of *both* parties. How can this be reconciled with giving advice, which carries the connotation of normativity? Therefore, it is necessary to define the concept of advice as given by a real estate broker.

Secondly, within what fields of knowledge must the broker give advice? Any lawyer will shy away from giving advice in fields of law where they are not proficient; many would decline to give advice within fields of law where they are not expertly versed. Within what fields is the broker expected to be proficient enough to give advice?

Thirdly, in close connection to the latter issue, what level of expertise is the broker expected to possess, and how expert and thorough must the advice be? One could of course answer simple questions, such as whether the sales contract must be in writing in order to be valid (which in Sweden would be a yes; 4:1 LC and 6:4 TOA), and thus nominally satisfy the requirement to give legal advice. The importance of answering such questions should not be overlooked, and there is no reason to suggest that doing so does not constitute good and proper legal advice. However, it is evident that real estate conveyances bring more complex issues to the fore. The question is, what degree of complexity is the broker obliged to manage? As any professional—jurist or gentile—can attest to, it is impossible to be an expert in every conceivable field. It is even very difficult to be an expert in every subfield of a given field. There will inevitably be a trade-off between width and depth. As to that, the fate of the broker is sealed both by the very nature of brokerage, and by the undisputed requirement to give advice on legal, technical, and financial issues: the broker is a generalist. Thus, it is logical that she cannot be expected to possess the same expert knowledge within, for instance, construction technology as would a construction engineer. At the same time, lest the duty to advise be rendered void of all meaning, it cannot be limited to trivial and superficial questions alone. Hence, it is necessary to discuss where the line should be drawn.

As previously stated, the 16 § EAA contains three specific obligations besides the general obligations to disclose information and give advice. The first is that to strive to ensure that the seller, prior to the

[405] Prop. 1983/84:16, p. 37.

sale, provides such information concerning the property as can be assumed to be of importance to the buyer. The second specific obligation is to strive to ensure that, prior to the sale, the buyer inspects the property, whether on their own or with the help of a third party. The third specific obligation is to to inform the buyer in writing of their duty to inspect the property. These obligations, which amount to specifically prescribed—in other words mandatory—advice, will be examined in more detail in the final subsection.

10.1.1 The Concept of Advice

16 § EAA lays down a duty to advise but says nothing of how it is to be accomplished. The *travaux préparatoires* of the 1984 EAA, which are equally applicable to the current EAA since the provision has survived subsequent legislation, do not provide any guidance. All that is said is that the broker's obligation to advise encompasses legal, technical, and financial issues. The scope and nature of the obligation, it is held, must be determined on a case-by-case basis with reference to "sound estate agency practice".[406] That is hardly an acceptable state of affairs as it leaves scant guidance as to the broker's duties and, consequently, the consumer's rights.

Perhaps the problem need not be so great. First of all, the due care duty laid down in 8 § calls for the broker to act diligently and prudently so as to safeguard the interests of the buyer and seller. To that end, the broker must be both active and proactive, remaining alert at all times to potential problems. Where the broker perceives a potential problem, she must take appropriate measures. The most natural measure is of course to alert the parties of the problem.

In **FMN 4-2192-08**, reviewed above (8.1.2), the broker had been informed by the seller that the issue of conversion from tenant-ownership homes to separate properties had been discussed, and that the seller would keep the broker posted if any decision was taken. Thus, the broker knew that there was some level of probability that a conversion would eventually take place. Given the far-reaching consequences in the event of a conversion, the information was of particular importance to the buyer. Now, the issue at hand in the proceedings against the broker was not only whether it was acceptable for the broker not to have ascertained whether a conversion was imminent. The FMN did not find it established that the broker had known that a conversion was decided. As a result, it could not issue a sanction for the failure to inform the buyer of the plans. From that line of reasoning, it is evident that if the broker had been aware of the plans, it would have been incumbent on her to disclose those plans to the buyer.

Could that, however, really be considered sufficient? In a situation where a process such as a conversion to separate property is imminent, can it really be considered enough for the broker to merely notify the buyer of that fact? Again, every interpretation must be made against the backdrop of the due care duty. Is it diligent and prudent to merely pass on the information, without explaining its significance? The only logical answer is no. The buyer – especially where he or she is a consumer, which is always the case when brokering homes – can hardly be expected to understand the legal and financial implications of a conversion. To satisfy the due care duty, the broker must therefore explain what a conversion is and what its consequences are. As will be demonstrated below (10.1.4),

[406] Prop. 1983/84:16, p. 37.

the broker is allowed a certain degree of relativity as to the required level of complexity. Every aspect of every issue involved in a conversion need therefore not be explained in expert detail. However, as will likewise be demonstrated, the degree of relativity is nowhere near as high as brokers may be led to believe. Thus, the safest conclusion is that the broker must explain all consequences.

The foregoing is just as applicable in cases where the broker is not certain that a conversion is imminent, but where she knows that it is possible or probable. After all, if the broker knows that there is a possibility that a change as great as a conversion may take place, then she knows that the buyer stands a risk that it takes place. To be blunt, that risk affects the market value of the property negatively. Therefore, the buyer must be informed. This also follows from the *travaux préparatoires*.[407] Arguably, the more probable it is that the conversion will take place, the more important it is that the broker explain the risks. If it is highly probable, perhaps almost certain, that it will take place, it would be patently negligent not to advise the buyer accordingly. Conversely, if in a given case the probability that a conversion will take place, then it might be suggested that the broker need not place as much emphasis on advising the buyer on the issues involved in that. After all, virtually anything is possible in theory, but few would deem it reasonable to demand that the broker give advice on all conceivable scenarios, including those that are highly improbable.

The problem is where to draw the line. In the aforementioned conversion case, the majority of the FMN accepted the broker's argument that she had been told by the seller, who was on the board of the tenant-ownership association, that no decisions had been made. The majority held that the broker had been entitled to trust the seller in that regard. That is a position that cannot be accepted. The seller is by definition partial, and can first and foremost be trusted to possess the universal human traits of self-interest short-sightedness. In cases of conversion of tenant-ownerships, there will always be those who are opposed to the change. In the reviewed case, it is readily understood that the seller was looking for a quick getaway; how else can one explain the fact that a member of the association board—who cannot possibly have been unaware of the plans, since a conversion is a process that takes at least several months, where the formal decision is only taken in the final steps of the process—puts out their home for sale just a few months before the conversion? Of course, the broker had no chance to *know* all of that with certainty, but given the nature of the information she should—from an objective point of view—have suspected that the seller was being less than truthful. In fact, given the gravity of the consequences in the event of a conversion, the diligent and prudent thing to do would appear to be to investigate the matter even if the seller seems trustworthy.

As will be demonstrated in Chapter 11, the drawing up of contracts is close intertwined with advice. That is no surprise since entering contracts is by definition the act of assuming rights and obligations—in other words, of exposing oneself to liability. There are practically endless options and variations, all of which have different consequences that the parties may not be able to foresee or understand. It is therefore not enough for the broker to draw up a contract that is adequate and adapted to the situation at hand. She must also ensure that the parties have *understood* the contract.

[407] Prop. 1983/84:16, p. 14. The actual sentence mentions physical defects that he broker suspects. However, since no distinction is otherwise made between information concerning the property and information on other issues, there is no reason to believe that anything else was intended in the case of "other issues", to which category conversion belongs.

LR 8600-09[408] concerned the sale of a tenant-ownership apartment. The broker had presented the parties with a pre-made standard contract that included a membership clause. Said clause entitled the seller, in the event that the buyer was refused membership in the association, to terminate the contract no later than seven days after being notified of the refusal.

The clause must be read against the backdrop of the following. Under 6:5 of the Tenant Ownership Act, a conveyance of a tenant ownership home is invalid if the buyer is refused membership in the tenant ownership association. Under 2:10 of the same act, the buyer is entitled to appeal a negative membership decision to the Tenancy Board. That decision, in turn, can be appealed to the Svea Court of Appeals; 11:3 TOA. 2:3 TOA prohibits tenant ownership associations from refusing membership where the applicant satisfies the association's regulations and it is reasonable to demand that the applicant be accepted as member. Since the acceptable grounds for refusing membership are few[409], appeals are relatively uncommon, but they do occur. The procedure in the Tenancy Board can potentially take several months, during which the validity of the sale is uncertain.

In her answer before the FMN, the broker claimed to have explained the contents of all contract clauses and that both parties had declared themselves satisfied. The FMN did not go so far as to denounce the use of membership clauses altogether. However, the FMN held that where the contract deviates from important applicable provisions, it is incumbent on the broker to explain not only the contents and implications of the clauses, but also the extent to which, and in what way, they deviate from the law. For the failure to do so, the broker was issued a warning.

The broker appealed the decision to the Administrative Court of First Instance. The case was decided after oral proceedings. In its ruling, the court cited Victorin and Grauers et al. and held that the right to appeal membership refusals could be contracted out. The court went on to observe that the broker has an independent responsibility for the content and wording of the contracts, and that the fact that the employer had recommended the clause at hand did not in itself exonerate the broker from said responsibility. Further, the court emphasized that the clause at hand had been included in the contract at the initiative of the broker, not the buyer or seller. Therefore, held the court, it was of particular importance for the broker to explain the full implications of the clause. The testimonies revealed that that the broker had explained the clause's meaning, but not the fact that it deviated from applicable legal provisions. Thus, the broker had not explained to the parties the *full* meaning of the clause. On these grounds, the court found that the broker had acted in breach of sound estate agency practice. However, the court also found two mitigating factors. Firstly, the clause at hand was a standard clause that had been widely used by brokers for many years. Secondly, from the facts of the case it was unlikely

[408] Ruling of December 30th, 2009.

[409] As a practical matter, only documented indebtedness that can be expected to cause problems with membership fee payments, or documented grave neighborhood disturbances, are acceptable grounds for refusing membership. The association is also entitled to deny membership if the applicant has no intention of taking residence in the apartment/home. See Victorin, pp. 145-151 and Tegelberg in Grauers et al., pp. 172-175.

that the buyer would be denied membership in the association. The court found that infraction was minor and waived the sanction, overturning the FMN:s decision in that part.

The case highlights just how intertwined the acts of drawing up of contracts and of giving advice are. In fact, when it comes to contracts, the "handiwork" aspect and the advice aspect are so interconnected that separating them dilutes the analysis. We will therefore return to the membership clause case in chapter 11. For now, three conclusions can be drawn. Firstly, the broker's duty to advise entails ensuring that the parties have understood the sales contract and any other document involved in the transaction. Secondly, the duty entails ensuring that the parties understand not only the immediate meaning of the clauses in the contract, but also their implications. Doing so involves explaining the context—primarily the legal context. Thirdly, the fact that the parties have declared themselves content and/or do not have any further questions is no guarantee that the duty to advise is fulfilled.

Advice can often take on the meaning of performing a service, such as drafting a contract or other kind of document, or to assist with a tax return. As to that, advice under 8 and 16 §§ EAA has the purpose of informing and guiding the parties, not to perform tasks for them. 21 §, which is the subject matter of chapter 11, obliges brokers to draw up all necessary documents. However, the documents envisaged are those that are necessary to accomplish the conveyance in an adequate manner, such as the sales contract, the deed, and a written spousal consent. Drawing up those documents is a natural part of real estate brokerage. Beyond that, however, the broker is under no obligation to perform services unless she explicitly undertakes to do so. To name a good example, I will argue in 10.1.3 that tax law is one of the fields of law where the broker is obliged to give advice. However, giving advice in the sense of explaining and informing is not the same as actually calculating capital gains or filling in tax returns. Those services are not an intrinsic part of the brokerage agreement, and the broker is therefore not required to perform them unless a separate agreement to that effect is entered.

In sum, the duty to advise means to ensure that the parties are informed of the context and consequences of the facts and processes that are involved in the transaction. Exactly what those facts and processes are will of course vary. Some problems arise in all transactions, others only in some. Some may arise seldom enough that the broker may believe them peripheral, perhaps even unimportant. That is a flawed conclusion. It is of no consequence whether a particular problem arises in every transaction or only in one out of a hundred: where it does arise, the broker must deal with it by advising the parties accordingly.

10.1.2 Advice the Parties "May Need"

As is the case with the duty to disclose information, the duty to advise bears a trait of relativity: it is limited to advice the buyer or seller "may need". It should be observed that, under 4 § EAA, the broker's obligations towards the parties can be contracted out where they are acting in a professional capacity. Therefore, the situation need not arise that the broker is obliged by law to give advice that is patently unnecessary since the clients are professionals in the field. However, it should also be observed that this applies only if the parties are acting in a professional capacity. If a real

estate professional—e.g. a broker, a construction engineer or a lawyer specialized in real estate law—seeks to sell or purchase a home, they are not acting in a professional capacity. Consequently, the broker is bound to her duty to advise even in such cases. Naturally, it may occur that a particular piece of advice is unnecessary due to the client's professional knowledge. However, the broker is not expunged from the obligation to ensure that the buyer and seller have understood the full implications of the instant transaction. Therefore, it would be ill-advised for the broker to assume that she need not give advice simply because the concerned party is a professional in the field.

What advice, then, does the buyer or seller need in a transaction? To answer that question, the following must be understood. The due care duty calls for the broker to act diligently and prudently *so as to safeguard the interests of the buyer and seller.* Similarly, the duty to advise applies to advice *the buyer and seller* may need. It is clear that it is the interests of the individual buyer and seller in the individual transaction that must be safeguarded. Thus, the scope and nature of the advice must be adapted to the transaction at hand. As to that, there are both "constants" and "variables" in each transaction. The "constants" are the intrinsic problems that arise in all conveyances, e.g. issues concerning the transfer of ownership. The "variables" can be divided into three categories. The first consists in the parties themselves, with their specific goals, preferences, and needs. The second consists in the problems that arise in the specific *kind* of conveyance that is at hand. For instance, the sale of tenant ownership is governed by the Sales Act and not the Land Code; the advice must be adapted accordingly. The rules on mortgages are also different in the case of tenant ownership homes. The third and final category consists in the problems that arise in the individual conveyance, irrespective of how they arise. As will be demonstrated, the broker may give rise to such issues with the solutions and services she presents.

10.1.2.1 The "constants"

The conveyance of real estate or a tenant ownership home (or, indeed, any other kind of property that a real estate may broker) entails a number of intrinsic problems. Again, a perfect example is the legal issues regarding the transfer of ownership. How ownership is transferred is therefore an issue that is always of importance. As to that, real estate and tenant ownership homes both share the trait that the validity of the conveyances hinges on a written contract; 4:1 LC and 6:4 TOA. Moreover, while real estate and tenant ownership homes are governed by different statutes with different rules, there are in both cases rules that govern the rights and obligations of the buyer and seller in relation to each other. It is clear that explaining those rules to the parties is a central obligation. This follows logically from the duty to give such advice as the parties may need: if a particular problem is intrinsic to the transaction, then consequently it is an issue on which the parties need advice. Thus, instructing the parties as to their rights and obligations under the Land Code or Sales Act is a key obligation in every transaction.

It should be observed that merely informing the parties *in abstracto* is not necessarily enough, since the advice must be tailored to the transaction at hand. Thus, the mere handing out of brochures or other standardized documents does not necessarily suffice. This is not to say, however, that the broker must explain every single applicable provision in every single conveyance. Observe the word "necessarily": buyers and sellers are not all the same and not everybody needs everything explained in detail in order to understand it. This will be discussed further in 10.1.2.2 below.

Taxes are another intrinsic issue that arises in every single conveyance. As will be demonstrated and discussed below (10.1.3), tax advice has been, and is still by some, regarded as something alien to the work of real estate brokers. That is a somewhat surprising view given that every conveyance entails fiscal consequences for the parties, and given the duty to give advice that the parties *may need*. It is no bold guess that many buyers and sellers do need tax advice. This is confirmed by the results to the questions concerning tax advice in my 2010 survey. On the question "How often does it occur that you answer questions on fiscal matters?", 25 % answered ">90 % of all conveyances", 29 % answered "61-90 % of all conveyances", and 21 % answered "41-60 % of all conveyances". Only 7 % answered that it never occurs or that it occurs less often than in 10 % of all conveyances, and only 1 % answered that it never occurs. It seems a reasonable and prudent interpretation that brokers do in fact receive questions concerning taxes. That is a strong suggestion that tax issues are in fact such that the parties "may need" advice on them.[410]

10.1.2.2 The Kind of Conveyance at Hand

Different kinds of transactions bring different statutes and rules to the fore. That is a simple fact and hardly to be disputed. It has also been established that the broker must adapt her advice to the transaction at hand. It follows that she must adapt her advice to the kind of transaction at hand. While this may seem self-evident, it can and does create problems for brokers.

A perfect example of different rules governing different kinds of transactions is the fact that the sale of tenant ownership homes is governed by the Sales Act, not the Land Code as in the case of real estate. The Sales Act is not really modeled to apply to tenant ownerships, but it is nonetheless the applicable statute. Therefore, its provisions constitute applicable law to which the parties must relate. Granted, the provisions of the Sales Act can be contracted out (3 § SA), but doing so still requires understanding the statute's provisions.

Anecdotal evidence, as well as the many and manifold horrendously worded clauses found in sales contracts, strongly suggest that there are misconceptions among brokers as to the applicable statute in general, and the contracting parties' responsibility for defects in particular. The two most common misconceptions, which would seem mutually exclusive, are: 1) that, since the Sales Act is not modeled for tenant ownership homes, the provisions of the Land Code are applied analogically and 2) that the rules regarding the parties' responsibility for defects are more or less the same in the Sales Act as in the Land Code. As to the former, it has been suggested in the literature that it would be appropriate to at least consider the provisions in Chapter 4 of the Land Code.[411] There is also vague support in the *traxaux préparatoires* of the Sales Act for the usage in some form of other rules than those of the Sales Act, in situations where it would be appropriate to do so given the particular character of the goods for sale.[412] The issue was also tried in **NJA 1998 s. 792**, which concerned the sale of a tenant ownership apartment that turned out to be marred by a cockroach infestation. The Supreme Court majority held that it was appropriate to compare the provisions concerning defects under the Sale Act with those of the Land Code. However, after a brief comparison—where it was

[410] To hold otherwise would be tantamount to saying that buyers and sellers regularly accost brokers with fiscal questions that they do not really need answered.
[411] Victorin & Flodin, pp. 167-168; cf. Tegelberg in Grauers P.H. et al., p. 146.
[412] Prop. 1988/89:76, p. 61.

observed that the Land Code, as opposed to the Sales Act, did not grant the seller the right to remedy a defect—the court based its ruling entirely on the Sales Act.[413]

The most compelling argument against the usage of the Land Code on tenant ownership homes, however, is the Sales Act itself: 1 § SA stipulates that the statute is applicable to *lös egendom*; i.e. all property that is not real estate. The second paragraph of the same provision exempts certain types of property, but tenant ownership homes are not one of them. If the legislator wished the Land Code to be applicable to tenant ownership homes—whether directly or otherwise—the paragraph would and should have made explicit reference to them. Furthermore, while it is true that it may appear arbitrary and unforeseeable to home buyers that different rules should apply depending on whether the home constitutes real estate or a tenant ownership home—which can admittedly be quite confusing especially in the case of row houses since they can be either separate properties or tenant ownership homes—it must be borne in mind that the tenant ownership right does not entail ownership to the home itself, let alone the property, but rather to a share in the association that owns the home. Thus, for a number of reasons, the only sound conclusion is that the Sales Act is the sole applicable statute. An analogical application of the Land Code that would set aside a right conferred on either contracting party by the Sales Act must be regarded as unthinkable. Analogical application is only a viable option where there are no rules in the applicable statute.[414]

As for the notion that the rules of the Sales Act are similar or even identical to those in the Land Code, there is no room here to elaborate at length on the similarities and differences of the two statutes. Let it just be said that the two regimes are quite different, not least with respect to the buyer's duty to inspect; 4:19 LC and 20 § SA respectively. Under the Land Code, the allocation of responsibility for physical defects is determined by what a reasonably knowledgeable layperson could have discovered at a suitably thorough inspection; 4:19 LC. This rule is quite harsh and is called the buyer's duty to inspect. Thus, responsibility for defects is split between the parties such that the seller is liable for "hidden" defects whereas the buyer is responsible for "discoverable" defects. After the landmark ruling **NJA 2007 s. 86**, sellers can become liable for "discoverable" defects if they have acted in bad faith. As described in the foregoing (9.1.6), the provisions of the Sales Act are quite different in that regard. The broker must of course advise the parties accordingly. For instance, the seller should be advised that unless they explicitly invite the buyer to inspect the premises, they may face liability.[415] As a practical matter, brokers use standardized documents such as the mandatory unit description as a means to convey information. In the software packages used by brokers, there are standard phrases such as "[t]he seller invites the buyer to inspect the tenant ownership home" or "[t]he buyer is invited to inspect the tenant ownership home". These are regularly used with the aim

[413] One judge issued a dissenting opinion, arguing that the buyer should not be allowed to have one part of the dispute settled under the Sales Act and another under the Land Code, as it suited them. Therefore, held the dissenting judge, the case should be settled based on the Sales Act alone.

[414] For instance, Chapter 2 of the Land Code can be used analogically to determine what the seller is entitled to take with them and what is included in the sale. Doing so would not strip either party of any rights nor create or expunge any obligations, since the Sales Act provides scant guidance as to what fixtures or other movables are included in the sale.

[415] It is sometimes held that the fact that the seller allows for showings, whether private or "open house", should be considered an implicit invitation that activates the buyer's duty to inspect under 20 § SA; Tegelberg, pp. 184-185. That is by no means self-evident. Even if one accepts that view, however, the buyer only loses the right to cite defects that they "should" have discovered. If the only inspection the buyer has conducted is to visit an open house showing, then the "duty to inspect" can arguably only encompass defects they could reasonably have discovered at the open house showing.

of activating the buyer's duty to inspect. It could be argued that the latter phrase does not suffice since it does not explicitly state that the seller is inviting the buyer to inspect, which is a prerequisite under 20 § SA. Either way, for the invitation to have the intended effect, the buyer must receive the invitation in good time so that they can exercise the duty to inspect. Again, the duty to inspect only includes defects that the buyer *should* have discovered. Consequently, even if the duty to inspect is activated, the seller will still be liable for defects that would require a more thorough inspection to discover than the buyer has been afforded. In **NJA 1996 s. 598**, the Supreme Court held that the assessment of what the buyer should have observed must be made with due regard to the thoroughness of the conducted inspection and what practical possibility the buyer, given their knowledge and experience, has had to discover the defect at issue. Thus, the buyer's duty to inspect under the Sales Act centers on the buyer's ability to discover the defect. It is a subjective standard, as opposed to the objective standard of the Land Code.[416]

It is clear from the foregoing that the issue of the parties' responsibility for defects in tenant ownership homes is of great importance to the broker's duty to advise. More importantly, it highlights the fact that the broker cannot simply rely on standardized documents.

10.1.2.3 Transaction-Specific Problems

The most straightforward example of transaction-specific problems is where the buyer or seller approaches the broker with a problem and asks for information or advice. It should raise no eyebrows to hold that the broker is obliged to advise the parties accordingly. Suppose, for instance, that the seller is the estate of a deceased person. In such cases, the seller usually wants a liability disclaimer for defects on the property to escape from the 10-year liability under the Land Code. As will be demonstrated in Chapter 11, whether the clause is ultimately to be included in the sales contract is for the buyer and seller to negotiate. However, to do so they must understand the significance of a liability disclaimer. Therefore, the broker must explain the significance of the seller's wish to the buyer, so that they can evaluate it and act accordingly. For instance, a property with a liability disclaimer typically warrants a lower sale price.

Another good example is where the buyer cannot, or does not wish to, conduct an inspection of the property before the sale. Especially when the market is hot, the buyer may not wish to spend money to hire a technical expert unless they are certain that the seller will not sell the property to another buyer. Due to the requirements of 4:1 LC, the only way to be certain of that is to sign a sales contract first. Under such circumstances, however, the buyer misses the opportunity to negotiate a lower sale price, or abandon the purchase entirely, in the event of defects. To remedy that, one can include a contingency clause—an inspection clause—in the contract. As will be seen in Chapter 11, the broker is required to suggest an inspection clause in such situation.

[416] Victorin & Flodin, p. 175; however, Folke Grauers holds that such an interpretation would create an unwarranted difference between the sale of real estate and tenant ownership homes. Grauers also cites NJA 1998 s. 792 and holds that the ruling, at least, it does not gainsay the notion of an objective standard for the duty to inspect; Grauers 2010, pp. 215-216.

The land lease case reviewed above (9.1.4) is another good example of how the broker must adapt to the particular situation at hand. In that case, the broker read the land lease agreement which stipulated that the right must not be recorded in the land register. The courts therefore held that the broker should have understood that the buyer would experience difficulties in using the land lease as security. Combined with the high probability that the buyer would need to borrow money, for which security would be needed, the courts found the broker negligent in not explaining the risks to the buyer. Explaining the risks entails, *inter alia*, understanding and applying applicable law. Therefore, it goes beyond the disclosure of facts and constitutes advice.

A more complex and problematic situation is where the broker brings problems to the fore with her service packages, standard clauses, standard documents, or even her advice. Since the duty to advise means to ensure that both buyer and seller have understood the significance of the facts and processes in the transaction, there can be no other conclusion than that the broker is obliged to explain the context and consequences of the measures she takes. Herein lies the danger with standardized documents and routine processes: while it is straightforward enough to see that one must explain the consequences of e.g. a suggested course of action where said suggestion comes from oneself with the intention of solving problems perceived in the transaction at hand, the connection appears somewhat more opaque when it comes to measures taken in standardized documents. In the aforementioned membership clause case (10.1.1), the contract clause at issue was a standard clause that was available to the broker in the software package supplied and used by her employer. The clause had been used in the marketplace for many years with what appears to be the good intention of solving a (perceived) problem. The broker did not for a moment question the legal implications of the clause, assuming instead that it was to the benefit of all parties involved. As the case demonstrates—and as can be concluded from the applicable provisions—her assumption was incorrect. Both the FMN and the court held that the broker should have explained the significance of the clause—not only its immediate contents but also the fact that it was tantamount to contracting out the buyer's statutory right to appeal decision to deny them membership in the association.

A yet more complex issue is that of pre-inspected properties, a phenomenon that has become increasingly common. Typically, such pre-inspections are undertaken upon suggestion from the broker, as a part of a package solution comprising an inspection and an insurance policy. While the specific conditions may vary, the general idea is the following. The seller purchases an inspection of the property. Based on the inspection report, the seller purchases an insurance policy covering hidden defects. In some instances, the insurance policy is transferred to the buyer upon sale, whereas in others the seller remains the policy holder. The package is marketed by brokerage firms as a safety for sellers and buyers alike, the logic being that the inspection reveals existing defects on the property, thereby facilitating a rational purchase decision.[417] Where the insurance policy is subsequently transferred to the buyer, the marketing also stresses the advantage for both parties of the buyer having the insurance company as counterpart in the event of hidden defects, rather than dealing with the seller. The seller, it is alleged, can move on without worrying about liability for defects, whereas the buyer is relieved from the onus of suing the seller who may not have the monetary means in any case.

[417] That position can certainly be challenged. Anecdotal evidence suggests that buyers, faced with the inspection reports with all its indications of defects and possible defects, are often disproportionately worried by the information.

There are at least two serious objections to be raised against the foregoing. Firstly, the inspections offered on the market very seldom—in fact, only just short of never—cover all parts of the property. Electrical installations and ventilation installations, for instance, are practically always omitted from the inspection. While the brokerage firms are usually clear about the scope of the inspection, it would seem less than prudent to market the pre-inspection package in a way that suggests it is a ticket for the seller to escape liability. Granted, the buyer's duty to inspect under 4:19 LC does not encompass electrical installations unless in the case at hand the buyer has reason to suspect that the electrical installations are in some way unsatisfactory.[418] However, that is all the more reason not to give sellers the impression that their liability is mitigated by the inspection. Secondly, the insurance policy does not expunge the seller's liability under Chapter 4 of the Land Code. In the event of defects covered by the insurance policy, the excess is paid by the buyer. Since the excess cost is incurred as a result of defects for which the seller is liable, the seller is liable for that cost.[419] Granted, the excess is typically nowhere near the total cost for the defects themselves. However, it needs to be stressed, again, that the seller's liability is not completely expunged by merely purchasing a liability insurance policy.

The latter argument is even more relevant when one raises the question of how the insurance company's assessment should be understood. Should the assessment of the insurance company as to whether or not a certain defect falls within the liability of the seller under the Land Code be taken as facts? After all, an insurance company is not an impartial judicial body. Its purpose is not to settle disputes fairly under the law, but to make a profit by means of a positive ratio between premiums received and indemnifications paid. This creates considerable bias, since the insurance company has strong incentives to deem the damage suffered by the policy holder as falling outside the scope of the insurance. In the case of liability insurances, the insurance company will thus be biased towards deeming the defects as falling outside the scope of the seller's liability under the Land Code. Under such circumstances, it is conceivable that in a particular case the seller is in fact liable under the Land Code despite the fact that the insurance company has reached the opposite conclusion.

> **FMN 2009-12-15:9** concerned the sale of a pre-inspected property. The buyer reported the broker to the FMN alleging that the broker had given incorrect information as to the nature of the conducted inspection, and that the broker had failed to disclose that the physical condition of the property was worse than the buyer was entitled to inspect. The broker objected that she had informed the buyer on at least two occasions of their extensive duty to inspect, as well as of the fact that an inspection by a professional inspector may not suffice to fulfill said duty to inspect. The broker further alleged that the buyer had had access to the inspection report at least a month before signing the sales contract, and that she had urged the buyer to contact the responsible inspector with any questions regarding the report. Finally, the broker claimed to have informed the buyer of the possibility to conduct an inspection of their own.

[418] Grauers, F. 2012, pp. 212-213.

[419] Some insurance policies cover certain defects for which the buyer bears the risk. Excess costs emanating from such defects fall outside the scope of the seller's liability. Where insurance claims concern both defects for which the seller is liable *and* defects for which the seller is not liable, the seller is only liable for the former category's share of the total costs.

The FMN observed that the broker has a general responsibility to inform the contracting parties of the applicable provisions in the Land Code governing the allocation of responsibility for defects, including the buyer's duty to inspect. The FMN further held that, where the property has been inspected, it is incumbent on the broker to ensure that the buyer has both read and understood the inspection report. In the case at hand, it was not found unequivocally established that the broker had failed in her duties, and the broker was acquitted.

In **FMN 2010-03-25:8**, which also concerned a pre-inspected property, the inspection report indicated microbial fouling on the inside of the roof panel and moisture damage in the attic. The report contained a recommendation of further technical inspection to ascertain the cause of said damages. No such inspection was undertaken. After taking possession, the buyers became aware of the dire consequences of the defects; the estimated repair costs amounted to roughly SEK 750,000. In their report to the FMN, the buyers alleged that the broker had not explained to them the full technical and legal implications of the defects and the indications in the inspection report. The buyer further held that the broker had been obliged to ensure that the sellers disclosed all facts known to them, and that the broker had failed in this obligation. Finally, the buyer held that, in view of the poor condition of the house, and of the (alleged) fact that the broker had withheld important information, the broker had brokered the property at a price that was obviously disproportionate to the market value.

The FMN stressed the broker's obligation to inform the parties of their rights and obligations under the Land Code with respect to defects, in particular the buyer's duty to inspect. From this obligation, held the FMN, follows an obligation on the part of the broker to inform the parties that a liability insurance policy may affect the allocation of responsibility between buyer and seller. The FMN further held that it is incumbent on the broker to inform the parties of the scope of the insurance policy and to ascertain that the buyer has both read and understood the inspection report that underpins the scope of the insurance policy. Finally, the FMN held that since the broker is required by law to strive to ensure that the buyer inspects the property before the sale, it is of particular importance that the buyer understand the significance of the inspection report with respect to the scope of the insurance policy, the buyer's duty to inspect, and whether there is in the particular case a need for further inspection. Therefore, it is incumbent on the broker to inform the buyer of the scope of their duty to inspect in the transaction at hand, taken into account the remarks in the inspection report as well as the scope of the liability insurance policy.

In the instant case, the broker claimed to have provided the buyer, at the showing of the property, with a copy of the property report, the inspection report, and the written disclosure list (*frågelista*) from the seller. He further claimed to have informed the buyers verbally of their rights and obligations. The FMN did not find it unequivocally established that the broker had failed in his duties

10.1.3 The Subject Matter

As previously mentioned, the duty to advise encompasses legal, technical, and financial issues. It follows from both logic and the wording of 16 § that this cannot mean *all* legal, technical, and financial issues - only issues that are connected to the conveyance. The problem is, that is still quite a large scope. The fields of law of importance include contract law, real estate law, family law, and tax law. Real estate law, here, should be understood as any and all laws that regulate real estate and the other kinds of property—most notably tenant ownership homes—that are or could be brokered. Can the broker really be expected to be proficient in all of them? The prudent answer would be yes.

As to the rules governing the sale itself—i.e. the relevant parts of the Land Code, Tenant Ownership Act and Sales Act—it has already been established in the foregoing (10.1.2) that the broker must be proficient enough to give adequate advice regarding the parties' rights and obligations. The obligation applies not only to the *a priori* legal situation, but also to the consequences of the particular facts and circumstances in the transaction at hand. For instance, as will be demonstrated in Chapter 11, the obligation to draw up adequate contract clauses is quite harsh. To adhere to it, it is not sufficient to merely possess working knowledge; it requires knowing the parties' rights and obligations under the relevant statutes and how they are affected by the clauses that are used.

It is no bold claim that the subject matter of the information encompassed by the duty to verify under 17 § EAA falls within the scope of the duty to advise. For instance, **FMN 2011-05-25:7**, reviewed above (8.1.1), the FMN held that it had been incumbent on the broker explain the consequences of selling without proper spousal consent. A similar statement was made in **FMN 2011-31-31:17**.

> The property in **FMN 2011-03-31:17** was the marital property of the seller, whose divorce was not yet finished at the time of the sale. The seller informed the broker before the sale that the couple was divorced but that the division of marital property had not yet taken place. The broker tried without success to obtain the other spouse's consent. He then contacted a lawyer who stated that since the broker's client was the sole owner of the property, the sale could proceed without spousal consent as long as the purchase sum was deposited in a special bank account and included in the subsequent property division. The property was sold without the consent of the spouse, who reported the broker to the FMN. The FMN held that it is incumbent on the broker early in the brokerage process to verify whether spouse's consent is necessary and, if so, whether such consent has been given. The FMN further held that, where the other spouse has not given their consent, the broker must inform the client of the possibility to obtain the district court's permission to sell without spousal consent, and of the consequences of selling the property without proper consent. With those remarks, the broker was acquitted.

The decision is unfortunate. The broker admitted to knowing before the sale that the property was marital property and that property division had not yet taken place. Thus, the broker should have realized that selling the property without spousal consent could result in the sale being declared null and void under 7:9 MC, which would of course be to the detriment of the buyer. Even if the sale were not declared void, the buyer would still suffer injuries. Without written spousal consent, a buyer will not be granted full title registration until the three-month statute of limitations for

annulment had lapsed; 20:7 LC. In the meantime, the buyer would not be able to mortgage the property which would in all probability lead to higher interest costs for that period of time or, at worst, to being denied the loan altogether.[420] Thus, in the interest of the buyer—and the spouse, though they were neither buyer nor seller—it was simply unacceptable for the broker to continue with the sale.

The right course of action would be to try to obtain consent and, failing that, to discontinue the sale unless consent or court permission was obtained. Here, the broker must safeguard the interests of the buyer who stands the risk of losing the property if the sale is declared invalid. Even should the spouse not sue under 7:9 MC, the buyer will have to wait for three months to obtain full title registration, before which the property cannot be mortgaged. The only possible conclusion is that the broker in the case at hand failed in their duty to exercise due care. The lawyer's advice cannot be seen as anything other than negligent, and the provisions governing spousal consent are such that the broker is required to master them. A warning would have been the appropriate response on the part of the FMN.

Similarly, the broker must give both buyer and seller adequate advice concerning other restrictions on the right of disposal, such as pre-emption rights, as well as encumbrances. The same goes for rights that are to the benefit of the property, e.g. easements. Suppose, for instance, that the broker is brokering a property that is the dominant property in a voluntary easement. Suppose the easement is not registered. The owner of the dominant property is entitled under 7:10 LC to have the right recorded in the land register. If the easement is not recorded, it may not survive a change in ownership on the servient property (see above 8.1.1). The diligent and prudent course of action would seem to be for the broker to inform the buyer of the legal reality and advise them to have the easement recorded in the land register. In other words, that is what the duty to advise compels the broker to do.

As previously stated (10.1.2), taxes are an intrinsic issue in real estate conveyances. There is simply no way of escaping the presence of the capital gains tax, the property tax, the stamp duty, and the deductibility of mortgage interests. Nor can it be denied that these issues are of great importance to the parties. Thus, tax advice on these issues is by definition advice that the parties "may need". In the language of the *travaux préparatoires*, it constitutes both legal and financial advice. Furthermore, the mandatory two-year university education comprises 7,5 ECTS in tax law. It would therefore seem logical and natural to conclude that tax law is one of the fields where the broker is obliged to give at least some advice. However, once again one is reminded that the law does not always follow the rules of logic. On the contrary, despite the foregoing there is a widespread view that tax advice is *not* encompassed by the broker's duty to advise. While in all probability the view has roots that predate them, a passage in the *travaux préparatoires* of the 1984 EAA are frequently cited as support. Said passage reads:

"The exact scope of the obligation to advise cannot be given a general definition and must instead be determined case-by-case with regard to what must be considered sound estate agency practice. If the broker does not feel competent to assess a particular problem, for instance a fiscal problem, he

[420] 22:4 LC; however, as long as the seller has full title registration, the problem can be remedied if the seller consents to the encumbrance.

should not attempt to solve the problem but rather make the principal aware of it so that they can seek expert advice".[421]

The opinions in the literature are divided but tend, overall, to lean to the position that tax advice is not mandatory. Melin simply holds that the broker is under no obligation to give tax advice or calculate taxes.[422] Zacharias seems to hold the door ajar (but not wide open) for mandatory tax advice, observing that the mandatory education comprises tax law but holds that, since tax law is a subject matter that requires regular practical experience, real estate brokers cannot be expected to be tax experts.[423] Tegelberg observes that, while taxes constitute financial issues that arise in real estate conveyances, from which it would seem natural to deduce that tax advice is comprised by the duty to advise, it is nonetheless a widely spread view that the broker has no general obligation to give such advice.[424]

In **FMN 2007-08-29:4**, the FMN opened its decision by stating that tax advice is not normally included in the brokerage assignment.[425] The case was the aftermath of a case before the National Board for Consumer Complaints, **ARN 2006-46-13**. The facts of the case were the following. The buyers in a conveyance informed the broker that, in order to finance the purchase, it was instrumental that they were granted a capital gains respite under Chapter 47 of the Income Tax Act. 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 false tax return[426] and interest to the taxes due; in all around SEK 156,000. The FMN found the broker negligent under 20 § of the EAA and awarded the full SEK 156,000 to be paid to the couple. The ARN decision prompted the FMN to open proceedings. However, the FMN acquitted the broker on the grounds that it was not established that he had undertaken to give tax advice.[427]

The FMN decision appears to be based on an unfortunate misconception. The FMN based its findings on the lack of an express provision in the brokerage contract. However, the brokerage contract was between the broker and the seller. The party asking for advice was not the seller but the buyer. It is patently obvious that there is nothing in the brokerage contract to govern that situation. Thus, the decision is not sufficiently founded. Notwithstanding, it serves to demonstrate the FMN:s position that tax advice is not mandatory as such. However, the ARN case demonstrates that if the broker does undertake to give tax advice, she will be liable for any injuries caused by incorrect advice. That principle is evident from **NJA 1991 s. 625**, which was a very similar case. The broker had received a question concerning eligibility for capital gains tax respite and given an affirmative answer without

[421] Prop. 1983/84:16, p. 37. The translation is my own.
[422] Melin, p. 144. It should be observed that the author offers neither sources nor discussion to support the claim.
[423] Zacharias 2012, pp. 745-46.
[424] Tegelberg in Grauers et al., p. 35.
[425] Here, too, it should be observed that the claim is supported neither by sources nor discussion.
[426] In accordance with Chapter 4 of the Tax Procedure Act (SFS 1990:324).
[427] The FMN decision was in fact incorrect. The reason is that the FMN misunderstood the case, thinking that it was the seller who had asked for tax advice, not the buyer. Since the client-agent agreement between the broker and seller did not stipulate that tax advice be given, the FMN assumed that no agreement existed. In actuality, however, it was the *buyer* who had asked for advice. Since the broker indisputably gave the buyer an answer, it stands to reason that he must be deemed to have accepted to give tax advice. Thus, the broker should by rights have been issued a warning.

making any inquiries as to the facts. When the client was denied the respite, the broker was found negligent and sentenced to pay damages.

It seems no bold claim that the view on tax advice as non-mandatory is based on a somewhat narrow definition of the term advice. Of by advice one means such services as e.g. extensive tax avoidance schemes or drawing up tax returns, the view is understandable. While real estate conveyances have intrinsic ties to tax issues, the brokerage assignment can hardly be considered to encompass such services by default. However, that is not to say that tax law as such is exempt from the duty to advise—it merely means that it is necessary to define a scope as to what tasks and services should be encompassed in the brokerage assignments. To name but one example, the aforementioned **FMN 2011-03-31:17** and **FMN 2011-05-25:7** (8.1.2 and earlier in the present section) make it clear that the broker must advise buyer and seller as to the rules on spousal consent. Doing so clearly constitutes legal advice in the field of family law. However, in no way does that mean that the broker is obliged perform all conceivable services that constitute legal advice in the field of family law. For instance, it can hardly be considered an intrinsic part of the brokerage assignment to draw up wills or prenuptial agreements. If a client wishes to hire the broker to perform such services, that is something that must be agreed upon separately. By the same token, tax issues as a subject matter are encompassed by the duty to advise, but extensive services such as those just mentioned are not mandatory. The difference is that the scope is defined by the nature of the service, not the subject matter.

What kind of tax advice, then, can be considered mandatory in a brokerage assignment? First of all, it must be observed that all conceivable problems do not appear in every conveyance. Just as e.g. inspection clauses and the problems associated therewith do not appear in conveyances where the buyer inspects the property before the sales contract is signed, not all fiscal issues are brought to the fore in every conveyance. To some extent, the buyer and seller define the scope by the questions they ask and the problems they bring to the broker's attention. Generally speaking, the broker should be able to answer questions on issues that are encompassed by the mandatory university curriculum. For instance, a broker should be able to answer, at least in general terms, the question of what the requirements for eligibility for capital gains tax respite are, or how the capital gains tax is calculated. N.B. that answering a question in general terms is not the same as giving particular advice as to the proper course of action, or giving a legal opinion as to whether the client will be eligible for the tax respite. Beyond that, it is for the broker to diligently and prudently identify the potential problems in the conveyance at hand and ensure that the parties have understood at least the *risks* involved. Since the broker has a general obligation to safeguard the interests of the parties, it could be argued that she must also advise the parties as to the *opportunities* in the transaction, such as eligibility for tax credits. However, the whole matter of tax advice remains admittedly a gray area.

10.1.4 The Level of Complexity

A question of some delicacy is what level of complexity the broker must be able to handle within the scope of her duty to advise. As previously stated, the broker is a generalist with her expertise divided between several fields including law, construction engineering, economics, business administration, and real estate valuation. It is a matter of logic that such a person cannot by default be expected to be as expertly versed in every single field as a specialist within that particular field. Consequently,

there will be situations where the broker is faced with a problem that is beyond her expertise to solve. In such situations, it is stressed in the aforementioned passage in the *travaux préparatoires* that the broker must not attempt to *solve* the problem but rather alert the client of it so that they may take the appropriate measures (see above 10.1.3). Based on that passage, one might conclude that the broker herself can define the prerequisite level of complexity: if a particular issue is deemed too complex, then it would seem that she is entitled to simply refrain from dealing with it. However, it is not as simple as that.

Firstly, logic dictates that lest the duties to exercise due care and to give advice be rendered devoid of all meaning, it cannot be left completely up to the individual to decide whether the duty applies in a particular situation. If it were, then there would be no duty at all, merely voluntary services. Granted, the idea that the broker should not dive in deeper water than she can handle is not without merit. If she does, not only will she be liable for injuries caused to the clients, but the clients and third parties could suffer injuries for which they are not compensated.[428] However, that is ultimately not a tenable argument. Again, the duty to advise applies to advice that the parties "may need". Again, further, there are issues that arise more often than others. It is not unreasonable to demand, for instance, that the broker should master the legal rules that govern issues that regularly arise in conveyances. If those rules are too complex for a particular broker to understand, then one must ultimately ask the question whether that person is really fit to practice the profession.

Secondly, the aforementioned passage in the *travaux préparatoires* dates back to 1983—no less than sixteen years before the mandatory university education was introduced in 1999. Without wishing in any way to denigrate brokers who do not have a university degree, it is undeniable that a person who is versed in a particular field is better equipped to identify and solve problems than those who do not possess the same level of knowledge. Thus, the passage is becoming more and more outdated for every new broker that is granted registration. It should be observed that *travaux préparatoires* are ultimately not a binding source of law per se. While they do on some level give voice to the legislator's intentions, those intentions must be weighed against other relevant factors. In the case of statements that are not applicable to the present context because the present context could not be foreseen at the time the statement was made, not only does one not have to follow them—one *should* not follow them.[429]

Thirdly, there are statutory obligations the proper execution of which undoubtedly requires expert knowledge. The most notable example is the drawing up of the sales contract and other necessary documents. Granted, the obligation to actually draw up the documents can be contracted out.[430] However, that possibility is extremely rarely used—possibly due in part to the fact that the right to remuneration is tied to the existence of a binding sales contract, which in turn presupposes a written contract that both parties sign and that satisfies the other requirements in Chapter 4 LC or 6:4 TOA. Moreover, the obligation to strive to ensure that the buyer and seller enter into agreements on issues that need to be resolved in connection to the sale cannot be contracted out. Identifying the

[428] Third parties, for their part, cannot expect to be indemnified by the broker as 25 § only mentions the buyer and the seller.
[429] Of course, if the statement embodies an abstract principle, it is possible that the principle could be translated to the present conditions and thus have bearing all the same.
[430] 21 § EAA; see further 11.2.1.

relevant issues definitely requires expert knowledge; the same goes for striving to accomplish agreements, since that involves explaining the how and the why.[431]

From case law, the following decision is illustrative.

> **FMN 2011-06-22:13** concerned the sale of a tenant ownership apartment that took place before the financial plan of the association had been registered at the Company Registration Office. Under 3:1 TOA, the tenant ownership association are barred from leasing out tenant ownerships until *inter alia* the financial plan has been registered. 4:7 TOA stipulates that a lease that has been effectuated in breach of 3:1 is invalid. In the case at hand, the association had leased out the tenant ownership to a member of its board on April 10-11th, 2010. Said board member immediately hired a broker to have the apartment sold. The unit description drawn up by the broker stasted that the tenant ownership association was an "association under formation" with a total of six apartments. It further stated that a financial plan was drawn up but not yet registered at the Company Registration Office. The apartment was sold and the sales contract signed on May 20th, 2010. The financial plan was not registered until May 26th, 2010.
>
> The broker claimed in her defense that she had read the financial plan and spoken to the official at the Housing Agency who was working with the plan at the time. An affidavit signed by said official on April 27th was submitted. The broker asserted that the subsequent registration was merely a formality. The FMN rejected that view, observing the aforementioned provisions and that the effectuated sale was null and void pursuant to 4:7 TOA. By marketing the apartment as a tenant ownership home and by contributing to the invalid sale, the broker had acted in a way that caused risk for injury as well as future disputes. The broker's actions, stated the FMN, were of such gravity that the revocation of the broker's registration had been considered. However, the FMN stayed its hand and issued a warning.

The case is interesting not primarily because it illustrates the importance of the rules governing tenant ownership homes, but because it demonstrates that the broker is required to master those rules and act upon them. It also demonstrates that the broker must make her own assessments and not merely trust others to act correctly. In the case at hand, the first serious mistake was made by the association and the concerned board member who effectuated the (invalid) tenant ownership lease in breach of the applicable provisions. Though it would have no merit, it could be argued that the broker should be able to trust that the association had everything in order. However, the FMN makes it clear that the broker should have reacted upon the fact that the financial plan was not yet registered, and drawn the necessary conclusions. Now, drawing those conclusions presupposes mastering the applicable provisions. Thus, mastering any and all relevant provisions is expected of the broker. The fact that the FMN considered revoking the broker's registration lends further strength to that conclusion.

[431] In some isolated instances, it may very well be enough to simply present a form and ask the buyer and/or seller to sign it. However, the duty to advise requires that the broker ensure that the party has understood its significance. Doing so simply cannot be accomplished unless the broker knows the significance herself.

10.1.5 Specifically Prescribed Advice

16 § EAA contains three explicit obligations that are tantamount to specifically prescribed advice. They are such that they can be logically deduced from the general duty to give such advice as the parties may need. However, in these instances the legislator has seen fit to be specific. Two of these specific obligations were in place before the 2011 EAA whereas the third is a novelty.

The first of the two older obligations is to strive to ensure that the seller provides the buyer, before the sale, with such information concerning the property as can be assumed to be of importance. It has been observed in the literature that the rule harmonizes poorly with the contracting parties' obligations under the Land Code.[432] However, that view hinges on the assumption that the seller has no *a priori* obligation to disclose defects to the buyer. Under that view, the allocation of risk is determined solely by the buyer's duty to disclose under 4:19 LC. Before 2007, that view had great merit. However, since the landmark ruling **NJA 2007 s. 86 (the "Motocross ruling")**, that view can no longer be accepted without reservation. In said ruling, the Supreme Court deemed the seller liable for a defect consisting in noise from a motocross track near the property, despite concluding that the defect was "discoverable" within the meaning of 4:19 LC.[433] The court found that the seller had acted in bad faith by failing to disclose the defect despite the fact that he himself indisputably considered the motocross track a serious disturbance. Whatever one thinks of the soundness of the ruling or the court's reasoning, it can safely be concluded that the seller stands the risk of being deemed liable if they fail to disclose a given defect *if failing to disclose it would be to act in bad faith.*[434]

Of course, the broker's obligations under the EAA apply irrespective of their relation to the buyer's and seller's obligations under the Land Code (or, where applicable, the Sales Act). Thus, from the broker's point of view the obligation is clear insofar as she must strive to ensure that the seller discloses known defects and other facts that may be assumed to be of importance. That entails urging the seller not to withhold information, and to facilitate the conveyance of information. A commonly employed method is the "question list", which is a form the broker asks the seller to fill out. The form contains questions about the property, such as whether the seller knows of any defects or other malfunctions. Copies of the form are then handed over to prospective buyers.

The motocross ruling does, however, have some bearing on the broker's obligation. If the seller cannot become liable for a defect unless it is "hidden", then as a rule they can safely withhold information about "discoverable" defects. Suppose that were the case. Suppose, further, that the seller does not wish to comply with the broker's request to disclose defects. In that scenario, the broker may of course feel that if there are in fact defects, then all parties would be better off if they were disclosed early on. However, since the seller would not run the risk of liability, the broker would not have to give any advice on the matter beyond that. Now, the sensible conclusion from the motocross case is that the seller *can* become liable for a "discoverable" defect if they are aware of it

[432] Melin, p. 199.
[433] The court even stated that the defect at issue could have been discovered "without difficulty".
[434] The language is from 33 § of the Contract Act. Curiously, although their argumentation relies heavily on that provision in substance, the Supreme Court maintained that the ruling does not hinge on whether or not the bad faith requirement is fulfilled. Instead, the court cited *inter alia* prop. 1989/90:77, p. 61and NJA 1981 s. 894 to prove that there was an implicit obligation on the part of the seller to disclose information under certain circumstances.

and fail to disclose it. Therefore, in order to properly fulfill the obligation to "strive to ensure" that the seller provides information, it must be seen as incumbent on the broker to ensure that the seller understands that the failure to disclose may result in liability.

Of course, failing to ensure that the seller understands the risk of liability constitutes insufficient or incorrect advice under any circumstances. Again, the broker is obliged to explain to both buyer and seller their rights and obligations under the Land Code or Sales Act. In the aforementioned cases **FMN 2008-04-23:1** and **FMN 2008-11-19:9** (9.1.3), the main issue at hand was the *broker's* failure to disclose information to the buyer. However, in both instances the broker also gave incorrect advice to the seller. In the former case, the seller explicitly asked the broker whether the prospective buyers needed to be informed of the planned helicopter station. The broker's negative answer – notably reached after asking her employer for advice – constituted incorrect advice to the seller. The scenario was almost identical in the ferry berth case. Thus, in both cases the broker could (and should) have been issued a warning not only for failing to disclose information to the buyer, but also for giving incorrect advice to the seller. It is no bold assumption that if the seller in such a case were to sue the broker for negligent advice, they would be successful.

The second of the two obligations that were in place before the 2011 EAA is that to strive to ensure that the buyer inspects the property, on their own or with the assistance of an expert, prior to the sale. Here, as in the case of the aforementioned obligation, striving to ensure that something takes place does not mean that the broker is necessarily at fault if it does not. However, to fulfill the obligation the broker must do what is in her power to make sure that it does. This involves urging the buyer to inspect as well as facilitating an inspection. As in the case of the seller's disclosure of defects, doing so presupposes ensuring that the buyer understands their obligations under the Land Code or Sales Act. As to that, it is unfortunate that 16 § EAA does not distinguish between the two different purchases since, the Sales Act does not stipulate any duty to inspect on the part of the buyer unless it is "activated" (20 §). Ironically, the broker would seem to place the buyer in a worse position if she is successful in urging the buyer to inspect, since one of the ways the duty to inspect under 20 § SA is activated is if the buyer actually inspects.

The FMN has observed in its case law that the obligation is to strive to ensure that the property is inspected *prior* to the sale. The conclusion drawn by the FMN is that it is not acceptable for the broker to routinely recommend inspections *after* the sale. In **FMN 2006-06-07:5**, which concerned multiple issues, the broker claimed that it was his habit to advise buyers to inspect the property after the sale. The FMN adduced in an *obiter dictum* that 4:19 LC presupposed an inspection prior to the sale, and that it was therefore not reconcilable with sound estate agency practice to "routinely and without acceptable reason" recommend buyers to inspect after the sale.[435] However, it is not entirely self-evident that the FMN position is correct. The provision was left unchanged in this part from the 1995 EAA. At the time of enactment of that statute, it was still common practice that buyers inspected the property prior to signing a sales contract. From a legal point of view, that still seems the most sensible course of action since the buyer then possesses better information about the property prior to the sale and can act accordingly by either demanding a reduction of the sale price or by refraining from purchasing the property altogether. However, faced with competition from other prospective buyers, people are less and less prone to pay for an inspection unless they are

[435] See also Melin, p. 234.

certain that the property will be sold to them.[436] Even in the absence of competition, it would seem that the marketplace has adopted a new transaction procedure. Under this régime, the buyer and seller first sign a sales contract that contains an inspection clause granting the buyer a right to withdraw from the purchase after the inspection.[437] The relative merits of the old and new transaction procedures are a separate topic in their own right, but it cannot be contested that the contract-first-inspection-afterwards model exists in the marketplace. Moreover, the parties are free to contract in any manner they choose. Therefore, it seems harsh to regard it as universally wrong for the broker to recommend that the inspection take place after the sale. As long as the broker gives adequate advice to both parties as to the possible choices before them and the consequences of those choices, thus enabling the parties to make informed decisions, the duty to advise must be deemed fulfilled. Of course, as will be elaborated in chapter 11, the broker must also in such cases recommend and draw up an adequate contingency clause.

The question of how well a certain course of action - be it inspecting a tenant ownership home and thus activating the duty to inspect under 20 § SA, or recommending an inspection after the sales contract is signed – harmonizes with the provisions in the Land Code or the Sales Act, need perhaps not be of apocalyptic importance. The general duties to exercise due care and to advise are ever present, obliging the broker to safeguard the interests of the parties and ensuring that they are aware of the implications in each situation. For instance, the obligation to strive to ensure that the buyer inspects the property is not necessarily fulfilled once an inspection is conducted. The inspection reports often contain remarks that increase the buyer's duty to inspect. There is no *a priori* obligation for brokers to read the inspection report. However, if the broker is informed that such a remark exists in the report, she is obliged to advise the buyer accordingly. That involves, first and foremost, ensuring that the buyer understands the legal implications of the remarks. As to the recommended course of action, there must be some measure of discretion for the broker to assess the situation and give the advice she deems appropriate, as long as the advice is suitably prudent.[438]

The third and final obligation that constitutes specifically prescribed advice is the obligation, introduced in the 2011 EAA, to inform the buyer in writing of their duty to inspect. In view of the foregoing, it would appear superfluous since the duty to advise always involves ensuring that the parties have understood their respective legal obligations. However, the general duty to advise does not prescribe any particular format. The obligation is to ensure that the parties are aware of the implications in each situation; how that is accomplished is of secondary importance. The novelty, then, is that the information to the buyer as to their duty to inspect must henceforth be in writing. *Prima facie*, the provision seems sound. Upon closer inspection, however, there are at least two important objections to be made. In both cases, the underlying problem is that making one obligation explicit may give the impression that another obligation does not exist, or that it is of lesser importance.

[436] Once again, I must resort to anecdotal evidence.

[437] There are numerous possible variations as to the specific conditions; see below Chapter 11.

[438] Presumably, most brokers faced with a scenario as the one described will opt to recommend a deeper inspection, since that seems the most prudent course of action. However, a deeper inspection comes at a cost, and depending on the circumstances that cost may not be outweighed by the benefits. Ultimately, it would seem to boil down to risk assessment and preferences. Moreover, one could conceive of multiple alternative solutions to a deeper inspection. In some cases, for instance, a reduced sale price in exchange for a liability disclaimer could be the best solution for all parties (except perhaps for the inspector).

Firstly, as is evident from the foregoing, the buyer is not the only contracting party with obligations: the seller has a duty to disclose information to the extent it would constitute bad faith to withhold it. Granted, making the seller aware of the risk of liability follows from the general duty to advise and no additional provision is needed. However, explicitly stipulating written advice to the buyer may give the impression that the equivalent advice to the seller is optional. The correct interpretation would seem to be that both instances of advice are mandatory per se, the difference being that the advice to the buyer must be in writing whereas no format is prescribed for the advice to the seller. The asymmetry and lack of clarity seem as ill-advised as they are unnecessary.

Secondly, in a profession where the counseling role is perceived as secondary – the prime function of the broker being the matchmaking function – there is a considerable risk that the focus on format may distract brokers from the main objective to ensure that the parties have understood the situation at hand. To be more specific, the explicit rule that the broker must provide written information is likely to give the impression that handing over a document with a legal text explaining the duty to inspect is enough to fulfill the duty to advise. As is evident from the foregoing, merely handing over a document is not nearly enough. It may be enough in a given transaction where it is clear that the buyer is well-informed and capable of understanding the information correctly. However, even in such situations the broker must make sure that the buyer actually *reads* the information and is afforded time to digest it. Another problem with written information is that it moves the focus from the broker to standardized forms and documents. While standardized documents are useful tools indeed, conveyances are not all identical. Therefore, there can be no one-size-fits-all advice. On the contrary, it must be stressed that, as a general rule, fulfilling the obligation to provide written information on the buyer's duty to inspect is *not* enough to fulfill the duty to advise.

10.2 The French Notary

At this point it seems superfluous to reiterate the legal basis of the notary's duty to counsel. Nonetheless, since the that basis ultimately determines the scope of the notary's specific obligations it should be observed once again that it is incumbent on the notary to take such measures and to give such counsel as is necessary to ensure the validity and efficacy of the sale. Validity is the legal validity of the transaction, whereas efficacy means that the transaction actually accomplishes that which the parties set out to accomplish.[439] To a large extent, that means tailoring the necessary deeds to the transaction at hand, i.e. the contract-engineering duty which will be treated in chapter 11. However, the very essence of counsel is that the counselor possesses knowledge that the client does not. Consequently, the counselor is able to perceive opportunities and threats of which the client is completely unaware, or of which they have a skewed or mistaken view. Giving appropriate advice, then, is to inform the parties of the opportunities and threats in the transaction at hand.[440]

[439] de Poulpiquet, p. 79.
[440] Ibid.

Determining the scope of the duty to advise brings several questions to the fore, largely the same as in the case of the broker. Firstly, we must define the concept of advice as given by the notary in a transaction where he is required to be impartial; again, a piece of good advice to one party may be to the detriment of the other. Moreover, there is a question of how active the notary should be in imposing the elevated wisdom of the expert as opposed to passively letting the expressed will of the parties be done. Secondly, the nature of the advice given must be described in more detail. What kind of opportunities and risks is the notary obliged to advise the parties about? Thirdly, subject matter of the advice must be specified. Within what fields of knowledge can the parties expect to receive advice? Finally, at what level of complexity must the notary give advice?

Given that the *raison d'être* of the duty to counsel as a whole is first and foremost to safeguard the two related but distinct interests of validity and efficacy, it seems logical to organize the following subsections around those two interests. However, while safeguarding validity may require advice, it is arguably more related to ascertaining facts and drawing up adequate deeds. Consequently, that aspect is treated in more detail in chapters 8 and 11. In this chapter, no distinction will be made between advice pertaining to validity and advice pertaining to efficacy, with one minor exception in 10.2.3.

10.2.1 The Concept of Advice

It has been established in the foregoing that the notary is obliged by law to be impartial. No matter from which of the contracting parties the notary received the assignment, the notary must never treat that party as his client and the other as their counterpart. The concept of impartial advice is one that is perhaps not self-evident, as attested to by the skepticism oftentimes expressed by those who are accustomed to giving advice to one party at a time.[441] Can giving adequate advice really be reconciled with impartiality? After all, it is undeniable that giving the best advice possible to one party may, at least *prima facie*, be at odds with the principle of impartiality. A perfect example is a normative advice concerning the appropriate course of action, to the effect that one party profits whereas the other loses. Should the notary refrain from giving such advice?

As can be seen, the problem is very much the same as in the case of the Swedish broker. By the same token, the problem need perhaps not be as grave as it appears. While giving normative advice to the parties that the notary knows to benefit one party to the detriment of the other is unquestionably in breach of the impartiality obligation. However, refraining from giving advice altogether could also be construed as incompatible with the impartiality obligation since that would be tantamount to withholding important information from one of the parties. It seems, then, that the obligation to act impartially cannot exonerate the notary from the duty to advise. However, it affects the nature of the advice given.

Suppose that in a given transaction between A and B, the notary foresees a problem on the part of A. The duty to advise obliges the notary to at least alert A of the risk. The notary might also give A advice as to counteract the problem. If the latter advice does not affect B, the notary should give the advice and that is the end of it. However, if the normative part of the advice given to A affects B in

[441] See e.g. Dyson, p. 5-6 for a British perspective.

some manner, impartiality dictates that the notary must give B the equivalent information. Arguably, the described scenario is most likely to appear with respect to the drawing up of contracts: the notary may perceive a problem for A and suggest that A would be best served if a particular clause was included in the contract. It is straightforward to conclude that the notary must ensure that both A and B have understood the full consequences of including, or not including, said clause in the contract. All of this clearly constitutes advice. Thus, impartiality does not exonerate the notary from the duty to advise. However, the advice must be adapted so as not to infringe on the rule of impartiality. It follows that the nature of the notary's advice is first and foremost *to inform and to explain*.

Art. 13 and 14 of the *Décret* of 1945[442] bar the notary from engaging in the administration of firms and from getting involved in any manner whatsoever in the affairs of the clients. That prohibition could be interpreted as lending support to the notion that the notary should remain passive in the transaction and not getting involved in the substantive contents of the transactions. That seems a sound principle with respect to easily comprehensible conditions such as, for instance, the sale price. It would not seem entirely compatible with the rule of impartiality for the notary to pursue an increased or reduced sale price because he feels the price is incorrect. However, non-involvement does not mean that the notary is barred from giving advice by informing, explaining, and presenting alternative courses of action. In fact, it is clear from case law that the notary *cannot* cite non-involvement to justify the failure to give informative advice.

> In **Cass. 1re Civ., Appeal no 00-11036**[443], the owners of a residential property had commissioned a real estate broker to have the property sold. The client-agent agreement entitled the broker, *inter alia*, to negotiate the method and terms of payment. The property was sold in November, 1991 to a real estate firm, 26 % of the sale price being paid up front whereas the remaining 74 % were to be paid on January 31st, 1992. As it happened, the buyer became insolvent and subsequently filed for bankruptcy in November, 1992 without having paid the remainder of the sale price. The seller sued the broker for damages, arguing that the broker had violated the terms of the client-agent agreement by negotiating such unfavorable terms of payment, and that the broker had been negligent in not investigating more closely the solvency of the buyer. The case reached the Cour de Cassation, who ruled in favor of the broker.
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> However, the sellers had also sued the responsible notary, arguing that the notary had negligently failed to advise them as to the implications of the contract, in particular the risks involved in the stipulated terms of payment. The Cour d'Appel held that, while bound to a stern duty to counsel, the notary must not cross the line and become involved in the affairs of the clients. On those grounds alone, the court ruled in favor of the notary. The sellers appealed to the Cour de Cassation, who held that the plaintiffs' claims that the notary had failed to observe his duty to counsel by not properly advising them as to the significance of the notarized deeds, could not legally be dismissed, as the Cour d'Appel had done, by merely referring to the general principle of non-involvement. The case was therefore remitted in this part to the Cour d'Appel.

[442] Décret no 45-117 du 19 décembre 1945.
[443] Ruling of May 15th, 2002.

It should be observed that the ruling does not necessarily mean that it is the view of the Cour de Cassation that the notary was obliged to give the disputed advice, though it is difficult not to draw some sort of conclusion to that effect. However, the ruling unquestionably means that the rule of non-involvement does not exonerate the notary from the duty to advise.

10.2.2 The Nature of the Advice

It has been established that informing the parties of, and explaining, the opportunities and risks in the instant transaction is the core of the duty to advise, along with such normative advice as is compatible with the principle of impartiality. However, opportunities and risks is a rather wide concept and must be defined and described in more detail in order to be meaningful.

Since the notary is a legal professional, it should raise no eyebrows to hold that *advising the parties as to applicable law* is one of the most important tasks. If, for instance, a particular statutory provision has bearing on the transaction at hand, the notary must 1) inform the parties of the existence of the provision, 2) explain its consequences, including in what manner it affects the transaction at hand, and 3) give adequate advice as to the possible courses of action.

> In **Cass 1re Civ., Appeal no 10-14170**[444], Mme Y, a widow, gave a sum of money to her daughter in 1988, Mme X, who used the money to purchase a property. In 1993, Mme X granted life-long usufruct of the property to Mme Y. In 1998, Mme X gave birth to a child. Under C.C. Art. 960, all donations made by a person who did not at the time the donation was made have any child or other legal heir, can be revoked by the donor. For whatever reason, Mme X chose to exercise her right under that provision and revoked the usufruct.
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> Mme Y proceeded to sue the responsible notary for failing to advise her as to the existence and consequences of the cited provision. The Cour d'appel held that a notary is liable only for damages incurred as a direct result of his negligence. In the instant case, the court observed, Mme Y confessed to having given her daughter the funds to purchase the property. Hence, it was clear that those funds were not the property of Mme Y at the time the usufruct donation was notarized. Consequently, Mme Y's claim to damages amounting to the value of the property must be rejected. The court ruled in favor of the notary.
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> Mme Y appealed the ruling, arguing that the notary had been obliged to call to the parties' attention the existence, contents, and consequences of C.C. Art. 960. Moreover, argued Mme Y, the notary should have stipulated in the deed that it constituted "the execution of a natural obligation born out of a duty of conscience", in order to counteract the provision. The Cour de cassation rejected those arguments. While the court found the notary negligent and in breach of his duty to counsel, it did not find it established that Mme Y had incurred damage as a result thereof.

[444] Ruling of April 28th, 2011.

The reviewed case highlights the obligation to bring applicable provisions to the attention of the parties. Oftentimes, the provision – or the legal régime it provides for – is already brought to the fore. However, that does not mean that the duty to advise is fulfilled, since there may be risks involved due to any number of uncertainties. The uncertainties may be inherent in the provision itself, such as where a provision is new and its interpretation unclear, or emanate from uncertainties as to its application in the instant case, such as where it is unclear whether a particular requirement in the provision is met. In both instances, the notary must alert the parties of the risks.

> In **Cass 1re Civ., Appeal no 10-25741, 10-26560, and 11-14663**[445], five different couples had purchased apartments under construction, which had been presented as eligible for tax benefits under "Loi Besson"[446], the purpose of which is to provide housing to underprivileged persons. The sales were effectuated by notary M.C. Subsequently, the tax authorities did not deem the buyers eligible for the envisaged tax benefits, invoking additional tax assessments for all buyers. The buyers sued notary M.C. for damages, citing negligent tax advice.
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> The Cour d'Appel held that the notary had been within his full rights to tailor the deeds to the most favorable fiscal situation he could foresee for the future buyers at the time of the sale. The subsequent decisions by the fiscal authorities could not, held the court, be laid at the notary's feet. The buyers appealed to the Cour de Cassation who held that it had been incumbent on the notary to alert the buyers of the uncertainties embedded in the fiscal régime applicable to the transaction. The court observed that the Cour d'Appel had failed to address the claim, raised by the plaintiffs in the appeal, that the notary had not fulfilled this duty. Thus, the judgment of the Cour d'Appel was deemed insufficiently founded.

As laid out in chapter 7, the distinction between advice and the disclosure of facts is made by the separation of the facts from its significance. As a practical matter, disclosing facts and giving advice are often intertwined. However, it is vital to distinguish between the two lest one reaches the mistaken conclusion that disclosing the fact is enough to fulfill the duty to counsel. The following cases highlight the difference between the fact and its significance.

> In **Cass. 1re Civ., Bull. I 1987 No 288 p. 207**[447], a vacant lot in Logonna-Daoulas in the *département* of Finistère in Brittany was sold to Mr and Mme Z in July, 1979. The *acte de vente* was signed on July 5th. In connection to the signing of the *compromis de vente*, on June 26th, a building permit issued to the sellers was transferred to the buyers. The term of the permit was set to expire on September 23rd, 1979. Once the sale was completed, the buyers proceeded to hire an architect for the construction of a house on the property. Upon commencement of the construction works some months later, Mr and Mme Z were informed by the municipal authorities that the building permit had expired on September 23rd. Mr and Mme Z sued both the architect and the notary for negligent counsel on the grounds that he had not informed them that the building permit was not valid after September 23rd.

[445] Ruling of January 26th, 2012.
[446] *Loi n° 90-449 du 31 mai 1990 visant à la mise en œuvre du droit au logement*.
[447] Ruling of November 12th, 1987.

The Cour d'Appel ruled in favor of the buyers, sentencing the architect and the notary to pay damages *in solidum*. The notary appealed the ruling to the Cour de Cassation, arguing that since 1) the buyers were well-informed and capable of understanding the meaning and consequences of the expiry of a building permit, Mrs Z being a member of the municipal council of Châteaulin (another municipality in the *département* of Finistère) as well as of the planning committee of that same municipality, and 2) building permits were not of such nature as to be essentially attached to the authentication of the deed, the notary had not been obliged to bring particular attention to the expiry of the building permit at issue. The Cour de Cassation rejected those arguments, holding instead that it is incumbent on the notary to inform the parties of their rights and obligations and to ascertain that the prerequisite conditions for the efficacy of the deed are met, with particular regard to the goals pursued by the parties. Therefore, held the court, the Cour d'Appel had been right in its finding that that the notary must have understood the problems that could arise with respect to the building permit. The Cour d'Appel had also been correct in holding that the connections of Mrs Z to the municipal authorities in another municipality could not exonerate the notary from the duty to counsel. The ruling was upheld.

Cass. 3me Civ., Appeal no 04-13200[448] concerned the sale of a property with a single-family house. According to the zoning plan, the property was situated in an "NB" zone, i.e. a *de facto* built-up area with no development plans. The zoning and planning report, which was appended to the *acte de vente*, specified that no further construction on the property was permissible. After the sale, the buyer, Mme Z, found out that the property was barred from construction altogether, and that the cabin that had originally been constructed on the property had been enlarged by the sellers without a building permit. Mme Z sued the notary for negligent counsel on the grounds that he had failed to inform her prior to the sale about the zoning and planning situation.

The Cour d'Appel held that the buyer could not pretend to have been unaware of the zoning and planning report appended to the *acte de vente*, and the remarks pertaining to construction contained therein. The court further held that the buyer had failed to establish that she had suffered injury. Mme Z had demanded damages amounting to the assessed value of the illegally constructed house. To support that conclusion, the court observed that the house – while illegally constructed – was after all in place. Moreover, held the court, it was not established that Mme Y would have demanded a price reduction had she been aware of the problem prior to the sale. The court ruled in favor of the notary. Mme Y appealed to the Cour de Cassation, who overturned the ruling on both counts. As to the conduct of the notary, the court held that the notary's duty to advise required him to specify to Mme Y the consequences of purchasing a property with a house built without a building permit. As to whether Mme Y had established injury, the court observed that the Cour d'Appel had based its finding on Mme Y's failure to produce a comparative value assessment. The Cour de Cassation observed that said failure did not logically preclude the existence of injury.

[448] Ruling of May 10th, 2005.

It is evident that alerting the parties of the risks involved in the course of action they envisage is an important aspect of the duty to advise. However, there is no guarantee that the parties will heed the advice they receive. Should the parties wish to proceed with an ill-advised (no pun intended) scheme, the notary is ultimately powerless to stop them. Unless the transaction is in some way illegal or invalid, the notary is obliged to effectuate it. However, the wise notary will see to securing proof that adequate advice has been given, as attested to by the following case.

> **Cass. 1re Civ., Appeal no 96-12874**[449] concerned the sale of a vacant lot. The property was purchased by a small, newly established real estate firm with the aim of constructing a group of buildings there. For some reason, the notary had failed to obtain any zoning and planning documents pertaining to the property prior to the authentication meeting. Instead, the notary inserted a warning and disclaimer in the *acte de vente* with the title "Absence of zoning and planning documents, warning" and the following wording:
>
> "*The buyer certifies that, despite having been advised by the notary as to the necessity to obtain information concerning zoning and planning, [they] requested the drafting and authentication of the deed without the prior procurement of such documents. The buyer declares [themselves] perfectly informed of the situation of the property in this regard and assumes full responsibility for any [restrictions on the right of use], renouncing any and all claims against the seller or the notary.*"[450]
>
> The buyer found out after taking possession that the property was situated in a no-construction zone, draining the transaction of its purpose. The buyer sued the notary for negligent counsel consisting in the failure to conduct the necessary verifications as to zoning and planning prior to effectuating the sale. The Tribunal de Grande Instance and the Cour d'Appel both rejected the buyer's claims. The buyer appealed to the Cour de Cassation, arguing that a notary who effectuates the sale of a vacant lot intended for construction is obliged to verify, prior to the sale, whether construction on the property is permissible. This obligation cannot, argued the buyer, be contracted out - even where the buyer is a professional in the field.
>
> The Cour de Cassation referred to the disputed clause and held that the notary had adequately alerted the parties of the importance of zoning and planning documents. Hence, the notary could not be deemed to have failed in his duty to counsel. The court ruled in favor of the notary.

In the reviewed case, the notary had not yet had time to obtain the necessary zoning and planning documents. It should be borne in mind that obtaining them can take a few weeks. It seems reasonable to conclude that the concerned buyer, faced with the choice of either awaiting the arrival of the zoning and planning report from the competent authority, or concluding the sale at once with the risk of discovering encumbrances or restrictions afterwards, chose the latter. Given these circumstances, and that the buyer was a real estate firm, the ruling seems reasonable. However, had

[449] Ruling of March 31st, 1998.

[450] My translation; the original reads: *"L'aquéreur reconnaît que, bien qu'averti par le notaire soussigné de la nécessité d'obtenir des renseignements d'urbanisme, il a requis létablissement de l'acte sans la production de ces pièces, il déclare être parfaitement informé de la situation de d'immeuble à cet égard et se reconnaît seul responsable de servitudes particulières, renonçant à touis recours contre le vendeur ou le notaire."*

the buyer been a consumer, it is not entirely improbable that the ruling would have been the reverse (see below 10.2.4).

For the transaction to be able to accomplish that which the parties set out to accomplish, it is a natural prerequisite that any future claims can be enforced. That, in turn, presupposes the existence of evidence to support said claims. Consequently, obtaining written documents are usually preferable to relying on verbal agreements and pledges. It is a matter of pure logic, then, that notaries are obliged to advise the parties accordingly. The following case stresses the point.

> **Cass. 1re Civ., Bull. I 1995 N° 226 p. 158**[451] concerned the aftermath of a property sale that never took place. The sellers, Mr and Mme Y, had issued a *promesse de vente* to the would-be buyer Z with a prescribed *indemnité d'immobilisation* of 420,000 francs. As it turned out, Z could not follow through with the purchase, but a successor to the promesse de vente, AX, was found. Six months later, verbal proceedings were officiated by notary M.A., in the presence of a notarial clerk working at the same notary office who assisted Mr and Mme Y. The verbal proceedings resulted in the recording of 1) the refusal of Mr and Mme Y to rescind their *promesse de vente*, and 2) their contention that they were entitled to the *indemnité d'immobilisation*, 400,000 francs of which had still not been paid. On the same day, Mr and Mme Y issued a new *promesse de vente*, with AX as beneficiary. That sale did take place and was notarized three months later. Mr and Mme Y were still not satisfied, however, and proceeded to demand payment from Z of the 400,000 francs to which they still felt entitled. Upon Z's refusal to pay, Mr and Mme Y sued Z. However, the court ruled in favor of the defendant, as it did not find it established that the debt still existed.
>
> Mr and Mme Y then proceeded to sue notary M.A. for negligent counsel, arguing that the notary's failure to advise them as creditors that their possibility to enforce their claim would be rendered practically useless in the absence of a written acknowledgement of debt signed by the debtor, and the failure to urge them to obtain such an acknowledgement, constituted a breach of the notary's duty to advise. The Cour d'Appel ruled in favor of the spouses, holding that, since the notary had been made aware during the verbal procedure of the spouses' position as to the alleged debt, remaining passive with respect to the spouses' possibility to enforce their claim did indeed constitute negligence and a breach of the duty to advise. The sellers were awarded 400,000 francs plus interest.
>
> The notary appealed the ruling, arguing that even if the he had counseled the sellers to obtain a written debt acknowledgement, there was still a possibility – indeed, given their position thus far, a high probability – that Z would refuse to sign such a document. Thus, argued the notary, the damage incurred by Mr and Mme Y would in all probability have been incurred even in the presence of the desired advice. There was therefore no line of causation between the failure to advise and the damage incurred. The Cour de Cassation rejected that argument, holding that the Cour d'Appel was correct in its assessment with regard to the notary's actions (or rather lack thereof). However, as to the measure of damages, the court held that the notary's obligation was to advise, not to collect the

[451] Ruling of May 30th, 1995.

alleged debt. The damages could not be measured based on the first *promesse de vente* since it was no longer valid. Therefore, in assessing the injury in the way it had, the Cour d'Appel had misapplied C.C. Art. 1382. Thus, while the Cour de Cassation found the notary negligent, the question of measure of damages was remitted to the Cour d'Appel.

10.2.3 The Subject Matter and Level of Complexity

Since the duty to counsel as a whole aims at safeguarding the validity and efficacy of the instant transaction, the logical conclusion would seem to be that the duty to advise encompasses all topics that are brought to the fore in the instant transaction. That is, without exaggeration, a quite wide scope. The topics pertaining to the *validity* of the transaction are fairly easily identified, as are the skills required on the part of the notary to handle them. Therefore, it is both consistent with the general purpose of the duty to counsel, and reasonable given the notary's role and expertise, to conclude that the duty to advise encompasses all topics that have bearing on the validity of the transaction.

Efficacy, for its part, is a much wider and more far-reaching concept. Again, efficacy refers to achieving the contracting parties' goals in the transaction at hand. Granted, most objectives in most transactions are in all probability fairly easily identified. For instance, in a real estate conveyance the seller typically wants to get paid and escape liability to the extent it is possible, whereas the buyer wants to take possession of a property that can be used in the intended manner without restrictions, with the possibility, in the event of defects or other deviances from the buyer's expectations, to invoke liability on the part of the seller to the extent it is possible. However, there are two major complications. Firstly, the parties could have goals and purposes of which the notary is not aware and cannot readily foresee. Can the duty to advise cover such topics? Secondly, while the notary is unquestionably an expert and quite knowledgeable with respect to numerous topics surrounding the transactions he is set to effectuate, even the notary cannot be an expert in every field. The notary is, after all, a *legal* expert. There are, however, other important issues that have bearing on the transaction's efficacy than those pertaining to the law. For instance, the parties to a real estate conveyance are of course highly interested in the price and the value of the property. Can the law require a legal expert such as the notary to give advice on such topics? Moreover, the law is itself a quite wide area of knowledge and no jurist is expertly versed in all fields of law.

As to the question of facts the notary can or cannot foresee, let us first state the obvious: the scope of the duty to advise must be determined by drawing a line somewhere. Theoretically, the notary could be required to give any amount of advice on any conceivable topic. However, not all advice is of use to the parties. From a simple and intuitive cost-benefit analysis, it seems reasonable to conclude that the duty to advise should be restricted to advice that can be of use to the concerned party. That is also dictated by logic since, by definition, a question that is of "no use" cannot have bearing on the validity and efficacy of the transaction. Now, lest the notary be left with a practically absolute duty to give advice on all conceivable topics all the time, we must add a subjective element. For instance, if in a given case the notary is unaware that one of the parties has a particular goal in mind, the notary will probably not think to give advice on that matter. The question is whether the notary's ignorance of the fact is acceptable or not. Here, it must be borne in mind that the notary's

duty to counsel as a whole emanates from the law of torts. Therefore, it is subject to the basic requirements of that field of law: negligence or intent, damage, and a foreseeable line of causation. With that framework, the possible scenarios can be divided into cases 1) where the notary *is* aware of a particular fact in the transaction, such as an intention on the part of the buyer, 2) where the notary is *not* aware of the fact at issue but where he *ought* to be aware of it, and 3) where the notary is *not* aware of the fact and cannot be faulted for that ignorance.

The first category is straightforward. If the notary *knows* about a fact that has bearing on the efficacy of the transaction, he must advise the parties accordingly. That much follows from the findings in 10.2.2 above. There is also no doubt that the fact that triggers the duty to advise can consist in a particular desire on the part of either contracting party. For instance, in **Cass. Civ. 1re, Bull. I 1990 No 160 p. 114**, reviewed above (8.2.1), the buyers had informed the notary of their intention to construct a home on the property. The main issue in the case was the notary's failure to obtain a *certificat d'urbanisme*. However, the Cour de Cassation made it crystal clear that the purpose of obtaining the disputed information is for the notary to act upon it by giving adequate advice.

The second category is clearly linked to the duty to ascertain facts, treated in chapter 8: if the notary is obliged to obtain a particular piece of information, then it can be concluded that the notary ought to be aware of it. Consequently, the notary must give advice pertaining to that information. Again, **Cass. Civ. 1re, Bull. I 1990 No 160 p. 114** can be cited as a perfect example. While the notary *did* know of the buyers' intentions, he *did not* know that the property was not connected to the necessary supply systems. However, the fact that the notary was deemed negligent means that the Cour de Cassation held that he *ought* to have known.

The third category is fairly self-explanatory. If the notary is unaware of a given fact, and no specific provision or standard of due care compels him to take measures to discover said fact, then the notary cannot be faulted for not giving advice on that topic. However, one important caveat must be made: facts that the notary ought to be aware of include facts that are *typically* present in the kind of transaction at hand. To be more specific, there could be instances where the notary does not know for certain that e.g. the buyer or seller in a real estate conveyance has a particular intention with the transaction, but where the notary ought nonetheless to realize that such an intention is probable. Take, once more, the aforementioned **Cass. Civ. 1re, Bull. I 1990 No 160 p. 114**. Suppose the notary did not know for certain that the buyers wished to construct a home on the property. Suppose, however, that the buyers were private persons and that the property was situated in a residential zone. In such a case, it could definitively be argued that the notary ought to understand that it was at least highly probable that the buyers would wish to build a home. With reference to the ruling, it seems safe to conclude that the notary would most probably have been held negligent if he failed to advise the buyers on the possibility to realize their intentions.

As to the question of the fields of law encompassed by the duty to advise, the same general framework applies here as in other matters. Thus, only fields of law that have bearing on the validity and efficacy of the transaction are of interest. Admittedly, that provides for a quite extensive scope. However, it is not unreasonable. Given the role and the power conferred on the notary by the state, it must be an absolute requirement that he be versed in the law governing the transactions he effectuates. As previously stated, notarial intervention in the form of authentication is mandatory in some instances and voluntary in some. It could be argued that it is more important that the notary

be ready to give advice on matters pertaining to deeds where notarization is mandatory. However, given the extensive consequences of notarization – full probative value and immediate enforceability – there is no reason to draw a line between the two scenarios. Moreover, it should be observed that the notary is required to have a law degree and a specialized post-graduate education specially aimed at the notarial profession, the mandatory curriculum of which includes subjects such as general private law, property law, zoning and planning, commercial law, procedural law, tax law, EU law, international private law, labor law, social security law, and administrative law.[452] It seems reasonable to conclude that the duty to advise applies to questions pertaining to those fields of law, to the extent it has bearing on the validity and efficacy of the instant transaction.

Switching perspective from the notary to the buyer and seller, within what fields of law can they expect to receive advice? In the case of real estate conveyances, it is fairly straightforward to identify the most significant points of interest: 1) everything with bearing on the validity of the transaction, 2) the rules governing the sale, particularly the specific rights and obligations of the contracting parties, 4) any other property/real estate law that could be of interest, e.g. easements and other encumbrances, 3) zoning and planning, and 4) tax law.[453] As will be treated in chapter 11, the notary must *inter alia* ensure that the parties understand and consent to all parts of the effectuated deeds. Presumably, all contract clauses should fall within the scope of the fields of law just mentioned, but in the event - however improbable it may be - that a given clause has a meaning that pertains to another field of law, the notary is still obliged to explain it since it has bearing on the validity and efficacy of the deed.

As in the case of the broker, identifying the subject matter on which advice must be give is not enough to answer the question of what advice the parties can expect. If a given question is answered in a superficial manner, then nominally that answer qualifies as advice on the matter. However, for the advice to be meaningful there must be some prerequisite level of depth and certainty. To be clear, giving proper advice on an issue presupposes a solid understanding of the substantive rules governing that issue. As to that, it is long established that the notary is obliged to be versed in the law and, where necessary, conduct the necessary research to ensure the certainty of his knowledge. The obligation applies to all positive law, including case law and other sources besides statutes.[454] This view is embedded in the case law reviewed above: identifying applicable provisions and acting upon them by giving adequate advice presupposes exact knowledge and understanding of the law. Thus, the required level of complexity is absolute in the sense that the notary is obliged to know and understand all applicable legal rules and act upon them.[455] Though it would seem intuitive, it is worth observing that

As to the question of non-legal issues, it must be borne in mind, again, that the notary is a *legal* professional. Notaries are no doubt oftentimes quite knowledgeable in other issues pertaining to the transactions before him, such as market prices. Such issues are also of interest with respect to efficacy since both parties to a conveyance will typically know if the price is right (a topic, however,

[452] Yaigre & Pillebout, pp. 20-24.
[453] It has been established in 10.2.2 that the notary is required to give tax advice.
[454] Biguenet-Maurel, pp. 104-105.
[455] Another matter entirely is the complexity of the applicable legal rules as such. Some rules are quite straightforward whereas others are depressingly difficult to grasp. That is not the complexity at issue here: rather, no matter how easy or difficult a given rule is to understand, the notary must master it and act accordingly.

on which they are bound to have conflicting opinions). Thus, from a logical point of view it could be argued that some level of financial advice is mandatory. Should the notary be obliged to give such advice? As attested to by the following case, the answer would seem to be no.

> **Cass 1re Civ., Appeal no 10-19942**[456] concerned the aftermath of the failed sale of a commercial property. Mme X had purchased a commercial property and the deed had been notarized. Under the terms of the contract, Mme X undertook to effectuate the necessary diligences for the transfer of the existing loans pertaining to the fixtures on the property. As it turned out, the creditors would not consent to the transfer of the loans, as a result of which Mme X found herself in breach of contract. The seller cancelled the agreement and Mme X paid damages to the seller. Seeking compensation, she sued the responsible notary for negligent counsel.
>
> The Cour d'Appel held the notary responsible insofar as it held that it had been incumbent on the notary to give proper advice to Mme Y concerning the risks involved in the event that the loans were not transferred to her. However, held the court, given that Mme Y acted not as a private person but as a player in a commercial transaction, she could and should have understood that the obligation to take over the loans in question was disproportionately cumbersome. Since the buyer was thus partly responsible, the court, while maintaining the notary's liability in principle, awarded damages equivalent to only 50 % of the loss incurred. The Cour de Cassation concurred with the Cour d'Appel, adding that while the notary is obliged to give counsel and alert the parties of the risks involved, in principle the duty to counsel does not extend to the financial aspects of the transaction. The ruling of the Cour d'Appel was upheld.

It would seem from the ruling that the notary can be held liable if he fails to advise the parties that there may be financial risks. Now, it is by no means straightforward to draw a clear line between legal risks on the one hand and financial risks on the other. For instance, if a particular course of action would lead to tax liability on the part of one of the parties, that is by definition a risk of both legal and financial nature since it emanates from the applicable fiscal regime and has economic consequences. It is also a risk of which the notary is unquestionably obliged to alert the concerned party. However, the purely commercial aspect of a problem falls outside the legal scope. In the case just reviewed, it was deemed as falling outside the notary's duties to assess and evaluate the substantive conditions of the transaction. Though it is admittedly only one case, it seems fairly safe to conclude that the notary is *not* obliged to give advice concerning the purely financial aspects of the transaction, such as the sale price.

10.2.4 A Duty Both Absolute and Relative

It should raise no eyebrows to hold that a duty to advise, whichever the concerned profession may be, cannot be unlimited. The notary is no exception. Indeed, it has been established in the previous

[456] Ruling of November 4th, 2011.

sections that the notary's duty to advise has its limits: financial advice, for instance, falls outside the scope of the duty. A question that has been the subject of particular interest is whether, and if so the extent to which, the status and knowledge of the client should be allowed to affect the scope of the notary's duty. The basic rationale is simple bordering on intuitive: if a particular piece of information is already known to the recipient, there is little or no use in telling them once more. Therefore, it seems a logical conclusion that such information and advice should fall outside the scope of the duty to advise.

However appealing that logic may seem, it is not as simple as that. Firstly, as has been established, advice transcends the mere conveyance of information: it concerns the *significance* of the facts. The mere fact that the buyer or seller is aware of a certain fact does not mean that they understand its implications. The duty of the notary is to ensure that the concerned party understands those implications. Secondly, one can never really be absolutely certain that another person has understood something unless one asks them. It should be observed that absolute certainty in that regard cannot be achieved by merely inquiring of the concerned party if they have understood. An uninformed person may not know that there is something in the situation to be understood. For instance, a person may be perfectly aware that they are required by law to disclose all income in their tax return, and that non-disclosure constitutes an infraction. However, they may not be aware of the sanction prescribed by law for that infraction. In a given case, the law may have been recently amended, and the penalty toughened. The concerned party may therefore have a mistaken view of the risks involved. Thus, the mere fact that that person answers the question whether they have understood the risks of non-disclosure in the affirmative does not provide certainty that they have understood the full implications. Consequently, asking such a question can never be sufficient to achieve the purpose of ensuring that the concerned party has understood the full significance of the situation.

The logical conclusion of the foregoing is that if the law requires the notary to *ensure* that the parties have understood the full implications of each situation, he must inform and advise on all topics all the time, i.e. the duty to advise must be absolute. Such a state of affairs would seem less than optimal due to the high probability that notaries would have to spend time on advice that is not needed. In other words, it would be an inefficient solution. It seems fairly evident that the scope of the duty to advise must be determined by balancing the interests of ensuring that all parties are aware of the full implications of the situation at hand, and of efficiency.

What, then, is the actual position of the law on the matter? As to that, it is apparent from case law and the literature that there has been, and continues to be, a general ambivalence. It is equally clear that the topic is perceived as important. For instance, the first half of Biguenet-Maurel's *Le Devoir de Conseil des Notaires* focuses on the question of the absolute and/or relative character of the duty to counsel as a whole.[457] At a glance, the author's conclusion appears somewhat confusing: the duty to counsel is held to be at once absolute and relative. However, the paradox is merely superficial. To be more specific, the author holds that the duty as such is absolute - meaning that there are no situations where the notary has no duty to counsel at all - but the notary is exonerated from that duty in certain situations.[458] That distinction is sound. The fact that one has a certain duty does not mean that one is required to act in the same way in every situation. Thus, it is perfectly consistent to

[457] See the table of contents, placed (in accordance with French custom) on pp. 327-333.
[458] Biguenet-Maurel, pp. 13-136.

hold that the notary has an absolute duty to advise, while at the same time holding that there are situations where is excusable for the notary not to give a certain advice.

It has been argued that there ought to be a correlation between duty to advise and the nature of the notary's intervention. For instance, it has been argued that where the parties have not sought the notary's advice, and the nature of the intervention is therefore limited to giving authentic form to an already drawn-up contract or to draw up said contract from scratch, the notary should not be obliged to give advice. However, it is clear that no such correlation exists. The principle was laid down in 1921 by the Cour de Cassation in **Cass. 1re Civ., D 1925, 1 p. 29**[459], where the court ruled that the mission of the notary "is equally to inform their clients of the consequences of the obligations they undertake" and that they cannot escape liability by arguing that their assignment had merely been to give authentic form to the agreements between the parties.[460]

It has further been argued that where the client is themselves a professional in the field, for instance a real estate firm, the duty to advise ought to be less strict. Similarly, where to the client is already represented by legal counsel, there would seem to be no need for the notary to give additional advice. However, the law is clear: the existence of the duty is unaffected by both the professional status of the client and the fact that they are represented by a lawyer.[461]

Thus, it is a well-established fact that there are no situations where the notary has no duty to counsel at all. However, a clear distinction must be made between the existence of the duty on the one hand, and its specific scope and consequences on the other. The Cour de Cassation held in a 1965 ruling, **Cass. 1re Civ., D 1965, p. 449**[462] that, while notaries are professionally bound to advise the parties as to the significance of the deeds and the risk of liability, "*the scope of the duty to advise, and the means to fulfill it, must be must be assessed with regard to the circumstances"*. As to the scope of the duty and the means to fulfill it, the Cour de Cassation held in **Cass Civ. 1re, Appeal no 96-12874**, reviewed above (10.2.2), that the notary had fulfilled his duty to advise by warning – by means of a clause in the deed – the buyers of the risks involved in purchasing a property without first checking the zoning and planning situation. The court specifically observed that *"the buyer, specialized in real estate transactions, was capable of understanding the warning delivered by the notary"*. Had the buyer not been a professional in the field, however, it is probable that the notary would have been obliged to explain the consequences in detail.[463]

As to the consequences, it has been demonstrated above (9.1.6) that the principle of mitigation of damages applies to the Swedish broker and that, while not exonerating the broker from her duties, contributory negligence on the part of the injured party may result in reduced damages. Does a similar principle apply to the French notary? The answer would seem to be yes.[464]

> **Cass. 1re Civ., Bull. 2005 I No 323 p. 267**[465] concerned a credit transaction between a bank and a real estate development firm. Under the terms of one of the deeds involved in the

[459] Ruling of July 21st, 1921.
[460] The ruling is cited by Biguenet-Maurel at p. 16; see also de Poulpiquet, pp. 65-66.
[461] de Poulpiquet, pp. 64-65; Biguenet-Maurel, pp. 35-56.
[462] Ruling of April 6th, 1965.
[463] See further Biguinet-Maurel, p. 54-55.
[464] Ibid., pp. 55-56.
[465] Ruling of July 12th, 2005.

transaction, a property owned by a real estate firm "under formation" was to be used as security for part of the transaction. After the sale, the development firm was declared bankrupt. The bank initiated foreclosure proceedings against the real estate firm – proceedings that had to be cancelled after it was revealed that the real estate firm had never been registered and that it had therefore never acquired legal capacity. The mortgage was thus null and void. The bank proceeded to sue the notary for negligent counsel.

The Cour d'Appel held that, while the notary is held to a duty to advise, the scope of that duty varies depending on the personal competences of the client. The bank, held the court, was a professional player in the instant kind of transaction, and could not have been unaware that a firm under formation did not have legal capacity. Therefore, the notary had no duty to advise the bank. The Cour de Cassation overturned the ruling, holding that the notary is not exonerated from the duty to advise by the competences of the client, or the information possessed by them. Those factors, held the court, can only have bearing on the question of contributory negligence, which affects the measure of damages.[466]

[466] See also Cass. Civ 1re, Bull. 2000 I No 72 p. 48, ruling of February 29th, 2000.

11 Contract-Engineering

The last, but certainly not least, of the four specific duties derived from the general duty to counsel is that of contract-engineering. The general definition of contract-engineering is a duty on the part of the broker/notary to *tailor the contract(s) to the needs of the instant transaction*. It is readily understood that fulfilling such a duty will by definition entail several steps. Indeed, merely reading the definition raises several spontaneous but nonetheless important questions:

1) What are the needs of the transaction?

2) What does it mean to tailor the contract(s) to those needs?

3) How should the broker/notary go about identifying the needs of the transaction?

4) How should the broker/notary go about tailoring the contract(s) to those needs?

As to the first question, it seems reasonable to hold that the main purpose of the transaction is to realize the will of the contracting parties. It follows that the will of the parties is of prime importance. However, as previously touched upon, the will of the parties is obscured by lack of information. To name a simple but perfectly valid example, suppose a buyer has declared herself willing to sign a contract without any contingency clause. Suppose, however, that said buyer is ignorant of the liability she may incur if she cannot obtain a loan and finds herself in delay with the payment or having to default from the purchase altogether. Suppose, finally, that after declaring her will to enter a contract without a contingency clause, the buyer is informed of the risk of liability. Would she still be willing to sign the contract without a contingency clause? That is of course possible, but not necessarily plausible. Either way, a person's primary will, shaped at least in part by ignorance of important facts, is a concept that is fundamentally different from the informed will of an informed person. Which of these wills should the law strive to uphold?

As to the second question, it seems reasonable bordering on intuitive to hold that tailoring the contract entails adapting it to the particular circumstances of the instant transaction. However, that is neither specific nor exhaustive. Suppose the broker/notary has identified and correctly understood the will of the parties. Suppose the buyer wishes to sign the contract first and conduct an inspection of the property later. The example is equally valid in Sweden and France since both the Swedish sales contract and the French *avant-contrat* are mutually binding between buyer and seller. Now, if one wishes to ensure that the buyer is entitled to refrain from completing the purchase without incurring liability, the contract must include a contingency clause. However, contract clauses can be worded in innumerable variations, with different consequences for the contracting parties. How specific should the duty of the broker/notary be understood to be in this regard? Is it enough to include a contingency clause, or does the professional responsibility extend to the specific wording?

Take another example. Suppose the broker/notary acts upon a perceived need – be it a request from either party, a statutory provision, or some other factor – and includes a certain type of clause in the contract. Suppose that one of the parties refuses to accept the clause. How should the broker/notary relate to the fact that one party wants or needs the clause to be included in the contract, whereas the opposite applies for the other party? Both the broker and the notary are bound to a duty of

impartiality, and are obliged to safeguard the interests of both parties. When those interests collide, at least seemingly – how should the broker/notary act?

Take yet another example. Building on the previous example with the clause that one of the parties refuses to accept, suppose that the parties negotiate and agree not to include the proposed clause in the contract. Suppose, however, that the broker/notary knows that without the clause, the probability of a costly future dispute between the party increases greatly. What is the responsibility of the broker/notary? Can the broker/notary be faulted for contributing to – in the case of the notary even *effectuating* – a contract that is suboptimal and exposes the parties to unnecessary risks, simply because the parties claim they wish it to be so? Differently put, can tailoring the contract ever entail overriding the will of the parties? If not, how should the broker/notary act in such situations?

It is fairly evident that contract-engineering is no single task, clearly distinct from the other duties described in the previous chapters. On the contrary, contract-engineering is a "hybrid" duty that is intertwined with the other duties, particularly that of giving advice. Consequently, treating the contract-engineering duty will by necessity entail a certain degree of overlap with above all the duty to advise. The relation between the two can be described both as contract-engineering being an important, perhaps the most important, exemplification of the duty to advise, and as the duty to advise being a part of the contract-engineering duty. Both descriptions are true. Hence, the overlap is inevitable.

The question of how the will of the parties – born out of ignorance, blessed with knowledge, and/or conflicting – should be handled by the broker/notary, who are for their own part bound to a duty of impartiality, is one that calls for reasoning that is equally applicable to both professions. I shall therefore deviate from the format of the previous chapter and treat this issue in a section of its own (11.1). Following that, I will treat the two professions separately just as in the previous chapters.

11.1 Impartiality, Advice, and the Will of the Parties

The will of the parties is the single most important factor in the transaction since it is the combined will of the parties that forms the basis of the contract; it is at once its *raison d'être* and its lifeblood. Yet it is undeniable that a will shaped by ignorance is not the same as a will based on knowledge of all relevant facts. Which of these wills, then, should the law strive to uphold?

From one perspective, the issue is as clear-cut enough to be trivial: with a few specifically provided exceptions, people are free to contract with whomever they want and under whatever conditions they want. With respect to real estate conveyances, there are no limits to that freedom except those which follow from law and logic, such as e.g. that one cannot sell that which one does own. Thus, buyer and seller are free to negotiate any agreement they want, including or excluding any contract clauses and wording them in whatever manner they see fit. No hired contract drafter, public officer, or other entity can force the parties to enter into an agreement they do not wish. Thus, in the aforementioned example where the parties agree that they do not wish to include the contract clause proposed by the broker/notary, they are free to omit it. There can therefore be no

"overriding" the will of the parties, even if they would be better served contracting in another manner (or not contracting at all).

However, the broker's/notary's duty to advise is not expunged merely because the parties have declared that they are ready and willing to pursue a course of action that exposes them to excessive risk. It has been established in chapter 10 that both professions have a stern duty to ensure that the parties have understood the full implications of the situation at hand. That involves explaining the significance of proposed contract clauses, legal provisions, and other factors that can affect the transaction. Hence, whatever choices the parties ultimately decide to make, the broker/notary must give adequate advice. Whether or not that advice is followed, however, is a matter for which the broker/notary cannot take responsibility.[467]

How, then, should the broker/notary act in a situation where the parties wish to enter into an agreement that does not represent the actual facts? Can one go so far as holding that it is illegal for the broker/notary to even contribute to the entering of such a contract, although it is the will of the parties? Assuming there is nothing illicit in the transaction, and that it does not violate the rights of third parties, the answer would seem to be that as long as the parties have received all necessary information and advice, the broker/notary is entitled to carry on with the transaction. I will return to this issue 11.2 and 11.3.

As to that, it could be argued that a fully cognitive adult person is responsible for their own knowledge or lack thereof, and that they are capable of deciding what risks to take. It is conceivable that a person

11.2 The Swedish Broker

11.2.1 A Hybrid Duty

As previously stated, 21 § EAA provides that the broker must make efforts to ensure that the buyer and seller reach agreement on issues that need to be resolved in connection to the sale. The second sentence of the same section provides that, unless otherwise agreed, the broker must assist the parties in drawing up the necessary documents.

The latter sentence contains the task that perhaps more than any other separates the Swedish broker from their colleagues in most other countries: that to draw up the necessary documents. The chief documents envisaged in the provision are of course the sales contract and the sales deed. The obligation applies, however, to all conceivable documents that need to be drawn up in connection with the sale. For instance, if the conveyance requires consent from a spouse or cohabitee - which in the case of real estate must be made in writing[468] - the broker's obligation to draw up documents applies.

[467] See e.g. **Cass Civ. 1re, Appeal no 96-12874**, reviewed in 10.2.2.
[468] 7:5 p. 4 MA; 23 § p. 2 CHA.

The obligation to draw up documents can be contracted out. The extent to which this is done in practice is not known, but anecdotal evidence suggests it is a rare occurrence. Since 23 § EAA makes the broker's right to her commission contingent on a valid and binding conveyance contract, it would seem to be in the broker's best interest to perform the task personally. Furthermore, contracting out the obligation is not as straightforward as one might imagine. Since the broker is an impartial intermediary, her obligations apply equally in relation to both buyer and seller. Thus, an agreement between the broker and her principal to contract out the drawing up of the necessary documents does not expunge her obligation in relation to the principal's counterpart to perform the task. Suppose, for instance, that a seller, who is the broker's principal, wishes the sales deeds to be drawn up by their long-time lawyer whom they trust. Now, the buyer may of course accede to the seller's request. However, the broker's obligation towards the buyer to draw up the deeds is not expunged unless she reaches an agreement to that effect with the buyer. Thus, if the broker wishes to contract out the obligation, she must reach agreement with both parties.[469] In addition, there is another important caveat to be made: even if the obligation to *draw up* the documents is contracted out, the duty to advise prevails. Thus, if the seller's lawyer is hired to draw up the contract, the broker is still obliged, at least in relation to the buyer, to explain the contract clauses and give appropriate advice.

The first sentence in 21 § is it a bit more problematic since it contains elements that are intertwined with other provisions, namely 8 § and 16 §. The provision can be divided into three equally important elements:

1) an obligation to *make efforts* to ensure that the parties

2) reach agreement

3) on *issues that need to be resolved* in connection to the sale.

The second element, meaning that the broker must pursue an agreement between the parties, should raise few eyebrows. After all, the chief objective of the broker's work is for the buyer and seller to enter a sales contract. However, since it is clear from 3) that the obligation applies not only to the main transaction but to any and all issues that need to be resolved, it should be borne in mind that the broker may in the instant case need to broker deals in ancillary issues as well.

It follows from 1) that the broker is expected be active: to *make efforts*[470] is by definition irreconcilable with remaining passive. It is equally clear from 3) that the broker is expected to identify the crucial issues in the instant transaction: in order to make efforts with respect to the issues that need to be resolved, one must first identify those issues. This is quite adequately described in the *travaux préparatoires* as an obligation on the part of the broker to be *active and observant* with respect to issues that must be resolved.[471] As the reader will doubtlessly observe, this conclusion is perfectly consistent with the due care obligation laid down in 8 § - so much so that it would seem appropriate to label 21 § an exemplification of 8 §. To put it plainly, the obligation to be active and observant with respect to issues that need to be resolved is a en exemplification of the general obligation to exercise diligence and prudence in order to safeguard the interests of the parties.

[469] See Melin, pp. 67-69, 237-238 for a similar conclusion.
[470] In the Swedish original *"verka"*.
[471] SOU 1981:102, p. 28; prop. 1983/84:16, p. 41.

While it is of course reassuring that the provisions of the statute are mutually consistent, the connection to the due care obligation is not merely of academic interest. On the contrary, it is clear that the efforts prescribed in 21 § must be aimed at safeguarding the interests of the parties. Those interests are not necessarily satisfied merely because the transaction is successful in the sense that a mutually binding contract is accomplished; the terms of the contract are equally important. At times, the terms regarding a particular issue can be of enough importance as to decide the fate of the transaction as a whole.[472] Moreover, the *interests* of the parties is a broader term than the *will* of the parties. It is conceivable that a particular term is consistent with the expressed will of the parties, while being inconsistent with the interests of at least of them. For instance, if the buyer accepts a contract that does not contain any contingency clause, then in the absence of duress, misrepresentation or the like that must be seen as the buyer's will and thus to be respected. However, if in the instant transaction there are particular risks, the lack of a contingency clause may be against the buyer's interests. Since the broker is statutorily bound to safeguard the interests of the parties, not merely to effectuate their expressed will - although, admittedly, effectuating their will is one such interest, and an important one at that - the broker cannot remain passive.

It becomes clear that not only the due care duty, but also the duty to advise, has an important part to play. While it is possible, and indeed it does occur, that the willingness of the buyer or seller to accept a term that is not in their best interests is a result of negotiations. If in the instant situation that is indeed so, then there is not much to say except that it is part of doing business. However, it is also possible that the concerned party is simply unaware of the risk involved, or that they have underestimated the risk. As laid out in chapter 10, the duty to advise means the broker must strive to ensure that the parties have understood the full implications of the situation.

Thus, it is clear that 21 § cannot be interpreted separately. Rather, it must be interpreted in the light of, and in conjunction with, the due care duty in 8 § and the duty to advise in 16 §. The overriding principle being, by virtue of 8 §, to diligently and prudently safeguard the interests of the parties, the main objective of contract-engineering is to prevent future disputes between the parties. Since disputes, particularly if they should reach the courts, are very costly and uncertain, it is straightforward to conclude that preventing them is to safeguard the parties' interests.

It follows from the foregoing that contract-engineering is a hybrid duty that aims at tailoring the contract(s) to the instant transaction. Its proper performance hinges on due care, adequate advice, and the handiwork of drafting all necessary documents. However, while it is possible to deduce this from the statutory provisions themselves, the specific contents of the contract-engineering duty have evolved mainly through case law. As will be demonstrated in the following, contract-engineering can be broken down into five distinct obligations:

1. to foresee and identify potential problems that must be resolved;

2. to suggest appropriate solutions to said problems;

3. to formulate the contracts and their clauses in an adequate manner;

4. to explain the suggested contract clauses to the parties; and

[472] I believe the term "deal-breaker" applies.

5. to make efforts to ensure that all agreements between the parties are documented.

These five obligations will be treated in the following.

11.2.2 Identifying the Relevant Issues

Since 21 § EAA clearly stipulates that the obligation to pursue agreements applies to "issues that need to be resolved", it follows that those issues must be identified. Just as one cannot convey information one does not possess, it is impossible to (wittingly) take measures with respect to an issue of which one is unaware. What is not entirely clear, however, is whether the obligation to identify the relevant issues should be understood to be *absolute* or *relative*. An absolute requirement would mean that if a particular issue is not resolved in connection to the sale - whether because the broker did not deem it necessary to resolve it, or because the broker was not aware of the problem, or for any other reason - the failure to reach agreement automatically constitutes a breach of the broker's duty. A relative requirement, by contrast, would mean that the broker's failure to identify a particular issue would not automatically constitute an infraction.[473]

The language in the provision suggests an absolute requirement: if the issue is such that it needs to be resolved, then the broker must see to it that it is resolved. However, as demonstrated in previous chapters, the broker's duty to obtain information about the property and other relevant issues is not unlimited. Rather, it is limited to the duty to ascertain facts through verifications and the duty to investigate. The requirement must therefore be seen as relative. That said, there are a good many issues the broker is expected to identify. For instance, if the broker discovers anything whilst carrying out her duty under 17 § EAA, such as an easement or a spouse whose consent is needed, those are issues the broker is expected to identify. The same applies to issues of which the broker is required to inform herself by virtue of the duty to investigate. Though such issues are not such that they can typically be solved by means of a contractual solution, they are nonetheless such that the broker is required to be aware of them.

Moving on, it is within the expertise expected of every broker to know a number of problems that may or may not arise in every transaction, some more common than others. For instance, the question of whether a contingency clause may be needed is both of great importance and present in virtually every conveyance. It is therefore not surprising that this particular issue was foreseen, and deemed encompassed by the broker's duty, as early as in the *travaux préparatoires* of the 1984 EAA.[474] Two important and common such clauses are inspection clauses and mortgage clauses. The need for the latter kind of clause was the underlying issue at hand in **NJA 1997 s. 127 I & II**. While the case will be reviewed below (11.2.3), let us examine briefly the problems that can arise, to underscore the importance to assess the need for a contingency clause. Most often, on the day the sales contract is signed, only a down payment (usually 10 % of the sale price) is made. The rest is due on the day of possession, when the bill of sale (*köpebrev)* is signed. If, for whatever reason, the buyer

[473] I deliberately use the expressions "breach of the broker's duty" and "infraction" instead of phrasing it in terms of liability. Even if the provision is understood to be absolute in the sense that the broker is expected to identify all issues no matter the circumstances, civil liability under 25 § EAA presupposes intent or negligence.
[474] Prop. 1983/84:16, p. 41.

cannot honor the obligation to pay on the day of possession, they will be in delay. If the contract contains what is called a cancellation clause (*hävningsförbehåll*) - which, in practice, virtually all real estate sales contracts in Sweden do[475] - the seller is entitled under 4:25 LC to cancel the agreement and demand damages. The damages for which the seller is entitled to compensation include the broker's commission[476] and the price loss in the probable event that the property is sold at a lower price to another buyer. Thus, a mortgage contingency clause serves to protect the buyer from the risk of having to pay damages to the seller in the event that their loan is denied. As will be seen below, brokers are expected to well enough versed in the law to understand the risk, and how the risk can be neutralized by means of a contingency clause.

The software packages used by most, if not virtually all, brokers play a double role since the standard contract templates include topics which the user must decide whether to regulate - and, if so, how - or to leave out. Either way, the fact that a particular topic is broached in the contract template, or in some other way in the software package, means that the user is made aware that the issue may need to be resolved in the instant case. Against the backdrop of the due care duty, it seems safe to hold that if a topic is broached in the standard contract, the broker is obliged to investigate whether, and if so how, it needs to be regulated in the contract. In sum, issues that are in some way *foreseeable* to the broker, because they are such that they arise from time to time in conveyances, are encompassed by 21 §.

As a practical matter, as long as the broker is reasonably diligent and prudent, most issues will present themselves during the normal course of business. When they do, it is for the broker to be alert and determine whether, and if so how, they need to be regulated. Suppose, for instance, that the seller has suggested that they would be willing to sell some of the furniture for a modest price (on top of the sale price for the property itself). The broker would do well to see that the matter is resolved in order to prevent future disputes. To name another example, suppose the buyer informs the broker that they want the property under condition that they can build an extension on the house to fit in one more bedroom. The broker knows, or ought to know, that such works require a building permit. In such a situation, the broker should ask the buyer exactly how important it is to them that they are able to build the extension. If it is important enough to the buyer as to be a deal-breaker, then a contingency clause making the sale contingent on the subsequent grant of a building permit may be an appropriate solution. A third example is the situation, which is nowadays so common that it is virtually the general rule, there the buyer wishes to inspect the property with a professional inspector, but wishes to sign a contract first so that they are sure that the property is not sold to another buyer. To make the inspection meaningful, the buyer needs an inspection clause in the contract.

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[475] 4:5 LC provides that if the contract stipulates the signing of a bill of sale, the validity of the sale is understood to be contingent on the payment of the sale price. That, in turn, is understood as a cancellation clause under 4:25 LC. See further Grauers F. 2012, pp. 128-129. Since it is customary to pay a down payment on the day the sales contract is signed, and the rest on the day of possession, most contracts consequently contain cancellation clauses.

[476] As a result of the landmark ruling **NJA 1986 s. 146**, the broker's right to the commission in the event the sale is cancelled as a result of the buyer's delay is contingent on a clause to that effect in the brokerage agreement. The standard agreements provided by the broker associations contain such clauses; see Melin, p. 294. In practice, therefore, one can safely count the broker's commission as one of the costs for which the buyer will be obliged to compensate the seller.

At times, the broker is expected to react to the terms proposed by the parties, alert as to any anomalies or inconsistencies. The following case illustrates the point.

> **FMN 2009-05-27:1** concerned a conveyance that was subsequently declared null and void by the Eskilstuna District Court.[477] The owner of a rural property, who was experiencing financial difficulties, had for some time been negotiating a business venture which would entail selling the property to a firm wishing to develop the land for a sum that was well below market value, in exchange for 32 % of the shares in the firm. The seller would also be permitted to reside on a part of the property. The sales contract, drawn up by a broker whose assignment was limited to that single task, specified neither the transfer of shares nor the right to reside on the property (with the result that said promises were not binding; 4:1 p.2 LC). The seller did not receive the promised shares and the buyer sought the aid of the Enforcement Authority to have the seller evicted from the property. The seller sued for invalidity arguing, inter alia, that the buyer had purposefully exploited the seller's inexperience in business and real estate transactions. The court ruled in favor of the plaintiff and declared the sale of the property null and void.
>
> The seller reported the broker to the FMN who held that the diligence obligation applies even where the broker's assignment is limited to drawing up the sales contract. The FMN further held that it must have been evident to the broker that the sale price specified in the contract – a mere SEK 600,000 for a rural property comprising roughly 35 acres of land, a residence building and farm buildings – was well below market value. The broker should therefore, held the FMN, have inquired of the parties whether there were additional agreements in connection to the sale and, if so, included those agreements in the sales contract. For the failure to observe his diligence obligation, the broker was issued a warning.

In sum, the obligation to identify the relevant issues applies to issues that need to be resolved and of which the broker 1) *is* aware, 2) should be aware because of the duty to ascertain facts, the duty to investigate, or the general due care requirement.

11.2.3 Present Adequate Solutions

Identifying the issues that need to be resolved is the first step. The next step is to prevent future disputes or other problems related to those issues, by presenting a contractual solution. If the broker is made aware of an issue that needs to be resolved, and can be resolved by means of a contractual solution, the failure to present a solution constitutes an infraction and will result in liability. The aforementioned landmark Supreme Court ruling **NJA 1997 s. 127 I & II** illustrates the point.

> **NJA 1997 s. 127 I & II** concerned two highly similar cases. In both cases, the buyers had failed to obtain a loan and could therefore not follow through with their purchases. As a result, they had incurred liability towards their sellers - a liability for which they now sought compensation from their brokers on the grounds of negligent counsel. In case I, the

[477] T 1938-07, ruling of June 23rd, 2008.

buyer had first told the broker that their annual income was SEK 90,000. With the buyer present, the broker spoke on the telephone with the bank, who declared that based on that information a loan would be granted. The loan was, however, contingent on a formal application. In that application, the buyer stated an annual income of SEK 55,000. The loan was denied. Since the seller had previously stated that they would refuse any contingency clause, the contract contained no such clause. As a result, the buyer was forced to pay damages to the seller. The District Court and the Court of Appeals both ruled in favor of the plaintiff, albeit with a dissenting opinion in the latter instance. The Supreme Court observed the buyer's risk of liability towards the seller, and held that in all cases where the buyer is dependent on obtaining a loan, it is incumbent on the broker to 1) educate the buyer as to the consequences of failing to pay as a result of being denied a loan, and 2) to advise the buyer to request that a mortgage contingency clause be included in the sales contract. The court also pointed out that the fact that the seller has declared themselves unwilling to accept contingency clauses does not exonerate the broker from the obligation to explain to the buyer the consequences of failing to pay, and to advise them as to the appropriate course of action. The Supreme Court ruled in favor of the buyer.

The facts in case II were very similar. An important difference is that prior to the signing of the sales contract, the buyer had informed the broker that she had a recorded non-payment of debt (*betalningsanmärkning)* at the Enforcement Authority. The District Court and the Court of Appeals both found the broker negligent and awarded damages. The Supreme Court did the same, on the same grounds as in case I.

The ruling can be interpreted as so far-reaching as to suggest that the broker was found liable on the grounds that the contract did not contain a mortgage clause, irrespective of how the parties have acted. That, however, is a mistaken view. Ultimately, the broker cannot force the parties to accept conditions they do not wish to accept. The broker can therefore never be faulted for the mere fact that the final version of the contract does not include a mortgage clause. Rather, the broker's obligation is to *suggest* a mortgage clause to protect the buyer. She is also obliged under the duty to advise to explain thoroughly the consequences of including or not including the mortgage clause.

By the same token, as previously suggested, the broker must suggest the inclusion of an inspection clause in situations where the buyer wishes to sign the sales contract first and inspect the property later. The same applies, of course, irrespective of why the contract signing is to precede the inspection. It could be the buyer who wishes to know that the property will not be sold to another buyer, rendering the inspector's fee a waste of money. It could also be that the parties wish to sign the contract immediately but no property inspector is available until some days later. Regardless, inspecting the property after the contract is signed is problematic for the buyer since they will not discover the "discoverable" defects, for which the seller is not liable, before the sale. If the inspection takes place before the sale, the buyer may choose whether to demand a price reduction or to refrain from purchasing the property altogether. In the event of an inspection after the sale has become binding, they do not have that option. To solve the problem, the broker must suggest an inspection clause, i.e. a contingency clause which gives the buyer a right to withdraw from the contract after a post-sale inspection, or to demand a price reduction - in other words, to place the parties in the same position as they would have been had the inspection preceded the signing of the sales contract. Since the inspection clause is a contingency clause, in the event that the buyer exercises

their right under the clause to withdraw from the contract it is understood that no binding agreement has been reached.[478] Inspection clauses will be discussed in more detail below (11.2.4).

In the membership clause case, reviewed above (10.1.1) and discussed below (11.2.5), the clause whereby the seller was given a seven-day period to withdraw from the sale in the event that the buyer was denied membership in the tenant ownership association is portrayed in a manner that suggests it is inappropriate by definition. That is not necessarily true. Since under 6:5 TOA the sale is invalid if the buyer is denied membership, the law can be construed as skewed to the seller's disadvantage: if the buyer appeals to the Tenancy Board, and perhaps after that to the Svea Court of Appeals, the process can take several months. During that time, the seller may face the situation where the apartment is no longer sellable. At the very least, the seller is likely to receive a lower price. To top it off, if the seller has already purchased a new home there may be double costs for rent and facilities. The membership clause is said to solve this problem for the seller. Thus, it would seem that the clause was originally intended to solve a problem embedded in the transaction.

However, that argument cannot readily be accepted. Firstly, the perceived problem emanates from a clear statutory right on the part of the individual to appeal a decision to deny membership. It should be borne in mind that the association's right to deny membership under 2:3 TOA is limited, and mostly aimed at serious financial problems that may affect the possibility to pay the membership fee and contribute to the association in a normal manner, or documented neighborhood disturbances. The right to appeal exists for a reason. Suppose, for instance, that the buyer is denied membership on discriminatory grounds connected to race, gender, or sexual orientation. The legitimate interest for the buyer to receive justice must be deemed to outweigh the seller's - albeit just as legitimate *per se* - interest to alleviate the risk of losing time and/or money. Thus, even if one accepts that there is a legitimate interest and an honestly perceived problem to be solved, it is outweighed by a contrary interest on the part of the buyer. Secondly, the manner in which the clause was used in the reviewed case - which is the same way it had previously been used by others, and is still being used, in all likelihood by the very same broker who was ultimately acquitted by the Administrative Court of First Instance - was not as a tool to solve a problem in the instant transaction. To the contrary, one of the court's two stated reasons for acquitting the broker was that it was highly unlikely in the present case that the buyer would be denied membership. But if that was true, then there would have been no problem to solve, would there? If there was no risk of denied membership, there was consequently no risk that the seller could lose time or money as a result of a time-consuming appeal process. Thus, by the court's (and the broker's) very own admission, the clause stripped the buyer of a statutory right in order to achieve absolutely nothing. Pure futility would be more rewarding.

Was the broker then a devious, conniving trickster seeking to cause mischief? Most probably not. However, the case illustrates the hazards of using standard forms in an uncritical manner. Transactions are not identical, and there can therefore never be a one-size-fits-all standard solution. To find a universally applicable quick-fix is no doubt a veritable Grail quest for corporate brokerage firms seeking to standardize their operations and cut costs. That cannot, however, be regarded as a legitimate interest, especially not in a legal context where there is a clear and unambiguous rule that

[478] As a result, the broker will not be entitled to her commission, since under 23 § EAA that right presupposes a binding sales agreement. "Withdrawal" based on a contingency clause should therefore never be confused with termination or cancellation of a binding contract. In Swedish, the used terms are "frånträda" (withdraw) and "återgång" (withdrawal), as opposed to "häva" (cancel, terminate) and "hävning" (cancellation, termination).

obliges brokers to adapt their counsel. Standardized tools such as contract templates are invaluable tools for many professionals, be they brokers or lawyers, but tools are only just that—tools. The problems to be solved are not identical in all transactions, and any and all solutions must therefore be brought forth in a manner that is adapted to the instant transaction. This is in no way contrary to drawing from one's owns experience, or from that of others.

11.2.4 Drawing Up the Contract in an Adequate Manner

Embedded in the obligation to draw up the necessary deeds and present contractual solutions to the identified problems is an obligation to formulate the deeds and their clauses in an adequate manner. The obligation applies to the choice of clauses as well as their specific wording.[479] Given that the overriding principle is to safeguard the interests of the parties, primarily by preventing future disputes, all contract clauses must be clearly worded so as to minimize the risk of interpretation problems. Ideally, every clause should be formulated such that its contents and meaning are entirely clear to any given reader. While that ideal is of course not always easy to live up to, case law shows that brokers would do well not to underestimate the required standard.

The kind of clause that has received by far the most attention is the inspection clause. There are two categories of inspection clauses. The first category is the *open clause*, which typically confers on the buyer an unconditional right to withdraw from the contract after the inspection. The open clause may or may not entitle the seller to an indemnity sum if the buyer chooses not to go through with the purchase. The second category is the *threshold clause*, which makes the buyer's right to decide whether or not to pursue the completion of the contract, or to demand a price reduction, conditional upon one or several factors. For example, the clause may stipulate that the buyer will be bound to the contract unless the inspection reveals defects the repair costs of which exceed a specified sum. The idea behind a threshold is to balance the scales, since any contingency clause is inherently skewed in favor of the buyer - the seller being unilaterally bound to the contract whereas the buyer is only bound if a certain condition is subsequently met. Given the broker's duty to safeguard the interests of both parties, it would seem appropriate, perhaps even commendable, to mitigate the situation for the seller by introducing a threshold. However, while a threshold is an excellent idea in theory, in practice it has proven quite challenging - to put it mildly - to formulate a threshold that is acceptable.

The main problem lies in how to formulate in words a threshold that both fulfills its intended purpose and is clear enough not to give rise to future disputes. Suppose, for instance, that the buyer and seller are in agreement that a threshold is called for. The broker constructs a threshold by stipulating that the buyer will be bound to the contract unless the total repair cost exceeds SEK 50,000. A delicate problem arises: who should assess the costs? The contracting parties themselves seem a poor choice given their opposing interests. One idea is to have the inspector who has conducted the inspection assess the costs. It must be borne in mind, however, that inspectors are often reluctant to perform such assessments for fear of liability. The inspector will therefore certainly not give a cost assessment unless specifically hired to do so. Even if a particular inspector is willing to

[479] Prop. 1983/84:16, p. 41.

give a cost assessment, unless both parties specifically pledge, in writing, to accept the assessment of that inspector, there may be a future dispute. Another popular, though inappropriate, method of formulating a threshold is to stipulate that the buyer is bound to the contract unless the inspection reveals defects that are defects within the meaning of 4:19 LC. This method is less than adequate because it means the buyer is not placed in the same position as if the inspection had taken place prior to the sale. In the latter case, it would not matter to the buyer whether a particular defect was a defect within the meaning of 4:19 LC, because they would still be free to refrain from purchasing the house.

Moreover, there are problems that arise regardless of whether one chooses the open clause or the threshold clause. Firstly, what time limits should be set? On the one hand, the clause is inherently skewed to the detriment of the seller, which would seem to call for a short time limit. However, it must be set such that the buyer has a fair chance to have the property inspected, receive a written inspection report, and make a decision based on the report. Finding an available inspector and set a date can often take a week or two. Thus, if on the day of signing the contract the buyer has not yet contacted an inspector and set a date for inspection, it is prudent to give the buyer at least one week for that. After the inspection, it often takes a day or two for the inspector to produce a written report and the buyer to receive it. Following that, the buyer needs some time, at least a day, to consider. Thus, it would seem appropriate to set a time limit of no less than ten days. However, that may change if an inspector has already been hired and an earlier date for inspection found.

The problems just mentioned are but a few of the problems that arise in connection to inspection clauses. The case law from the FMN and the administrative courts regarding less than satisfactory inspection clauses is extensive, and it would be a daunting - and not sufficiently rewarding - task to account for all of it. In the following I will instead review a collection of illustrative cases.

RK 3836-04[480] concerned, inter alia, an inspection clause worded as follows.

"The buyer is entitled to inspect the property no later than 5 November, 2002. In the event of the buyer's right of cancellation, the buyer may not cite defects or damages that the buyer had reason to expect given age, condition, or price. The buyers shall, in the event of cancellation, give notice hereof no later than 10 November, 2002. The buyers are not entitled to cancel the purchase if the seller repairs the cited defects before the day of possession."

The contract was signed on 24 October, 2002, and the agreed day of possession was 1 May, 2003.

The FMN had two main reservations. Firstly, since the clause is phrased in terms of "cancellation" instead of "withdrawal" - the latter term being commonly used to phrase contingency clauses whereas the former is the term used in statues and contracts to describe a sanction in the event of a serious breach of contract - the FMN found it unclear whether the clause was meant as a contingency clause or a limitation of the buyers' cancellation right under Chapter 4 of the Land Code. Secondly, given the long period of

[480] Ruling of 9 February, 2005.

time between the signing of the sales contract and the agreed day of possession, the seller's right to repair the cited defects before the day of possession means that the question of the completion of the contract could potentially be left undecided for as long as five and a half months. For including a clause with these two defects in the sales contract, the broker was issued a warning.

The broker appealed to the Administrative Court of First Instance arguing, inter alia, the following. Both parties were informed of the meaning of the clause and accepted it as a fair solution on a hot market. The wording of the clause was a way to safeguard the interests of both parties, in accordance with 8 and 21 §§ EAA.[481] If the buyer were entitled to cite all defects, the seller's situation would become untenable since under such terms the buyer had full discretion as to whether to go through with the purchase or not. As for the potentially long period of uncertainty, the broker's experience of the clause was rather that the parties came to quick understandings, which is advantageous to both.

The court held that the parties have a right to demand that the contract is worded in a correct manner. The purpose of a written agreement, held the court, is to document what has been agreed upon and thus to prevent conflicts between the parties. All clauses must therefore be clearly worded, especially clauses that deviate from the applicable provisions in the Land Code. The court upheld the warning.

In his appeal to the Administrative Court of Appeals, the broker argued, inter alia, that both at the time of the drawing up of the contract at hand, and at the present time [i.e. the time of appeal], there were no clear rules as to how inspection clauses must be worded in order to satisfy the supervisory body. The case law of the FMN was also inconsistent. Further, the broker contended that the parties were aware of the meaning of the clause and that neither party had raised complaints in that regard. Finally, the broker cited case RÅ 2002 ref. 30[482] and argued that he had acted upon the advice of his legal counsel.

The FMN answered by holding that the broker has an independent responsibility for the wording of the clauses in the sales contract. The fact that a particular clause has been drafted by a lawyer can therefore not exonerate the broker. The court concurred with the FMN and the Administrative Court of First Instance in that it is incumbent on the broker to draw up clauses that are clear enough that there can be no doubt as to what has been agreed upon. The court also concurred with respect to the deficiencies in the clause at hand, and upheld the warning.

[481] The statute in force at the time was the 1995 EAA; the provisions were then 12 and 19 §§.

[482] In the cited case, the broker had acted upon the advice of his legal representative. The client had threatened to report the broker to the FMN, which the broker – having consulted said legal representative – answered by reporting the buyer to the police for duress. The advice was based upon a blatant misinterpretation of the law and therefore grossly negligent. Nonetheless, the majority in the Supreme Administrative Court found that the broker was entitled to trust the advice of his legal counsel and acquitted the broker. The ruling is unfortunate and severely ill-advised to say the least, since it both presupposes that brokers are inherently ignorant, and openly endorses that imagined state of affairs.

KamR 9347-08[483] concerned an inspection clause worded as follows.[484]

The seller grants the buyers the right to, at their own expense, conduct a conveyance inspection on the property in accordance with 4:19 LC before 3 September, 2004 at 6 PM.

In the event of the buyer's right to terminate this agreement as specified hereinafter, the buyers are not entitled to cite defects, deficiencies or damages that could have been noticed without difficulty or which the buyers had reason to expect given, inter alia, the age and condition of the property.[485]

In the event of grave defects, deficiencies or damages the total reparation cost of which exceeds SEK 38,000 the buyers are entitled, if the seller does not intend to repair defects and deficiencies [sic!] before the day of possession or concedes a reduction of the sale price by an equitable sum and provided the aforementioned prerequisites are met, to terminate this agreement.

In the event of termination, all payments and other duties shall be cancelled. The buyers shall, in the case of demand of termination no later than 6 September, 2004, inform the seller and the responsible real estate broker of the defects and deficiencies or damages the buyers wish to cite as grounds for termination, as well as a reasonable estimate of the cost to have said defects, deficiencies or damages professionally repaired.

The FMN discovered the clause in the documents submitted by the broker in an ongoing investigation concerning the same broker, and found the clause wanting in several respects. Firstly, the clause did not specify whether or not the specified sum of SEK 38,000 included VAT. Secondly, the clause did not specify who would estimate the repair costs. Thirdly, the FMN found fault with the passage whereby the buyer was barred from citing defects, deficiencies, or damages that could have been noticed or that the buyers had reason to expect given, inter alia, the age and condition of the property. As interpreted by the FMN, the consequence of that passage was that no matter what was revealed at the

[483] Ruling of November 11th, 2009.

[484] My own translation. I chose to make the translation as true to the Swedish original as I could manage, and I therefore take no responsibility whatsoever for the less than satisfactory quality of the writing. The original wording was (nothing added, nothing erased):

"Säljaren ger köparna rätt att på köparnas bekostnad låta utföra en överlåtelsebesikting enligt 4:19 JB på fastigheten före 2004-09-03 kl. 18. Vid köparens rätt till frånträde enligt nedan, äger köparna då ej rätt att åberopa fel, brister eller skador som utan svårighet hade kunna uppmärksammas eller som kan anses motsvara vad köparna haft skälig anledning att förvänta sig bl a med ledning av fastighetens ålder och skick.

Framkommer härvid grava fel eller brister där totala reparationskostnaden överstiger 38.000 :- äger köparna om säljaren ej avser att åtgärda fel och brister före tillträdesdagen eller medger nedjustering av köpeskillingen med skäligt belopp och därest förutsättningar föreligger enligt ovan, rätt att frånträda detta avtal.

Samtliga prestationer skall härvid återgå. Köparna skall vid begäran om frånträde senast 2004-09-06 kl. 12.00, informera säljaren och handläggande fastighetsmäklare om de fel och brister eller skador köparna önskar åberopa som grund för frånträde samt skälig kostnad att fackmässigt åtgärda dessa."

[485] How the age of the *property* (which of course means "land"; 1:1 LC) could possibly affect the existence or foreseeability of defects is beyond the comprehension of this humble writer. However, it seems likely that "property" should be read as "building" or "house".

inspection, the buyers were not entitled to cite defects that are not defects under 4:19 LC. Therefore, held the FMN, the clause is likely to cause the buyers to overestimate the possibility to prevent the completion of the contract or achieve a reduction of the sale price. In connection with this remark, the FMN pointed out that if such a passage is included in the sales contract, it is incumbent on the broker to explain its meaning in detail to the parties, in order to avoid disputes concerning the interpretation of the limitations on the buyers' right to termination or reduction of the sale price.[486] Finally, the clause did not specify a time limit for the seller's notification as to whether they wished to repair the defects, which potentially left the question of termination undecided until the day of possession, to the detriment of the buyers. On these grounds, the FMN found the inspection clause in question unacceptably unclear, and issued a warning.

The broker appealed the decision to the Administrative Court of First Instance, where the case was heard in oral proceedings. In support of the appeal, the broker cited, *inter alia*, that the inspection clause at hand did not deviate significantly from those that were recommended by the broker associations, that the clauses such as the one at hand had been used on the market for a long period of time, and that he had been using clauses similar to the one at hand for a long time without causing disputes or problems. The court majority[487] overturned the warning, with no other explanation than that the admittedly unclear clause did not constitute a serious enough breach of the EAA as to merit a warning. Two members, including the only judge, issued a dissenting opinion upholding the warning.

The FMN appealed the ruling to the Administrative Court of Appeals citing, *inter alia*, that the wording of the clause meant that the buyer could potentially be forced to accept reparation work being conducted on the property after the day of possession. The FMN further held that the broker must act to prevent future disputes, and that the fact that the clause at hand had as yet not caused disputes in practice should not affect the assessment of the broker's conduct since one can never know at the time the contract is signed whether there will be disputes in the future. The broker, for his part, cited in his defense, *inter alia*, that the buyer had a family member who was a lawyer, and that the seller was himself a real estate broker.

The court held that the broker has an independent responsibility for the contents and wording of the sales contract and its clauses, and that it is of utmost importance to both buyer and seller that an inspection clause is worded in a manner that leaves no doubt whatsoever as to what has been agreed upon. The court concurred with the FMN:s interpretation and assessment of the clause at hand. The court further held that the fact that the buyer had a lawyer in the family, and that the seller was a real estate broker, did not exonerate the broker from his responsibility for the wording of the clause. Therefore, by contributing to an unclear inspection clause, the broker had acted in breach of sound estate agency practice. Finding no mitigating circumstances, the court overturned the

[486] Given that there is no discussion whatsoever in the decision as to whether the broker had in fact explained the clause satisfactorily to the parties, this last remark must be interpreted as an *obiter dictum*.
[487] Two members of the court voted in favor of overturning the FMN decision whereas two voted for upholding it. Under 2:2 of the Code of Administrative Proceedings, such a vote results in acquittal.

ruling of the Administrative Court of First Instance and upheld the warning issued by the FMN.[488]

LR 645-06 concerned the following inspection clause, included in a sales contract signed on February 1st, 2004.

"The buyer is entitled to, no later than February 11th, 2004 and at their own cost, inspect the property, and the sale may be cancelled without indemnification no later than February 12th, 2004 if the inspector has observed defects and deficiencies the repair cost of which are estimated to exceed SEK 45,000, VAT included".

The FMN found fault with the clause. Firstly, the word "cancel" was, held the FMN, inappropriate in a contingency clause. However, no sanction was issued on that count. Secondly, the clause failed to specify who was to estimate the repair costs. Thirdly, the clause failed to specify how and to whom the withdrawal notification should be given. As to that, the broker stated that the buyer and seller were in agreement that the notification should be given in writing "with his assistance". The FMN was not appeased, and held that notwithstanding, the agreement should have been made in writing. The broker was issued a warning for drawing up an imprecise contract clause. The broker appealed to the Administrative Court of First Instance, arguing that there had been no doubtfulness concerning the significance of the clause, and that no dispute had arisen as a result of it. The broker further argued that it is incumbent on the party who wishes to cancel the contract to demonstrate that the repair cost exceeds SEK 45,000, and that it must be evident to all that in a contract between no more than two parties, the correct recipient for the notice of cancellation is one's counterpart. The court remained unimpressed, however, and upheld the warning.

The importance of setting time limits that are possible for the concerned party to observe is illustrated by **LR 20385-06**.

In **LR 20385-06**[489], 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 FMN 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 FMN issued a 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 verbal agreement the parties may have entered 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

[488] One member of the court argued in her dissenting opinion that there were mitigating circumstances and that the ruling of the Administrative Court of First Instance should be upheld.
[489] Ruling of October 30th, 2006.

of both buyer and seller, as well as to draw up a clear contract clause. The warning was upheld.

FR 16592-10[490] concerned an inspection clause, used with minor variations in three separate conveyances, with the following deficiencies.

Firstly, the clause stipulated that the buyer would be bound to the contract if the seller offered to have the discovered defects repaired by a professional, or to compensate the buyer for the cost of such repairs. However, since the clause did not specify a time limit for the seller's notification, the seller was in effect unilaterally empowered to decide the validity of the sale until the day of possession.[491] The FMN found said deficiency serious enough as to merit a warning.

Secondly, the clause provided that the down payment be refunded to the buyer upon the buyer's notice that they did not wish to go through with the purchase. However, due to the seller's aforementioned right to save the sale by offering to pay for any necessary repairs, it would at the time of the buyer's notification not yet be decided whether the sale would be completed or not. As a consequence, it would still be uncertain which of the parties was entitled to the down payment. The FMN issued a warning on this account as well.

Thirdly, the clause provided that defects discovered at the inspection, including circumstances indicated in the risk analysis in the inspection report, were not hidden defects within the meaning of the Land Code. In other words, said defects would fall outside the scope of the seller's liability. This, held the FMN, is tantamount to a limitation of the seller's liability. The FMN held that passages such as this should normally not be used in contracts between consumers unless the broker informs the buyer in detail about the meaning and possible consequences of the clause. The FMN also called it regrettable that a liability limitation clause be woven into an inspection clause. However, no warning was issued on this account.

The broker appealed to the Administrative Court of First Instance arguing, inter alia, that all conveyances where the clause had been used had been conveyances where the property had previously inspected on behest of the seller, that all parties were therefore familiar with the technical condition of the respective properties, and that all parties were aware of the meaning and implications of the clause and had declared themselves satisfied with it. The court stressed the importance to write clauses that are clear enough as to leave no doubt what has been agreed between the parties. The court further held that the deficiencies in the clause at hand were not minor breaches of the broker's obligations. The warning was upheld.

In **FMN 2011-04-27:6**, the sales contract, which was dated September 7th, 2009, contained an inspection clause worded as follows.

[490] Ruling of February 22th, 2011.

[491] The assessment is not entirely accurate, since the buyer could force the completion of the sale if they wished to. It was only the buyer's possibility to stop the completion of the sale that was curtailed by the seller's right to repair the defects.

"The buyer is entitled, with the aid of an inspector chosen by him, to inspect the property no later than October 1st, 2009. The parties are in agreement that any defects or indications of defects revealed at this inspection shall not constitute hidden defects under the Land Code."[492]

After the inspection, the buyers notified the seller that they would not go through with the sale. However, the sellers maintained that the buyers were bound to the contract and the broker did not return the down payment, which he held in deposition as per prior agreement. Instead, he transferred the money to the sellers, retaining his commission fee. The buyers reported the broker to the FMN. The broker objected before the FMN that the property had been inspected by a professional in August, 2007 when the sellers purchased it. All defects were evident from that inspection report, which was presented to the buyer along with the verbal statement that no measures had been taken on with respect to said defects. The buyers were therefore, held the broker, aware of all existing defects. The new inspection in 2009 did not reveal any significant deviations from the conditions in 2007.

The FMN rejected the broker's view that the 2007 inspection could in any way exonerate him, holding instead that since the first inspection had been conducted as early as two years prior to the sale at hand, there was [at the time the contract was drawn up] a considerable risk that the technical condition of the house had changed. The FMN further noted that the inspection clause did not make the validity of the contract contingent on anything. Even if, as the broker claimed, the clause was intended as a contingency clause, it could not be understood as such.[493] The broker's diligence obligation, the FMN pointed out, entails an obligation to ensure that all agreements between the parties are documented, so as to prevent future disputes. The broker was issued a warning.

The warning is well-founded by any standard, and it would seem that the FMN could have gone further – if not with respect to the choice of sanction, then at least regarding the grounds for the decision. First of all, since the clause does not contain a contingency, the sale is binding for both parties once the sales contract is signed. That renders the right to inspect after the sale completely useless and not at all in accordance with how inspection clauses are meant to work and usually do work. The whole point of inspection clauses is to give the buyer the possibility – with or without restrictions - to inspect after signing the sales contract, and to refrain from going through with the purchase if the result is unsatisfactory, or at the very least to demand a price reduction. In the absence of such a right, the buyer's only resort is to cancel the contract under 4:19 LC. Such cancellation requires, however, that there is a defect that could not be discovered prior to the sale - which is a narrow definition in itself - and that said defect is substantial within the meaning of 4:12 LC. This rules out the possibility – which is otherwise present in inspection clauses – for the buyer to call off the sale upon discovering defects that are not defects within the meaning of 4:19 LC, defects that would have been discoverable if inspecting before the sale, or defects that were non-discoverable (i.e. "hidden defects") that are not serious enough as to be deemed substantial within

[492] My translation. The original read: *"Köparen har rätt att, med av honom utsedd besiktningsman, besiktiga fastigheten senast den 2009-10-01. Parterna är överens om att fel eller indikationer på fel som framkommer vid denna besiktning ej kan utgöra s.k. dolda fel enligt jordabalken."*

[493] 4:3 LC provides that contingency clauses must be made in writing.

the meaning of 4:12 LC. It should be borne in mind that where the property is inspected prior to the sale, the buyer is at liberty to call off the deal on account of any circumstance at all.

For a professional as the real estate broker, in whom buyers and sellers are meant to place their trust, to draw up an inspection clause that is not a contingency clause can only lead to one of two conclusions: either the broker did not understand the legal significance of the wording of the clause – in which case his suitability for the brokerage profession must be called into question – or he acted fraudulently in relation to the buyer – in which case his suitability for the brokerage profession must likewise be called into question.[494]

Moreover, the second sentence would seem to constitute a limitation of the seller's liability. Under 4:19 LC, all defects discovered after the sale that were such that they were not discoverable prior to the sale, i.e. "hidden defects", fall within the liability of the seller. It certainly lies in the realm of possibility that the inspection undertaken after the sale may reveal such defects. Therefore, an agreement between the parties that no defects discovered at the inspection after the sale would count as defects is tantamount to a liability limitation. At least two major problems are brought to the fore. Firstly, since the limitation is placed, without comment, in what appears to be an inspection clause - which is by definition a kind of contingency clause - it is highly questionable whether the parties were actually aware of the liability limitation. The high probability that the buyer was ignorant of the implications of the clause is particularly grave. Secondly, (which, ironically, could offset the negative consequences for the buyer) liability limitations are not valid unless certain forms are observed. For instance, the seller must disclose any known hidden defects.[495]

Judging from the broker's own statement that the clause was meant as a contingency clause, it is evident that gross incompetence is at the heart of the problem. Since drawing up and interpreting contract clauses are two of the broker's most important - and irrefutably two of the most sensitive - tasks, gross incompetence in that regard seems hard to countenance.

The vast case law concerning inspection clauses, of which the aforementioned cases are but a selection, demonstrates the significance placed by the FMN and the courts on the broker's responsibility for the way the contract and its clauses are worded. However, there is more to the broker's contract-engineering than formulating contingency clauses. As illustrated by the following case, the contract as a whole must be tailored to fit the needs of the instant transaction.

> In **RK 1995-04**[496], the broker was hired by the buyer, who had been the seller in a previous transaction negotiated by the broker, to draw up the sales contract. The broker did not visit the property and possessed no knowledge of its specifics. The broker used a standard form contract and made no changes therein. At the contract signing meeting, the broker read the contract out loud, and the parties did not voice any objections to its contents. Directly after signing the contract, the buyer transferred the entire purchase sum to the

[494] There is a third possibility, viz. that the broker deemed that there were special circumstances that made it reasonable to draw up the clause in the manner he did. However, given the nature of the broker's role in the transaction and obligations to both contracting parties, as well as the dire and foreseeable consequences of the broker's actions, that judgment is so grossly ill-founded and negligent that, again, the broker's suitability for the brokerage profession must be called into question.
[495] Grauers F. 2012, p. 232-236.
[496] Ruling of November 22nd, 2004.

seller and received the deed. Sometime after the sale, however, the seller proved unhappy with the deal and reported the broker to the FMN alleging that the broker had not safeguarded the seller's interests, inter alia by setting too low a sale price.

While the FMN could not find fault with the broker with respect to the sale price, several deficiencies were found in the contract. For instance, although the purchase sum was paid immediately, the contract included several clauses that were not applicable to the transaction at hand. For instance, § 10 regulated the allocation of costs and revenue during the time between the contract day and the day of possession, whereas § 2 and § 4 regulated the buyer's taking over the seller's mortgage debt and insurances respectively. The FMN observed that the EAA was applicable to limited assignments such as the one at hand, and held that it was incumbent on the broker to tailor the contract to the transaction at hand. For the failure to do so, the broker was issued a warning.

The broker appealed the warning arguing, inter alia, that the contracting parties had been aware of the inconsistencies in the contract and accepted them, that none of the parties had suffered damages as a result of said inconsistencies, and that the inconsistencies were in any case not of such nature as to warrant a disciplinary sanction. The Administrative Court of First Instance, who expressly pointed out that it did not wish to label the inconsistencies minor nor trivial, nonetheless ruled in favor of the broker and overturned the FMN:s decision. The FMN appealed to the Administrative Court of Appeals, who held that the broker had not fulfilled his obligations with respect to adapting the contract to the situation at hand, and that this failure could not be deemed minor. The ruling of the Administrative Court of First Instance was therefore overturned and the warning upheld.

The case lends further strength to the arguments made earlier (11.2.3) about the hazards of the uncritical use of standardized forms. It also underscores the futility of arguing that the contract is acceptable on the mere grounds that the parties' signatures render the terms of the contract synonymous to their will in the eyes of the law. When the broker prints out a contract, and asks the buyer and seller to sign it, that is tantamount to an advice to sign it. If that advice is inadequate, e.g. because the contract is poorly adapted to the present situation, the broker cannot be exonerated by the fact that the parties followed the advice.

As previously discussed, a piece of good advice to one party may be to the detriment of the other. As likewise discussed, the same applies to contract clauses: a clause that is favorable to one party may be unfavorable to the other. If one of the parties suggests a clause that is in their best interest, the broker is obliged under the duty to advise as well as the duty of impartiality to safeguard the interests of the other party by studying the clause critically and, depending on the circumstances, warn the other party not to accept it. The following case illustrates the point.

Case **LR 28148-05**[497] concerned the sale of a tenant-ownership apartment. The parties agreed upon the price SEK 710,000, but the contract also included a clause obliging 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 obtain a loan; the

[497] Ruling of May 29th, 2006.

real sale price was in fact 629,850 SEK. The broker was issued a warning by the FMN on the grounds that the clause unduly favored the interests of the buyer to the detriment of the seller, whose capital gains tax 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.[498] The parties were perfectly aware of the reasons and implications of the chosen solution. The court rejected the broker's arguments and upheld the warning.

The ruling cannot escape criticism. It would appear that the buyer had difficulties obtaining a loan and suggested a solution which the seller accepted. The broker then chose to document the agreement - which, as will be demonstrated in 11.2.6 below, is an obligation *per se*. The crucial issue is whether the seller was aware of the risks. It was definitely incumbent on the broker to explain the risk of a higher capital gains tax to the seller. Had it been established that the broker had failed to do so, a warning would be warranted. However, the clause in itself - though, admittedly, exposing the seller to a risk of higher taxes - does not seem reason enough to issue a warning. Granted, warnings are issued on the grounds of sub-par or risky clauses despite the brokers' objections that the parties had agreed to their inclusion in the sales contracts. However, in those cases the clauses were included upon suggestion from the broker. In the present case, the initiative came from the parties themselves.

11.2.5 Explaining the Significance

Given that the broker has a duty to advise under 16 § EAA, and that said duty obliges the broker to ensure that the parties have understood the full significance of the situation at hand, from a logical point of view it seems superfluous to account for that duty at length here. I will therefore be brief. The obligation to explain the significance of the different contract clauses is mentioned in the *travax préparatoires* to the 1984 statute, which demonstrates that an advice aspect has been intended all along.[499]

At times, however, explaining the direct contents of the contract clause is not enough to convey its significance. This is particularly true where a deviation from applicable has been made, as in the aforementioned **LR 8600-09**, reviewed in 10.1.1. The contents of the membership clause at issue in that case were quite straightforward: in the event that the buyer was denied membership in the association, the seller had a seven-day period beginning the day the seller was notified of the decision within which they were entitled to withdraw from the contract - even if the buyer had appealed the decision to the Tenancy Board. However, that does not account for the fact that the clause deviates from the law to the detriment of the buyer. It is one thing to know that one does not have a particular right or option: knowing that it has just been taken away from under one's nose is quite another.

[498] SFS 1991:614.
[499] SOU 1981:102, p. 208; prop. 1983/84, p. 41.

Now, neither the FMN nor the Administrative Court of First Instance went so far as to hold that it is unacceptable for a broker to draw up - or, in the instant case, make use of - a contract clause that was tantamount to contracting out the buyer's statutory right to appeal the decision not to grant membership. If that had been the case, the ruling would have been reviewed in 11.2.4 along with the other cases concerning the wording of contract clauses. The broker's mistake - and let there be no doubt that there had been a breach of the broker's duty to advise, although the court found mitigating circumstances - was the failure to explain to the buyer that the clause at issue deviated, to the buyer's detriment, from applicable law.

11.2.6 Documenting Agreements

The formal requirements prescribed in 4:1 LC and 6:4 TOA for sales contracts for real estate and tenant ownership homes are an anomaly in Swedish law. The general rule is that there are no formal requirements for the entering of contracts. Still, a verbal agreement is of scant use in the event of a dispute if one cannot prove its existence and its terms. Moreover, the lack of documentation paves the way for disloyal behavior: if the contract cannot be properly enforced if necessary, the incentives to act loyally are reduced. Thus, there is ample reason to have all non-trivial agreements documented even where it is possible to enter a valid agreement verbally. Brokers are required to pursue that end.

> In **LR 889-06**[500], the buyer and seller in a tenant ownership home conveyance had agreed verbally that the buyer would be allowed to take possession of the home earlier than the day of possession stipulated in the sales contract. For that, the buyer agreed to compensate the seller. Subsequently, however, a dispute arose. The buyer could not prove the existence of the verbal agreement in court and lost the case to the seller. The ruling found its way to the FMN who opened a disciplinary proceeding. The FMN held that the broker ought to have made efforts to ensure that the disputed agreement was made in writing. For failing to do so, the broker was issued a warning. The broker appealed to the Administrative Court of First Instance, who upheld the warning.

As in the case of all other conceivable unfortunate courses of action, the parties are of course free to contract under any terms they see fit. If they do not wish a particular agreement to be done in writing, then that is their choice. That does not, however, exonerate the broker from the duty to advise. Verbal agreements are risky, and it is incumbent on the broker to ensure that the parties have understood those risks.

[500] Ruling of May 31st, 2006.

11.3 The French Notary

As established in chapter 4, one of the main reasons the notarial profession came into being was to record deeds in writing. It is therefore no surprise that the general definition of the notary's duty to counsel as a whole is to ensure the validity and efficacy of *the deeds*. Hence, it is straightforward to conclude that the notary is obliged to draw up any and all documents that are necessary to effectuate the transaction. However, as established, the notary is no mere scribe assigned with the practical task of drawing up documents. Again, the key objective of the notary's duty to counsel is to ensure the validity and efficacy of the deeds. While validity as a concept is fairly straightforward – any and all legally prescribed formalities must be observed and any and all necessary consent must be at hand – efficacy may require more diligence and prudence on the part of the notary since it entails ensuring that the deeds accomplish the objectives envisaged by the parties. That, in turn, entails examining the expressed will of the parties against the backdrop of the circumstances in the instant case, particularly the applicable law.

11.3.1 Effectuating the Will of the Parties

First and foremost, the will of the parties must be respected. At that, since the very definition of efficacy is that the will of the contracting parties can be realized, the notary has a responsibility to ascertain what that will is. It also follows that the notary has a responsibility to *adapt the deeds so as to render that realization possible*. The following case demonstrates a situation where the notary knows, or ought to know, the intentions of the buyer but fails to draw up the deed accordingly.

> In **Cass. 1re Civ., Appeal no 10-18066**[501] M.X. pledged by means of a *promesse de vente* signed Juy 19th, 2001 to sell a residential house comprising two apartments, a garage, annex buildings and a yard to Mme Y. M.X. and his wife reserved for themselves the life-long right to use the bottom-floor apartment, whereas Mme Y would have the second-floor apartment. The *promesse de vente* further stipulated that the buyer would have the apartment and a parking space in the garage at her disposal once the sale was authenticated.
>
> The sale was authenticated by notary M.A. on October 24th, 2001. The *acte de vente* established, firstly, an *état descriptif de division*, whereby the property was divided into four lots: 1) the bottom-floor apartment, 2) the second-floor apartment, 3) the garage, and 4) an independent construction. The *acte de vente* stipulated that lots 2 and 4 would be conveyed will full ownership to Mme Y as of the *acte de vente*, whereas lots 1 and 3 would, until the death of M.X. and his wife, only be conveyed with bare ownership. Thus, the usufruct right to lots 1 and 3 was assigned to the seller for life.
>
> On October 24th, 2001 – notably the very same day the sale was effectuated – buyer and seller signed a contract *sous seing privé*, which contained the following clause:

[501] Ruling of December 1st, 2011.

"In annex to the acte de vente received on this day by [the notary], the parties recognize and accept that M and Mme X (…) authorize Mme Y and her assignees to use a parking space situated in lot n° 3 created in the état descriptif de division *received by [the notary] jointly with the* acte de vente *on this same day, whereas the usufruct right to lot 3 as a whole is reserved for life to M and Mme X in accordance with the* acte de vente*."*

After the sale, Mme Y proceeded to rent out her apartment along with the parking space referred to in the clause. M.X. sued for cancellation of the sale. Mme Y, in turn, sued notary M.A. for negligent counsel. The two cases were adjudicated in the same proceedings along with two other counts. As to the cancellation of the sale, the Cour d'Appel held that the buyer had acted in breach of the sales agreement and, beyond the cancellation of the sale, sentenced the buyer to pay the seller all rent income that had been collected to date. As for the notary, the Cour d'Appel held that the buyer could not have failed to observe that the promise of a parking space could was not feasible due to the *état descriptif de division*, which did not specify different parking spaces. If the *acte de vente* was contrary to the buyer's will, held the court, she should have refused to sign it. The notary was found not liable.

The case was appealed to the Cour de Cassation, who upheld the ruling as regards the cancellation of the sale and the collected rent money. As to the responsibility of the notary, however, the Cour de Cassation observed that the notary had left the buyer to solve the sensitive issue of the right to the parking space directly with the sellers, without at least offering the advice necessary for the drafting of a deed that could ensure the efficacy of said right. The court thus found the notary negligent, and remitted case to the Cour d'Appel.

It can be observed that in the case just reviewed, the Cour de Cassation did not discuss the question of whether the notary should have understood that the buyer assumed that she had acquired a right to the parking lot. On the contrary, the court treats it as a matter of course that since the *promesse de vente* mentioned a parking lot, the notary should have understood that the matter was of importance and that he should therefore have made sure that the deeds accomplished that end. Another example of a situation where it is found that the notary ought to have understood the intentions of the parties is offered by the following case.

Cass. 1re Civ., Appeal n° 10-17259[502] concerned, inter alia, problems attributable to the allocation of costs for renovations and the installation of elevators in a condominium building. The unit owner association[503] planned to install elevators in the building and hired a contractor for the project. The project suffered a setback when the unit owners on the bottom floor made it clear they had no wish to help fund the elevators since they had no use for them. Now, under Art. 8 of the condominium statute[504] every condominium property must have a *règlement de copropriété* which, inter alia, specifies the private and common units/parcels of the property, and the terms of their enjoyment. Under Art 10 of

[502] Ruling of October 6th, 2011.
[503] *Syndic de copropriété*.
[504] Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.

the same statute, the unit owners must share the costs of maintenance and utilities. Art 10 further provides that the *règlement de copropriété* must specify the quota of each category of costs for common units/parcels to be borne by the owners of the respective private units/parcels. Moreover, to render the division of the property into units binding towards third parties, it must be established in an *état descriptif de division*. Both documents must be published by a notary at the *bureau des hypothèques.*

In the instant case, it turned out that the assigned notary had failed to specify the unit/parcel where the elevators were to be installed. Consequently, there was also no specified allocation of costs. As a result, the financing of the project was uncertain, which in turn caused delays in its effectuation. The unit owner association proceeded to sue, inter alia, the responsible notary for the deficiencies in the drafted documents.

The Cour d'Appel found it established that the notary had known or ought to have understood, at the time of the drafting of the *règlement de copropriété* and the *état descriptif de division*, that the building was intended to be furnished with elevators. Therefore, it constituted a negligent breach of the notary's duty to counsel, and of the aforementioned Art. 10 of the Condominium Act, to draw up documents that did not properly specify the allocation of costs, depriving them of the efficacy and security prescribed by law.

The Cour de Cassation did not contradict the Cour d'Appel as regards the breach of the notarial duties. However, it found that the Cour d'Appel had not established a sufficient line of causality between the notary's errors and the damage incurred by the unit owner association. Upholding the ruling with respect to the breach of the duty to counsel, the Cour de Cassation remitted the case to the Cour d'Appel as concerned the line of causality.

Given the obligation to ensure that the will of the parties is put to effect, it seems a natural requirement that the deeds and their clauses are worded in such a manner that they fulfill the parties' intentions. Thus, it is not necessary to merely include the necessary clauses in the contract; said clauses must also be worded in a satisfactory manner.

Cass. 1re Civ., Appeal no 10-27305[505] concerned a conveyance where a rural property owner had sold a parcel of land to the municipality, and where the subsequent use of the land by the party to which the municipality had re-sold the property did not appeal to the original seller.

In 1997, the parcel was sold to the municipality of Tournan-en-Brie in the Île-de-France region. The seller expressed concerns about the municipality's intended use of the land, since they wished to protect their farming land which was adjacent to the property for sale. Upon request of the seller, therefore, a prohibition clause in the *acte de vente* stipulated that the buyer must not use the property for the recycling or storage of any kind of refuse save green waste. The buyer was also barred from letting another party use the property in such a manner. The sale was effectuated by notary X.

[505] Ruling of December 13th, 2011.

In 2002, the municipality partitioned the land into two parcels, one of which was sold to a waste treatment firm that was active in several municipalities. The partition and sale were effectuated by the same notary X. In 2006, the waste treatment firm was authorized by the *prefecture* to conduct waste separation on the property. The firm thus started conducting separation of waste collected in the municipality of Tournan-en-Brie.

The original seller, who saw the waste separation plant as a threat to their farming land, sued the municipality for breach of contract, demanding the cancellation of the sale of 1997. That suit, which went all the way to the Cour de Cassation, was settled in favor of the municipality. The Cour d'Appel and Cour de Cassation both held that while the municipality had indeed acted in breach of the sales contract, said breach – considering that no serious threat of environmental damage had been established - was not serious enough to warrant the cancellation of the sale.

However, in an action treated in the same proceedings, the municipality also sued notary X for failing to draft an effective prohibition clause in 1997 and for failing to include the same clause in the *acte de vente* in the 2002 conveyance.[506] The municipality argued that it was the notary's failure to produce an unequivocal and unassailable prohibition clause that led the municipal officials to misinterpret its rights under the contract. Therefore, argued the municipality, the notary's failure had caused the injury suffered by the seller. Rejected by the Cour d'Appel, the argument was deemed founded by the Cour de Cassation, who held that he notary's responsibility is distinct and independent. The notary was therefore held negligent for the failure to draft an effective prohibition clause as well as the failure to include the prohibition clause in the 2002 deed.

11.3.2 Adapting to the Present Circumstances

Establishing the will of the parties and ensuring that it is put to effect is well and good. However, as has been established in chapter 10, it is the *informed* will of the parties that should be aimed at. The *expressed* is likely to be based on incomplete or erroneous information and/or misconceptions. For instance, it can and does occur that the expressed will of the parties cannot be realized because it is incompatible with the law, be it statutory provisions or some other source of law. To name an admittedly banal example, one cannot sell what one does not own. Now, the notary is bound to a duty of diligence and prudence. If he has reason to suspect that the seller does not own the good for sale, he cannot effectuate the sale. The same applies where the transaction as a whole is valid, but where the notary has reason to suspect that a particular condition cannot be met.

Cass. 1re civ., appeal no 97-15947[507] concerned the sale of an apartment, in which sales contract the notary had included a clause specifying that, as per statement from the seller, the apartment was occupied "without right nor title".[508] However, as it happened the

[506] The municipality's reasons to pursue this action are unknown; however, it seems reasonable to deduce that the municipality had agreed to indemnify the seller and sought compensation.
[507] Ruling of November 21st, 2000.
[508] *Sans droit ni titre*.

occupant enjoyed a tenancy protected under the Law of January 1st, 1948.[509] As a consequence, the notice of termination that had been presented to the tenant prior to the sale was without effect. The buyers sued the notary for damages for failure to observe his duty to counsel.

The Tribunal de Grande Instance ruled in favor of the notary, holding that the notary had not in any way failed to observe his duties. The notary, held the court, could not be faulted for not producing the relevant documents since the situation described to him indicated that no such documents existed. The Cour d'Appel upheld the ruling with a similar reasoning, holding that the notary could not be deemed to have failed to observe his duty to counsel since he did not have the means to exercise it.

The Cour de Cassation, by contrast, held that it was incumbent on the notary to make inquiries with the seller as to their precise reasons to declare that the apartment was occupied without right nor title. Notwithstanding that there had been no indication of the presence of a tenancy protected by the 1948 statute, the Cour de Cassation held that the seller's statement was so laden with implications that the notary ought to have investigated the matter in more detail.

The case just described could admittedly be classified under the duty to ascertain facts. However, it serves to demonstrate that the notary cannot simply take the expressed will of the parties at face value. In the instant case, the seller may very well have been sincere in their belief that the occupant had no legal title and that the notice of termination was binding. However, due to the 1948 statute – the existence, contents, and implications of which the notary is obliged to know – that belief was mistaken. Hence, the intention of the parties – to buy and sell, respectively, an apartment free from tenants – could not be realized. Thus, the notary had not properly safeguarded the efficacy of the transaction.

As established in chapter 10, the notary is obliged to alert the parties of the risks involved in the transaction. A natural continuation of that obligation is that the notary must adapt the deeds accordingly, be it by including a particular clause or by advising the parties with respect to a clause suggested by them. The following case illustrates the point.

Cass. 1re Civ., Appeal no 10-26934[510] concerned the sale of a commercial property comprising a bar, a restaurant, and a hotel. The buyer and seller were both firms. Shortly after the sale in October, 2002, the buyer came into financial difficulties. In September, 2006, the company filed for judicial recovery. Shortly thereafter, in July 2007, it filed for bankruptcy. The totality of the sale price could not be paid due to insufficient funds. The seller proceeded to sue the responsible notary for negligent counsel on the grounds that the notary had failed to advise them of the risks involved should the buyer become insolvent, and to adapt the sales contract accordingly.

The Cour d'Appel held that, while the notary was under no obligation to conduct investigations as to the financial status of the buyer and the risk for insolvency, the very

[509] Loi du 1er janvier, 1948.
[510] Ruling of December 15th, 2011.

nature of the transaction should have alerted the notary as to the risks since the buyer purchased a commercial property, the sale price of which was to be paid in installments over four years. Therefore, held the court, it had been incumbent on the notary to explain the risks to the contracting parties, including the fact that in the event of bankruptcy, the seller's claims would be at jeopardy due, *inter alia*, to the ranking of creditors that would necessarily be established. Given that this risk was foreseeable at the time of the signing of the *acte de vente*, the notary was held liable.

The Cour de Cassation found fault with the ruling insofar as the Cour d'Appel had failed to specify the assessment tools available to the notary, from which the notary could have concluded that the insolvency of the buyer was foreseeable at the time of the signing of the *acte de vente*. Thus, held the court, the Cour d'Appel had not provided sufficient legal grounds for its decision. The case was remitted.

Though the Cour de Cassation did not find it established that the potential insolvency of the buyer had been foreseeable for the notary, the case confirms that in the presence of a foreseeable risk, the notary must advise the parties and see to amending the deeds accordingly.

11.3.3 Responsibility for Inaccuracies

It follows from the tenant case reviewed in 11.3.2 that the notary has a responsibility for the accuracy of the statements in the contract. That being so in a case where the notary did not *know* that the information was inaccurate, but could and should have found out, it is a matter of pure logic that it must be so where the notary actually knows that some part of the contract misrepresents the actual facts. The following case lends support to the conclusion.

Cass. 1re Civ., Appeal no 99-15642[511] concerned a transaction where a group of properties were sold through a real estate broker to a buyer who wished to restore the buildings in order to be eligible for tax benefits under the "Loi Malraux". The multiple sales were effectuated by notary X. Under the terms of the *actes de vente* drawn up by the notary, the properties were sold free of any tenancies whatsoever. After the sale it turned out that, contrary to what had been stipulated, there were in fact tenants in some of the buildings. As a result, the intended restoration works could not be commenced until more than two and a half years later, when the last of the tenancies had expired – a delay, in turn, that barred the buyer's eligibility for the intended tax benefit.

The buyer sued the seller, the broker, and the notary, demanding the cancellation of the sales contracts and indemnification for the losses incurred. The Cour d'Appel held that, while the "Loi Malraux" was not only applicable to vacant properties, it was established in the case at hand that the existing tenancies had in fact made impossible the restoration works necessary to obtain the intended tax benefit, and that the buyer acted upon the erroneous information given by the seller and notary alike. Moreover, since it was likewise

[511] Ruling of January 15th, 2002.

established that the notary had been aware of the existence of the tenancies, the court concluded that the notary had acted in breach of the duty to counsel by including - or accepting without comment the inclusion of - the clause in the *actes de vente* stipulating that the properties were sold without tenancies. The court found it highly unlikely that the buyer would have proceeded with the transaction had they been given correct information. Thus, finding it established that that the defendants had caused the losses for which the buyer now sought compensation, the Cour d'Appel ruled in favor of the buyer on all counts.

The case was appealed to the Cour de Cassation who concurred with the Cour d'Appel on all counts and upheld the ruling.

At times, it matters not whether the notary knows or merely ought to know that the contract or a document appended to it is incomplete or misrepresentative. Both are damning in their own way: in the former case, the notary willfully contributes to fraud or at least a contract based on false premises, whereas in the latter case, the notary has failed in his duty to ascertain facts.

Cass. 3me Civ., Appeal no 08-20250[512] concerned a conveyance where the seller had failed to disclose crucial information to the buyer and the notary. The seller, real estate firm PPCA, purchased a property in 2001 from Mr. and Mme Z. The *acte de vente*, drawn up and authenticated by notary Y, specified that Mr. and Mme Z had had several restorations and improvements done on the property, including treatment of the joists and stabilization of walls. The deed also stated that Mr. and Mme Z had delivered the invoices from the firms who had conducted the works, so that PPCA could make use of the warranties if the need should arise.

Through a deed effectuated by the same notary Y in 2002, PPCA resold the property to Mr. and Mme X. PPCA failed to inform the buyers – who were laypeople - of the works conducted by the previous owner. The notary, for his part, failed to make mention of them in the *acte de vente* – or, for that matter, in any other way. Shortly after possession, the Mr. and Mme X discovered cracks in the wall, and it became clear that serious damage to the walls had been camouflaged in bad faith before the sale. Mr. and Mme X sued the seller for damages. The Cour d'Appel ruled in favor of the plaintiffs, observing that the extremely short time between the sale and the discovery of the damage bespoke fraudulent non-disclosure on the part of PPCA.

In the same proceedings, PPCA sued notary Y for negligent counsel, demanding that the notary be sentenced to pay any damages PPCA was sentenced to pay Mr. and Mme X. The PPCA argued that the notary has a distinct and independent duty to inform and advise. Since the notary had had access to information about the conducted works from the *acte de vente* of the 2001 conveyance, argued PPCA, it constituted a negligent breach of the notarial duty to counsel not to inform the buyers on the matter.

[512] Ruling of October 20th, 2009.

The Cour d'Appel and the Cour de Cassation both rejected PPCA's demand. While both courts found that the notary had in fact acted in breach of his duties, they held that the notary's error did not entitle the fraudulent PPCA – who were themselves in breach of their duty to disclose information – to damages from the notary.

Since the notary is obliged by law to know and master the applicable law, it follows that if a certain piece of information is rendered invalid or incorrect by legislation or some other source of law, it constitutes an infraction for the notary to draw up and/or authenticate a deed with such incorrect information. At that, it is irrelevant whether or not the notary was *actually* aware that the information was incorrect. The following two cases illustrate the point.

Cass. 3me Civ., Bull. 1990 III N° 119 p. 66[513] concerned the failed sale of a property with a building under construction. Mme X wished to purchase two workrooms in the future building, to which end she signed two reservation contracts and two checks, each for the amount of 230,000 francs. The reservation contracts, signed on June 21st, 1984, were authenticated by notary Y on July 3rd the same year. Mme X had granted a power of attorney to Z to handle the affair and did not treat directly with notary Y. By April, 1985, Mme X was informed that the construction works were not yet finished. She demanded, and received, the deed from Z – who had thitherto not relinquished the deed to their principal. Mme X sued the construction company, Y, and Z, demanding that the contract be declared void, and that the paid sums be refunded with interest.

Now, under Article 261-10 of the Construction Code[514], the sale of a building under construction must take the form of one of the contract types envisaged in C.C. Art. 1601-2 and 1601-3, namely *vente à terme* or *vente en état futur d'achèvement.* Under the former regime, ownership is transferred upon completion. The seller is not entitled to the sale price until that time. Under the latter regime, ownership is transferred, and the seller is entitled to the sale price, immediately. A contract that does not satisfy those requirements is void. In the instant case, the transfer of ownership was understood to take place upon completion, yet the sale price was paid long before that. Therefore, the Cour d'Appel and the Cour de Cassation both found the sale null and void.

As for the notary, both courts observed that the notary had authenticated a sale that he ought to have known to be invalid. Thus declared negligent and in breach of the notarial duty to counsel, the notary was sentenced to pay damages to Mrs X *in solidum* with the construction company and Mrs X's assignee.

Cass. 1re Civ., Appeal n° 07-18057[515] concerned an apartment that turned out to be smaller than anticipated. In 1994, Mr. and Mme Z acquired an attic apartment. The *acte de vente*, drawn up and authenticated by notary X, specified that the apartment was an attic apartment with with a living area of 88 m^2. In 1996, the Condominium Act[516] was amended

[513] Ruling of May 16th, 1990.
[514] Code de la construction et de l'habitation.
[515] Ruling of February 5th, 2009.
[516] **Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.**

by the so-called *Loi Carrez*[517], which introduced an obligation on the part of sellers of condominiums to disclose the apartment area in all documents related to the sale. In 1997, a *décret* was passed, Art. 4-1 of which excluded from living area all space with a ceiling height of less than 180 cm. In 2001, Mr. and Mme Z sold the apartment to Mr. and Mme Y. Once again, notary X was assigned the task of effectuating the sale. Once again, the *acte de vente* specified that the apartment was an attic apartment with a living area of 88 m^2.

However, since all space with a lower ceiling height than 180 cm by law no longer counted as living area, the apartment's living area turned out to be smaller. Mr. and Mme. Y sued Mr. and Mme Z., the brokerage firm who had brokered the sale, and the notary for failure to disclose critical information and, in the case of the latter two, for negligent counsel. Mr. and Mme Z, for their part, sued the brokerage firm and the notary for negligent counsel.

As concerns the notary, the Cour d'Appel observed that the notary had effectuated the sale in 1994 and that the deed from that sale was therefore by definition known to him.[518] The court held that as a professional, the notary was aware – or at least obliged by law to be aware – of the 1996 and 1997 legislation. Therefore, held the court, the notary should have realized that the specified living area of 88 m^2 was no longer correct. The court further held that the notary's duty to counsel was in no way expunged by the fact that the statement emanated from Mr. and Mme Z. Thus, the notary should have advised the buyers that the statement as to living area was incorrect. The court sentenced the Mr. and Mme Z, the brokerage firm, and the notary *in solidum* to indemnify Mr. and Mme Y with a sum that corresponded to a price reduction in proportion to the difference in declared and actual living area.

The court also found that the notary should have advised the Mr. and Mme Y that the declaration was incorrect as a result of the 1996 and 1997 legislation, and that they faced liability if they did not adapt their statement to the current measurement rules. The notary was sentenced to pay damages corresponding to the injury suffered by the sellers, consisting in the compensation they were sentenced to pay to the buyers.

The notary did not appeal the ruling as regards the buyers. However, he appealed the part of the ruling that concerned the sellers, arguing that since the price reduction was nothing but the difference between what the buyer actually paid and what they would have paid had they been given correct information on living area, the sellers had suffered no injury. The Cour de Cassation subscribed to that view and remitted the case to the Cour d'Appel as regards the notary's liability towards the sellers.

Besides the fact that the notary cannot escape liability if he knows that the contract contains or is based on incorrect information, the Loi Malraux case reviewed above demonstrates that the mere fact that the contracting parties *sign* the contract does not in itself exonerate the notary. It is tempting to hold that by signing the contract, the parties subscribe to its contents, and that the contract is therefore by definition a manifestation of the parties' will. However, again, it is the *informed* will that should be manifested in the contract, not merely the expressed will since the

[517] Loi n° 96-1107 du 18 décembre 1996 améliorant la protection des acquéreurs de lots de copropriété.
[518] Again, the notary is obliged to verify the deeds pertaining to the property dating back 30 years.

expressed will may be based on misconceptions and/or lack of information. Moreover, the notary has a professional responsibility to ensure the efficacy of the deeds. If the notary perceives that the goals of the parties cannot be achieved if the contract is worded according to their expressed will – then the notary cannot remain passive and must suggest a better option. The conclusion is further supported by the following decision by the Cour de Cassation.

> **Cass. 1re Civ., Appeal no 08-11564**[519] concerned a power of attorney with an inaccurate sale price. Mme X and Mme A (the latter through her firm) had entered a rental agreement concerning the Mme X's property. The transaction was effectuated by notary Y. In the rental agreement was included an option to buy, with the following wording:
>
> *"[Madame X] confers on [Madame A], who is under no obligation to purchase, the option to purchase [the property] if she so chooses at a price amounting to 1,300,000 francs adjusted for inflation".*
>
> On January 15th, 2003, Mme X received a letter from notary Z expressing Mme A's wish to exercise the option to purchase included in the rental agreement, "at the price specified therein". On June 20th the same year, notary Y sent a letter to notary Z with a power of attorney, signed by Mme X, to sell the property. The price specified in the power of attorney was € 198,185 – the equivalent of 1,300,000 francs *without* inflation adjustment. Acting on the power of attorney, notary Z effectuated the sale at said price. After the sale, Mme X belatedly realized that the sale price had not been adjusted for inflation. She sued both notaries for € 11,889.50, which corresponded to the omitted indexation.
>
> The Cour d'Appel held that Mme X had knowingly signed a power of attorney that was clear and unequivocal, stipulating a sale price set at € 198,185. In so doing, held the court, Mme X had clearly manifested her will to sell the property at the set price. The court further held that the reference to the sale price in the letter of January 15th, 2003 could be interpreted as "1,300,000 francs converted to euros". The court ruled in favor of the defendants.
>
> Mme X appealed to the Cour de Cassation who overturned the ruling. The court observed 1) that the letter of January 15th, 2003 made reference to the price stipulated in the rental agreement, 2) that Mme X had informed notary Y that the price derived from simply converting the nominal price to euros did not equal the price set in the rental agreement, and 3) that the letter written by notary Z, sent to notary Y on June 20th, 2003 along with the power of attorney, made reference to the "worries" of the seller as to the sale price. On those grounds, the Cour de Cassation found it established that the notaries could not be exonerated merely because Mme X had signed the power of attorney.

In the case just mentioned, it is not entirely clear whether the clause at issue emanated from the parties themselves or from the notary. However, in determining the notary's responsibility, that is a moot question. As established in chapter 7, the notary is not exonerated from the duty to counsel merely because in the instant case his participation has been only to authenticate a deed that has been negotiated and drafted by the parties themselves. If, then, the notary can be liable for

[519] Ruling of April 2nd, 2009.

inaccuracies or unnecessary risks where the parties have drafted the deeds themselves, it is a matter of pure logic that the same applies where the deed has been drafted completely by the notary.

Part III: Analysis and Conclusions

12 Comparative Legal Analysis

12.1 The Duty of Impartiality

12.1.1 The Swedish Broker

As previously stated, the impartiality principle, currently embodied in 8 and 11-15 §§ 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 8 § (safeguarding the interests of both parties), and 15 § (prohibited from representing either party). The latter is given by 11 § (prohibited from purchasing the property), 12 § (prohibited from brokering to and from related persons), 13 § (prohibited from trading in real estate), and 14 § (prohibited from engaging in activities that may compromise the broker's integrity). 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 FMN/FMI 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 8 § presupposes that the broker has *actually* failed to safeguard the interests of both parties.[520]

[520] Granted, the cases where brokers were issued warnings for extending loans to either contracting party tests that assertion. Has one really failed to safeguard the interests of one party just because one has extended a loan to the other? It is indisputable that in those cases, it is not entirely clear whether 8 § or 14 § is the appropriate provision to cite. However, the FMN held that extending a loan to one of the parties created a tie to that party that in itself constituted a breach of the duty of impartiality.There are a few instances in the EAA where it is fairly clear that a particular obligation or prohibition exists, but not quite as clear which provision in the statute best fits the situation. For instance, in chapter 9 and 10 it will become evident that the line between information and advice is not always clear-cut.

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 13 § 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 compromise the broker's integrity does not presuppose any actual partial behavior from the broker. For instance, it is currently impermissible to broker mortgages unless the remuneration is "purely negligible". 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 duty of impartiality is divided. The first dimension is *internal/external* as described 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 an Infraction?*

	Actual	**Integrity**
Internal	• 8 § Failing to safeguard the interests of both parties • 11 § Purchasing the property • 15 § Representing a party	• 12 § Brokering to or from related persons • 14 § Business relations with a party
External	• 8 § Failing to safeguard the interests of both parties	• 13 § Trading in real estate • 14 § Integrity-compromising activities

12.1.2 The Latin Notary

The notary's duty of impartiality is surprisingly similar to that of 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 attorneys 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 duty of impartiality presupposes 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 bars him from taking sides.

As the reader has no doubt observed, the active intervention described in the previous paragraph is counsel. Given that the duty to counsel is usually perceived as distinct from the duty of impartiality, it is interesting that the former is derived from the latter. Of course, even where there are identical or similar rules in several jurisdictions, each jurisdiction has its own law and its own manner in which binding legal rules are created and perceived. However, the derivation of the duty to counsel from the duty of impartiality was accepted at a UINL congress, which lends some level of cross-jurisdictional legitimacy to the claim.

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 desirable 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.[521] 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 4, 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 attorneys, the law demands that they keep the two functions separate and make it clear to all parties involved in which capacity they are acting. Similarly, where it is permissible to trade in real

[521] See for instance Sevilla et al., at 3.

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	• 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	• Notarizing for related persons • Business relations with a party • Notarizing for oneself
External	• Acting partially • Granting favors to third parties	• Trading in real estate • Integrity-detrimental activities • Some places: advocacy

12.1.3 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 the legislators' 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 attorney, whereas others do not, attests to this. Yet legislators 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.

12.2 The Duty to Counsel

12.2.1 Ascertaining Facts

It follows from what came to hand in chapter 8 that 1) the Swedish broker and the French notary both have a duty to ascertain facts, 2) the respective duties are very similar both with respect to the types of information the professional is required to obtain, and in that the duty has an absolute and a relative dimension, and that 3) there is a significant correlation in both instances between the duty to ascertain facts and the availability of easily accessible information.

As to the existence of a duty to ascertain certain kinds of facts, it is no mere happenstance that both jurisdictions have chosen to confer such a duty on a professional who is a key player in real estate conveyances. The main difference between the two jurisdictions seems to lie in the approach: whereas the Swedish EAA specifies a few information categories that are encompassed by an *a priori* obligation to verify, French law seems to center on a general principle of ensuring the validity and efficacy of the transaction and the deeds it entails.

It is tempting to speculate whether this reflects a fundamental difference in the way jurists in the respective jurisdictions think law, giving rise to differences in how the law is constructed. Swedish law, for its part, tends to be inductive: the legislator, in their infinite wisdom, has[522] laid down rules that must be followed. There may or may not be specific abstract principles underpinning the substantive choices of the legislator, but whether or not that is so is ultimately irrelevant since the basis of the rules' legitimacy is that they emanate from the legislator, which is an absolute normative source. Thus, the rules—usually corresponding to sections in a statute—need not necessarily be categorized in any particular manner, nor be consistent with abstract principles apart from those in the constitution; they need only be followed. Now, legal scholars may of course try to make sense of the rules, categorizing them and seeking to formulate abstract principles that bind them together. However, that is understood to be mainly an *ex post* activity. The law, therefore, is to a large extent inductive.

Naturally, French statutes are just as binding as their Swedish counterparts. However, there seems to be a tendency among French courts and legal scholars to approach the law in a more deductive manner: the abstract principle comes first, then the application of said principle. In the foregoing, it has been repeated time and again that the notary's first and foremost duty—which, depending on

[522] Swedish lawyers always refer to "the legislator" in singular.

which school of thought one wishes to follow, is the very foundation of the duty to counsel—is to ensure the validity and efficacy of the deeds. From that principle, the specific tasks to be performed are derived. The scope and nature of those tasks are always determined by the overriding principle.

An alternative explanation to the difference in approach is the fact that whereas the Swedish broker's duty to verify is statutory, the equivalent obligation for the French notary has evolved through case law. In case law, especially where the statutory basis is thin, it is natural for courts to formulate principles on which their decisions hinge. This explanation is supported by the way the Swedish broker's duty to investigate, as described above, has evolved through case law. It, too, centers on a general principle, namely the due care obligation.

As to the specific information the respective professionals are required to obtain, the similarities are striking. In both instances, the information can be summarized as having to do with the right to dispose of the property and encumbrances. One major difference in this regard is that the French notary is obliged to investigate the zoning and planning situation, whereas the Swedish broker is not. Though it is admittedly speculative, it might be suggested that the difference is related to the availability of summarized information: whereas in France such information is easily obtained by means of the *certificat d'urbanisme*, Sweden knows no such document. Of course, it could be argued that even in the absence of such a document it would still not be unduly cumbersome for a professional such as a broker to contact the competent authority and obtain the desired information. However, it is undeniable that the existence of a standardized format such as the *certificat d'urbanisme* gives considerable strength to the argument in favor of requiring the professional to obtain the information it encompasses.

It is interesting to note that the respective duties of both professionals have an absolute and a relative dimension. The absolute dimension lies in the fact that, for certain types of information, the failure to obtain correct information will always be considered a breach of the professional obligations. The relative dimension lies in the obligation to verify the veracity of the obtained information, which in both instances hinges on 1) whether the professional has reason to suspect that it is incorrect, and 2) how easily accessible the information is. The notarial case law does not explicitly mention the relative importance of the subject matter at hand, which corresponds to "step 2" in the three-step model used in in Swedish brokerage case law. However, given that the studied French case law belongs to the law of torts, it is probable that the relative importance of the subject matter has bearing, directly or indirectly, on the assessment of negligence.

The distinction between an absolute duty to ascertain, and a relative duty to investigate, would seem to lend support to the notion that the availability of easily accessible information affects the decision to require the professional to obtain it. Looking at the information the respective professionals are required *a priori* to obtain, it centers on information that is available in public registers and/or that can be easily obtained in a tangible format. With regard to information that cannot be collected in such a straightforward manner, the case for requiring the professional to obtain it is weaker.

Figure 11 *The types of information encompassed by the duty to ascertain facts*

Information	**Swedish broker**	**French notary**
Right of disposal		
Identity of parties	Yes	Yes
Title-bearing owner(s)	Yes	Yes
Consent of co-owners	Yes	Yes
Consent of spouses and co-habitees	Yes	Yes
Consent of/waiver from preemption right holders	Yes	Yes
Consent of estate beneficiaries	Yes	Yes
Encumbrances and right to use		
Easements	Yes	Yes
Mortgages	Yes	Yes
Jointly-owned facilities	Yes	Yes
Zoning and planning	No	Yes
Other municipal decisions affecting use of property	No	Yes
Cadaster maps	No	Yes
Other		
Legal character of property	Uncertain	Yes

12.2.2 Information Disclosure

The duty to disclose information is arguably where the fundamental difference between a broker and a notary is most evident. While both the Swedish broker and the French notary are bound to a strict duty to disclose information that is available to them and that may be assumed to be of importance to the parties, the respective roles of the two professionals render that duty significantly more important in the case of the broker than that of the notary. This is hardly surprising. While they both perform many tasks that are shared by both, the broker is "out in the field" whereas the notary is "at the office". Consequently, the broker can be expected to possess information about the particular property, such as physical defects. While notaries, for their part, are no doubt excellently informed as about the real estate market where they operate, they cannot typically be expected to possess specific information about the property since their role in the transaction does not require them to visit it. Furthermore, as mentioned in 9.2, the notary is in all likelihood not the one the parties turn to in cases of physical defects on the property. Hence the relative scarcity of relevant court cases.

That said, it is interesting to note that the notary's duty seems more absolute than that of the Swedish broker. Even if the broker's "window of relativity" is admittedly narrow, it does exist. The same cannot be said for the notary, who must provide equal information no matter how well-

informed the concerned party is. Only where the concerned party is actually already aware of the information at issue is the notary exonerated from the duty to disclose. The fact that the courts have not awarded damages to plaintiffs that have been deemed well-informed does not change that assessment since those rulings hinge on general principles in tort law: firstly, that one is not entitled to indemnification unless one has actually incurred damages as a result of the tortfeasor's behavior and, secondly, that one is not entitled to indemnification to the extent that one has contributed to the damages.

Of course, one might object that if there is no sanction, then there is no obligation. Thus, if a particular omission has not led to civil liability, then given the fact that the notary's duty to counsel belongs entirely to the field of tort law, then one could hold that the omission did not constitute a breach of the professional duties. That in itself is a relativity of sorts. With that stance, the duty to disclose information is in some way relative in both cases. The difference is that, in the case of the broker, the relativity emanates from considerations as to what is required in view of the due care obligation, whereas in the case of the notary the relativity hinges on general principles of tort law.

In both cases, the duty to disclose information as described here seems incomplete. Again, being informed of a particular fact is worthless unless one understands its implications. In the next section, which will treat the duty to give advice, the picture will hopefully become clearer and closer to something that resembles completeness.

12.2.3 Advice

It can be concluded from the foregoing that the broker's and the notary's respective duties to advise have the same general definition and purpose: to ensure that the parties have understood the implications of the instant transaction. In both cases, the general rule is that it is left up to the professional to decide *how* this is to be accomplished, as long as it *is* accomplished. The recently introduced obligation for the broker to provide written information on the buyer's duty to inspect is the exception that proves the rule, in the true meaning of the expression. In neither case, furthermore, is there a decided script that dictates *what* advice must be given. Again, there are exceptions in the case of the broker. However, in both cases the general rule is that the professional must assess the situation and decide what advice to give.

As to the subject matter, it is not surprising that there are several common traits since the problems that arise are to a great extent inherent in the kind of transaction. Questions pertaining to e.g. property law, tax law, and real estate valuation are ever present in real estate conveyances. The differences in this regard seem to be conditioned by the diverging roles and competences of the respective profession. The broker is required to have a certain level of knowledge in construction engineering, and can therefore give some advice on such matters, whereas the notary, being a "mere" jurist does not possess that knowledge. Conversely, the fact that the notary is a legal professional makes it possible to demand perfect precision in the application of the law; consequently, it is clear that misapplying e.g. a statutory provision will result in liability. In the case of the broker, it is not entirely clear to what extent misapplying a provision, thereby giving inaccurate advice, constitutes an infraction. However, recent case law suggests a development towards a

stricter view. Taken together with the mandatory university education, it is not unreasonable to demand that brokers be required to apply all relevant law correctly.

Equally importantly, the broker can be expected to possess specific knowledge of the conveyed property, such as physical defects, whereas the role of the notary does not typically call for specific knowledge in that regard. Herein lies a relative advantage of having the broker give advice, since she can use the information about the property and tailor her advice accordingly. For instance, if the broker perceives signs of defects while visiting the property—e.g. spots on the wall indicating moisture damage—she must give the issue of liability for defects particular emphasis since she knows that the issue is of particular importance in the instant transaction. The notary, on the other hand, could of course also give advice on the matter, but that advice will typically be *in abstracto* since the notary will not typically be aware of the existence of defects.

The difference in the law regarding tax advice could have greater implications than one may be led to believe. In the case of the notary, tax advice is simply mandatory, whereas the broker is only required to give tax advice—at least applied advice such as e.g. calculating taxes—if she has specifically agreed to do so. However, if she agrees to give tax advice, it must be correct. Since, as the survey suggests, a majority of brokers do give tax advice regularly, it might be concluded that the result is that buyers and sellers can expect roughly the same tax advice under both regimes, as long as the broker agrees to give advice. However, all that can be concluded from the existing case law regarding the broker is that she will be liable for misinterpretations and miscalculations. Whether she could be liable for the failure to inform the buyer or seller about opportunities, such as tax credits, remains to be seen. In the case of the notary, it is clear that such opportunities are encompassed by the duty to advise.

One striking difference in the two professions' duties emanates from their respective legal bases: whereas in Swedish brokerage law the duty to advise is supported by both disciplinary responsibility and civil liability, French notarial law rests solely on civil liability. The latter is therefore completely bound to the principles of the law of torts. It seems that the existence in Swedish law of disciplinary proceedings—which focus exclusively on performance, not its consequences—renders clearer the distinction between the duty itself and the sanctions for infractions. This is not to say that tort law is not a suitable legal basis for a professional duty. Nor is the distinction between performance and consequences alien to tort law. Still, as attested to by some of the reviewed case law, it would appear that even learned judges fail to make the distinction at times. To be clear:

1. An infraction does not presuppose the existence of damage.
2. Contributory negligence on the part of the injured party affects the measure of damages, but not the question of whether there has been a breach of the professional duties.

As to the former, damage is of course a prerequisite for civil liability. However, one would be sorely mistaken to take a court case where the court ruled in favor of the defendant on the grounds that no injury, or no line of causation, had been established, as proof that a certain behavior is acceptable under the law. The behavior may well constitute a breach of the professional duties even if no injury can be established. As to the latter, contributory negligence falls under the doctrine of mitigation of damages. The mitigation rule, however, is only applicable where it is first established that there has been a misconduct that has caused an injury. Scholars and judges alike should exercise care and uphold the distinction between the behavior and its consequences.

12.2.4 Contract-Engineering

As a whole, it would seem that the Swedish broker and the French notary have virtually identical duties with respect to drawing up contracts that are tailored for the instant transaction. In both cases, the obligation entails being vigilant with respect to risks and potential problems, presenting solutions, formulating said solutions in an adequate manner so that they achieve their intended goal and minimize the risk for disputes, and giving adequate advice concerning the deeds.

The striking similarities are at once surprising and to be expected. They are to be expected because given that both professionals have a duty to exercise diligence and prudence, to identify risks and problems and to give adequate advice, it is logical that the same applies to the drawing up of contracts and other necessary documents. While it may surprise some that the Swedish broker has been assigned the task of drawing up the sales contract—albeit with the option to contract out said task—it is logical that the task must be performed in accordance with the due care duty and the duty to advise.

What may raise an eyebrow or two is that the wording of the contract clauses used by brokers is subject to such detailed scrutiny by the supervisory body, and that the broker is held to such a high standard. In fact, judging from the reviewed Swedish and French case law, it would appear that the Swedish broker is scrutinized more closely as regards the formulation of the contracts than the French notary is. However, it would be a mistake to assume that French notaries are not held to an equally high—or, in all probability, higher—standard. It should be borne in mind that the reviewed French cases are from the Cour de Cassation and concern civil liability. The data is therefore limited to cases where it is at least alleged that the notary's performance has caused injury. The Swedish cases, by contrast, are mainly disciplinary cases from the FMN and the administrative courts. In those cases, there need not have been injury for a sanction to be issued. Thus, the warnings issued by the FMN and the courts regarding the wording of contract clauses (11.2.4) are based purely on the assessment that the concerned clauses were less than satisfactory—primarily that they were likely to cause or aggravate disputes. Thus, the observed difference is not indicative of a difference at law.

On the Swedish national level, it is clear that there is a gap between, on the one hand, the legal reality, which is characterized by personal responsibility on the part of the individual broker, and the physical reality, where brokers use pre-made contract clauses obtained from software packages. Now, personal responsibility and adapting the contract to the situation at hand are not necessarily in opposition to using tools such as software packages. On the contrary, tools such as software packages, used in a constructive manner, should facilitate the proper performance of the broker's contract-engineering duty. Anecdotal evidence shows that there are many competent brokers who work that way. However, it seems quite clear that there are still, 13 years after the introduction of a mandatory university education with contract law and property law on the curriculum, knowledge gaps among many brokers with respect to applicable law and the legal significance of the contract clauses employed in the contracts. As a result, many trust blindly in the standard forms found in the software packages, which are in practice formulated by a small number of legal professional who work in or around the brokerage industry, such as the broker associations. Again, it need not be a problem *per se*; however, a state of affairs where the broker is exonerated merely on the grounds

that they have acted on the (implicit) advice of those legal professionals would undermine the whole concept of personal responsibility. In any case, it is clear that, *de lege lata*, brokers *cannot* be exonerated by the mere fact that a particular contract clause has been formulated by, for instance, the legal staff at one of the broker associations.

As for the French notary, it is not particularly surprising that the courts do not tend to elaborate in detail how the notary should formulate contract clauses. As mentioned in the previous paragraph, the studied case law is not the result of disciplinary proceedings but of civil lawsuits. Consequently, the focus lies chiefly on the extent to which the notary's performance has caused injury on the part of the plaintiff. Another contributing factor may lie in the fact that drawing up deeds is not only a core competence for notaries, but also, along with *publica fides* and the power to authenticate, the very *raison d'être* of the profession. What is more, notaries are specialized legal professionals. One would expect such professionals to be able to formulate adequate contract clauses since it an intrinsic part of their work.

Another issue that is certainly worth discussing is the implication of basing the notary's duty to counsel completely on the law of torts. The focus on negligence and injury serves in part to obscure the position of the law with respect to how notaries are expected to act and how contract clauses should be worded. By contrast, in the case of the Swedish broker, the FMN seems determined to educate the brokerage industry in how their work should be conducted. It seems a double-edged sword that raises the important question of how much the state should interfere in the marketplace. I will return to this issue in chapter 13.

12.2.5 Defining the Duty to Counsel

The juxtaposition of the respective duties to counsel of the Swedish broker and the French notary reveals similarities that are nothing short of remarkable. Most importantly, they consist in the same sub-duties:

1. to ascertain facts, mostly related to the validity of the sale,

2. to disclose information,

3. to give adequate advice, including not only normative advice but also ensuring that the parties have understood the full implications of the situation at hand, and

4. to draw up the necessary documents and tailor them to the instant transaction.

As the reader will no doubt have observed during the course of chapters 8-11 and the present one, defining those respective duties requires working in opposite directions, one largely deductive and one largely inductive: whereas the French notary's duty is statutorily conditioned by C.C. Art. 1382 and given its shape by the case law of the Cour de Cassation, the Swedish broker's duty is an extrapolation of four distinct statutory duties. Taken separately, neither development seems particularly surprising. Granted, there has been and continues to be resistance among members of the two professions against some of the obligations. A certain reluctance to accept new obligations—

for in the eyes of the practitioner, an obligation derived from a court ruling is always a new obligation, notwithstanding that the predominant legal theory holds that civil law courts and Scandinavian courts do not create law but merely "find" it—is only to be expected. However, from a strictly legal point of view—and with the privilege of hindsight—both the Swedish and the French development are logical.

In the case of Sweden, the separate obligations have come to be interpreted in the light of the general duty to exercise due care. With that as a beacon of sorts, the application of the provisions has become more consistent and aimed at upholding a high standard of diligence and prudence whilst safeguarding the interests of the buyer and seller. In other words, the increased focus on the due care duty has served to clarify that safeguarding the interests of the buyer and seller takes precedence over whatever incentives the broker may have. At the same time, and as a natural result of the focus on the due care duty, the relative importance of "sound estate agency practice" has diminished. This development is hardly to be lamented. The implicit question of interpretation embedded in "sound estate agency practice" is "what would the good broker do in this situation"? That perspective has two fundamental flaws.

Firstly, while it bears a measure of resemblance to the concept of *bonus pater familias* in tort law, it still implies that the answer should be found in the way brokers "out there" actually behave in the marketplace. Now, it is by no means my intention to denigrate brokers in general. The point of the relevant provisions, however, is not to legitimize established practices but rather to provide a sound and equitable code of conduct. Thus, the obligations of the broker must always be interpreted from a *normative* point of view. Secondly, focusing on what "the good broker" would do provides for a great deal of conservatism and an unacceptably low floor for the code of conduct. If "the good broker" is the measure, then as long as one can conceive of a broker who is in some manner or other a "good" person, and who behaves in a certain way, then that behavior is acceptable under the law. That does not qualify as an acceptable state of affairs. By contrast, the duty to exercise "due care" asks the implicit question of whether a particular course of action is diligent and prudent with regard to the interests of the buyer and seller.

The role of the FMN should of course not be underestimated. Ever since the creation of the supervisory body, it was only a matter of time before it assumed the role of chief interpreter of the broker's code of conduct, robbing the broker associations of that function. Granted, by virtue of the *travaux préparatoires*, the associations are still significant in determining whether a certain practice is sound or not. Furthermore, if a particular conduct is disapproved of by both the industry and the government body, the argument against it is all the stronger. However, the reverse does not hold true. Suppose a particular behavior is considered unlawful by the FMI but lawful by the industry. Should the latter's view be given equal weight? It should be borne in mind that the industry is inherently biased. Even the associations, who purport to act for the benefit of brokers and community alike, are ultimately owned by their members and therefore constrained by their wishes. That is all the more so since there is no legal obligation for brokers to belong to an association: if they are unhappy with the association, they are free to leave it. Thus, the associations cannot be taken as independent interpreters of the law. By contrast, the FMI is an exogenous entity, granting it an independent perspective. For instance, it is hard to believe that the quite high standard required of brokers with respect to the wording of contracts could have been conceived, let alone upheld, by a self-regulatory body.

As for the French notary, the deductive reasoning employed by the courts in general, and the Cour de Cassation in particular, provides for a standpoint of the law that is at once vague and crystal clear. Given the principle that the notary must ensure the validity and efficacy of the deeds, and given that both validity and efficacy have been given clear definitions, it is straightforward to conclude that the notary must, in every situation, diligently take whatever measures are available to him in order to ensure those ends. In that respect, the law is very clear. What is not clear, however, is what those measures are in any given situation. The problem is exasperated by the vagueness of the objective. Validity is a clear enough concept - either the deed is legally valid, or it is not. Efficacy, on the other hand, defined as the ability of the deeds to effectuate the (informed) will of the parties, is less well-defined. For instance, if a sales contract includes a clause that solves problems for one party while creating problems for the other, does it promote efficacy?

Now, I am not suggesting that the French rule elaborated by the Cour de Cassation is a bad one—much to the contrary. Transactions are not all identical, however much some players would wish that they were. Planning for every possible contingency in a statute is therefore simply not a viable option. However, it seems prudent to issue the caveat that one should not have blind faith in abstract principles. If even courts disagree on their interpretation and application, one can safely assume that the players in the marketplace will have diverging opinions—not only on how the law *ought* to be, but on how the law *actually is* as well. Thus, the approach is sound but not perfect.

Despite the different approaches, and despite variations on the task-specific level, the duty to counsel of the Swedish broker and that of the French notary are similar enough that it is possible to venture a uniform definition. Thus, the duty to counsel is:

the duty to diligently and prudently safeguard the interests of the parties, with particular regard to the validity and the efficacy of the transaction. That duty is accomplished by fulfilling the four sub-duties of ascertaining facts, disclosing relevant information, giving adequate advice, and drawing up deeds that are suitably tailored to the transaction at hand.

13 A Broader Perspective for Evaluation

Chapters 3-5 laid out an overview of the legal and institutional framework that gives the foundation of the Swedish broker's and the Latin notary's role in real estate conveyances. Chapters 8-11 elaborated the two professions' duty to counsel. It has been established that the Swedish broker and the Latin notary are both obliged to act as impartial counselors to both, or all, parties. However, there are questions to be answered. As touched upon in chapter 2, the existence of legal obligations does not prove that the obligations are fulfilled in the physical world. As likewise touched upon in chapter 2, ascertaining empirically the actual state of affairs in that regard is a challenging endeavor to say the least, and ultimately not one that has been carried out in the course of this study. However, in the absence of an answer to the question "Does it work?", it is both possible and desirable to discuss a related question: *can* it work? This question shifts our focus from the actual state of affairs to an institutional analysis of the *viability* of the concept of impartial counsel. There are a number of perspectives that can be taken. Of course, as the chapter title indicates, discussing the Swedish broker and the Latin notary in terms of "impartial counsel" it in itself a new perspective.

13.1 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.[523] 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.[524] 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.[525]

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 (13.2.1), and the yet-to-be-settled clash between the EU and the European notariat (13.2.2).

[523] Malavet, at p. 472.
[524] Malavet, at pp. 464-472.
[525] Van den Bergh & Montangie 2006a, pp. 21-22.

13.1.1 The Notariat 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.[526] Meanwhile, the regulation of fees does nothing to alleviate these problems in the eyes of the economist.[527] 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.[528]

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 of efficiency. With respect to the services of liberal professions—that is, highly qualified professions with specific competences for which a university degree is often a prerequisite—three kinds of market failure are generally discussed. Firstly, there is the problem of asymmetric information. Secondly, notarial services are held to generate substantial positive externalities. Thirdly, 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 without difficulty—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.[529] 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

[526] See e.g. Art 5 of the Belgian notarial law.
[527] Arruñada 1996, p. 3.
[528] Kreps, p. 299-302; van den Bergh & Montangie 2006a, p. 41.
[529] van den Bergh & Montangie 2006b, p. 6.

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.[530]

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.[531] 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.[532] In the case of notarial services, the most important externality is held to consist in 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 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.[533]

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.[534] 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.[535] 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.[536]

[530] *Ibid*.
[531] Nahuis & Noailly, pp. 29-31.
[532] Milgrom & Roberts, p. 75.
[533] van den Bergh & Montangie 2006a, p. 25-29, van den Bergh & Montangie 2006b, p. 7-8.
[534] Kreps, p. 168.
[535] van den Bergh & Montangie 2006a, p. 8.
[536] van den Bergh & Montangie 2006b, p. 18-19.

13.1.2 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 jurists, 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.[537] 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 an 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.[538] 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.[539] 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. As one might have expected, the Council of the Notariats of the European Union (CNUE) 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 freedom of establishment. However, due to pressure from the Commission, Spain, Portugal, and Italy abolished their formal nationality requirements.[540]

After the rulings of May 24th, 2011, reviewed in chapter 1, the concerned member states have been forced to abolish their nationality requirements. There seems to be more to come, as well. For instance, Italy has reportedly lifted its cap on the number of notaries.[541] However, it has recently been suggested that the notary regime may have helped avoid a mortgage meltdown, of the kind suffered in the US, in Europe.[542]

In addition to the political and judicial arena, there has been some—albeit politically related and motivated—scientific discussion concerning the economics of notaries and the desirability of regulation. In short, the discussion centers on two (seemingly) conflicting theories/phenomena:

[537] Paterson et al.
[538] COM(2004) 83 final; especially at 30 and 88.
[539] COM(2005) 405 final.
[540] http://www.euractiv.com/en/competition/commission-notaries-open-foreigners/article-158768 (2012-08-02).
[541] http://www.economist.com/node/21560242 (2012-08-15)
[542] Murray 2011; however, the author does not go so far as to claim with certainty that it is so.

competition theory (the cartel argument) and market failures.[543] At a glance, the former seems to speak in favor or 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 rights[544], there are two examples of *deregulation* related to real estate conveyances. Firstly, 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.[545]

Different studies on this deregulation have been conducted, with different results. Surveys in 1986—after the law had been changed but prior to 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.[546]

Secondly, 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 Commission[547] 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.[548]

The other report was written by the Netherlands Bureau for Economic Policy Analysis.[549] 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,

[543] Stephen & Love, at p. 987.
[544] Stephen & Love, at p. 995; van den Bergh & Montangie 2006a, p. 42-43.
[545] van den Bergh & Montangie 2006a, p. 42-43.
[546] Stephen & Love, at p. 995-996.
[547] Commission on Evaluation of the 1999 Notary Act.
[548] van den Bergh & Montangie 2006a, p. 71.
[549] Nahuis & Noailly (2005).

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.[550]

13.2 A Function in the Conveyance Process

Having established a common definition of the duty to counsel, the next step is to examine the role that duty fills in the conveyance process. Could it even be labeled a function? In the following, I will put the duty to counsel into perspective by borrowing the terminology of transaction cost economics (13.3.1) and in relation to the steps in the conveyance process (13.3.2)

13.2.1 Contact, Contract, Control

While I have no intention of wading too deep into economics lest this dissertation be rendered too eclectic, 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), TCE divides the transaction into three separate phases: 1) contact, 2) contract, and 3) control.[551]

1. *Contact* is the phase where the parties find each other in the marketplace. 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.[552]

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.[553]

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.

[550] Nahuis & Noailly, p. 57-58.
[551] Kreps, pp. 743-769; Nooteboom, pp. 2-4.
[552] The intermediary is of course meant to lower the parties' search and marketing costs, but the extent to which that holds true is less than clear.
[553] 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.

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 the parties to legal counsel in the form of an attorney.[554]

The notary, for his part, is not by necessity involved in the contact phase. 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 the conveyance deeds. 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.[555] 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	*Not involved*
Notary	*Not involved*	Core function	Not official function

[554] The problem for the broker is that she is still subject to the duty of impartiality, making it difficult to assist the parties in case of dispute.
[555] Wagner, pp. 44-46.

13.2.2 Real Estate Functions

The TCE model is not the only plausible way to analyze the broker's and notary's respective functions. Where the TCE model focuses on the transaction, it is possible to focus instead on the conveyance process on a more practical level. Limiting the scope to the residential real estate market, the steps are roughly the following. First, there is *matchmaking*. 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. Next, there is *bargaining and contract*. Again, 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. Next, 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, 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 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.[556]

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 should be accomplished through a notary, or indeed a broker. 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, particularly 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 forms. The quality of the service also consists in adapting the deeds to the circumstances and tailoring a solution that fits the needs of the parties. 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

[556] Arrañuda 2007, pp. 13-14.

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 counsel. Para-legals at a government agency cannot offer this service. Construction/development companies, who act as buyers' counterparts, will certainly not.

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

1. *Fairness* – 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.

2. *Consumer protection* – There is no uniform definition of consumer protection, and therefore no one single explicit purpose. However, it is not hard to trace both a fairness argument and an economic argument behind such rules. The fairness 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 FMI 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 counsel.

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.

It is by no means impossible to dispute the merits of the foregoing. I will return to these issues in section 13.4 below.

13.3 Institutional Robustness

I suggested in chapter 1 that an important dimension in evaluating the different regimes for real estate conveyances is whether the model can or could work. As a matter of logic, answering that question entails analyzing the regimes' *institutional robustness*. Given the different players with their skills, their knowledge, and their incentives, given the legal framework: how well can the different regimes fulfill whatever goals are laid out? This dissertation is not the right place to elaborate a model to measure institutional robustness - that is a project in its own right. However, since I have demonstrated that the Swedish broker and the French (and ultimately the Latin) notary have the same duty to counsel, and since I have proposed that said duty is a function in the conveyance process, it seems appropriate to address the extent to which the two professions can be expected to fulfill their duty to counsel in a satisfactory manner.

13.3.1 The Swedish Regime

The different approaches through which the duty to counsel has evolved in Swedish and French law is of academic interest compared to the radically different core functions of the two professions. As previously touched upon, it is indisputable that the classic function of the broker is that of matchmaking. While brokers are obliged to give advice, it takes place as part of the brokerage activity. Granted, the duty to counsel applies equally where the broker is hired to draw up the deeds only. However, such assignments are hardly the broker's main source of income, and many brokers never receive such assignments.

An important question is what the self-image of brokers is like, and how it can be expected to affect the performance of their duty to counsel. When even the EAA defines brokerage as an activity with the aim of finding a counterpart for one's principal, and the same statute ties the right to remuneration to a successful conveyance, how can the broker not regard that as her single most important function? Anything else appears delusional. Now, this need not be a problem, but it certainly could be. When one function is perceived as more important than the others, the others are consequently perceived as less important. Logically, the duty to counsel is likely to be perceived as an encumbrance rather than an integral part of the craft. The resistance of brokers and their representatives in the evolution of the relevant case law strongly suggests that it is so. Further support for the supposition is lent by the tendency of brokers to evaluate the competence of employees and prospective employees by their ability to sell. Under that logic, a broker who is successful in the sense that she has a high closing ratio is a competent broker even if she is completely ignorant of the applicable rules and constantly gives buyers and sellers incorrect information and advice.

It does not require too much pondering to realize that the broker's self-image presents a problem. Unfortunately, the problem is exacerbated by the way brokers are viewed by the public. Anecdotal evidence strongly suggests that people generally consider getting the property sold to be the single most important task of the broker. It is possible, perhaps even likely, that most people are unaware of the fact that brokers have a duty to counsel—let alone its extent. People's tendency to choose broker based largely on commission level, brand name, and/or anything giving the impression that

the broker can get the property sold fast and/or at a high price attests to that. The price-cutting part may have a market failure explanation. Even assuming that the public is fully aware of the scope and nature of the broker's duty to counsel, the quality of its performance is hard for the consumer to evaluate. In such cases, according to the market for lemons logic, people will use the one criterion they can observe: the price. If this is true, then brokers who charge a higher commission but are willing to perform their duty to counsel in a manner that exceeds the legally prescribed bare minimum—or indeed to perform it at all—are driven out of the market to the benefit of the "lemons". Again, unfortunately, anecdotal evidence suggests that it is so.

It should be observed that commission levels are low in Sweden, ranging from 1 % to 5 %. For a tenant ownership apartment in central Stockholm, commission levels of 1,5 % are not uncommon. The difference between Swedish brokers and their counterparts on the European continent is striking. Even where the former only perform the bare minimum of their duty to counsel, they still perform more tasks, and more qualified tasks at that, than their counterparts in e.g. France or Germany where commission levels are reportedly 5-6 %. This lends further support to the notion that the commission levels greatly affect the choice of broker.

Another challenge is the one touched upon in chapter 1, namely the broker's relatively modest legal training. The mandatory university education comprises two years, roughly half of which consists in law courses. Most of the brokerage education programs in the country are today longer than two years, but none comprise more than one year of legal studies. In the Murray Report, this is taken as evidence that brokers cannot and could not offer relevant legal advice. Is this true? Certainly, to a jurist, the idea that somebody could practice one's craft with substantially less training seems counterintuitive to say the least. However, it should be borne in mind that the broker need only be versed in the fields of law that are of interest in real estate conveyances—mainly basic private law, family/inheritance law, property law, and tax law. The substantially longer LLM program comprises many more fields of law. That said, the argument in the Murray Report has merit. One year—at some universities less than that—of legal studies cannot be considered enough.

However, the assessment that the current curriculum does not contain enough law does not mean that brokers could not still perform the duty to counsel satisfactorily. Firstly, experience serves to at least partly compensate for the lack of formal training. An experienced broker is often better at some—albeit isolated—parts of the relevant fields of law than many a fledgling jurist. Secondly, the curriculum can be changed so that it contains more law. Thus, contrary to what is asserted in the Murray Report, the admittedly insufficient legal training of brokers does not mean that placing the duty to counsel on brokers is a flawed model.

The single most discussed challenge to the proper adherence to the duty to counsel is the broker's economic incentives to lean towards her principal, usually the seller. That incentive, which is all the stronger as a result of using commission as remuneration method, is of course real and a serious problem. However, as previously mentioned, incentives can be counteracted. A powerful way to provide incentives to adhere to the law is supervision. For this reason, in order to uphold the duty to counsel it is imperative that the FMI actively supervises brokers and is given sufficient means to do so. In this regard, the tendency of brokerage firms to impose standardized routines on employees presents a formidable challenge that at times amounts to a dilemma. Recalling the membership clause case, reviewed in chapter 10, the root of the problem was a standard contract provided by the

employer, in whom the broker put enough faith to use the template without question. In that case, the broker was issued a warning by the FMN despite the fact that the contested clause emanated from the employer. The Administrative Court of First Instance found other - seriously flawed - arguments to overturn the warning. Between the lines, however, it is not difficult to see the reluctance to punish a young broker for a sin that was really committed by her employer. Pre-inspection packages offer similar problems for broker and supervisory body alike. These are but examples of the situations where the instructions - explicit or implicit - and recommendations from the brokerage firms may run counter to the law. The only strategy available to the FMI today is to mete out disciplinary sanctions to individual brokers, and at best hold discussions with the concerned brokerage firms. A better solution, which would provide for better institutional robustness, would be to charge the FMI with supervising brokerage firms as well as brokers.

13.3.2 The French Regime

Notaries do not share the broker's two traits held in the Murray report to prevent offering impartial advice, viz. the incentive to favor one of the parties to the detriment of the other, and the modest legal training. To the contrary, the notary is a highly qualified legal professional and expertly versed in the relevant fields of law. The notary has excellent incentives to keep the knowledge sharp, since any mistake resulting from insufficient knowledge of the relevant law will result in liability. The notary also does not have incentives to favor one party over the other, at least not inherent in the transaction model. Of course, on the individual level it may occur that a particular notary might wish to favor a particular party, though the impartiality provisions treated in chapter 5 should serve to alleviate that problem. On the institutional level, however, the only reason for a notary to favor a particular party would be if he expected that party to provide future business.

It is of course not clear how strong an incentive a notary would have to favor a certain party in practice. However, all alternatives to a notary are private players such as brokers or solicitors, none of whom can be expected to be less inclined to favor one of the parties. Thus, while it may be that the notary model does not provide flawless protection against partisan behavior, it is at least not worse than the broker or solicitor solutions.

As for the duty to counsel, the very essence of the notary's work is to draw up deeds and authenticate them. Thus, the notary's education and the core function of the profession both render it natural to draw up adequate deeds. A certain measure of ascertaining facts is also inherent in the craft, at least as regards information that could affect the validity of the deeds. The remaining duties are arguably not as self-evident - an assessment attested to by the fact that they have evolved over time in case law. However, for a legal professional, giving counsel to the parties is no alien concept. There should therefore be no insurmountable challenges to the proper performance of the notary's duties emanating from the notary's self-image, such as seems to be the case with brokers. However, the tendency among notaries in the relatively near past to hold in their defense in court that they had been hired merely to draw up the deeds suggests that this reductionist and ultimately incorrect view of the notarial tasks may still have its supporters among the members of the profession.

One might observe that since the notary's duty to counsel stems from tort law, it is shaped and constrained by the rules that apply in that field of law: liability presupposes an injury, negligence, and

a causal relation. There is also the mitigation of damages doctrine. Several of the cases reviewed suggest that the focus on tort law may at times obscure the court's view on the broker's conduct. For instance, when the court dismisses the plaintiff's claims and rules in favor of the notary on the grounds of contributory negligence - which may be a perfectly correct outcome in the instant case - the question of whether the notary's conduct was acceptable is lost. The phenomenon is by no means unique to French courts. Swedish courts may also at times forget to distinguish between the conduct and the injured party's right to damages. Thus, one might suggest that it would be desirable if the duty to counsel were enforced by a disciplinary board as well as the civil courts. However, for such a regime to be meaningful, it would have to be administered by the state rather than the notary associations to avoid bias.

13.3.3 Is Impartial Counsel Possible?

Critics of the concept of impartiality make a habit of asserting that it is impossible to uphold in the physical world, with its myriad of counteracting incentives. For instance, criticism of the Swedish broker's duty of impartiality are prone to stress the broker's intuitive and contractually conditioned bias towards her client. It is also oftentimes claimed - without evidence - that in "the rest of the world" (or something to that effect), buyer and seller each have their own broker who represents them. While this is not the place to disprove that claim at length, it must be said that those claims are false. It is true that in some places, most notably the US, it is an established custom among many buyers in the marketplace to hire a broker to find a property. That broker will then make use of her contact or whatever databases she can access to find a property, which has usually been put on the market by another broker, the so-called "listing broker". Upon a successful conveyance, the two brokers will split the commission. This custom - which has been allowed to flourish, *inter alia*, by the lack of comprehensive databases which the public can access - should not, however, be confused with legal negotiations where each party is represented by their own attorney.

I have stated in the foregoing that incentives can be counteracted by measures that create other incentives. Two such measures are regulation and effective supervision. As to the latter point, the new rule (if indeed it can be called new more than one year after its introduction) in 20 § EAA stipulating that the broker must keep a journal for each assignment, and provide the buyer and seller with a copy each at the end of the assignment, may be of help since it should promote transparency in the conveyance process. For instance, if the journal contains a statement that the broker has explained the implications of a particular contract clause to the buyer, and the statement is false, the buyer has a chance to react and refuse to attest to its veracity. In the event of disciplinary proceedings, if the FMI finds an irregular clause and no attestation by the buyer that they have received adequate advice, the broker may be issued a disciplinary sanction. The same applies if there is no statement at all.

An important impediment to giving proper counsel is where there are no economic incentives to do so - or, conversely, where there are economic incentives not to do so. It has been suggested above that the market for lemons phenomenon may impede the proper performance of brokers. If, as seems likely given the development surrounding the notariats in the EU notaries are subject to free competition, a similar situation may arise for that profession. Thus, it may well be that brokers and

notaries alike must take measures to signal to consumers that they offer high quality in the form of proper counsel - even such counsel as is prescribed by law - lest they find themselves outmatched in the marketplace by less diligent competitors.

13.4 State-Prescribed Impartial Counsel - Is It Desirable?

13.4.1 The Fallibility of Economic Analyses

How much should the state interfere in our private lives and in business? Impartial counsel may well be a nifty concept, but all things come at a price. Let us assume that we accept that regulation can be a legitimate and appropriate means to provide utility for the community.[557] Let us also assume that we can readily measure the costs and utility of a particular piece of regulation. Granted, it is an epic assumption with a questionable connection to reality, but let us make it anyway. Let us assume, finally, that we want all laws and regulations to provide a surplus of utility. For a piece of regulation to be desirable, the utility would have to exceed the costs. If an existing piece of regulation carries more costs than it produces utility, it should be abolished. If a proposed piece of regulation has a utility deficit, it should not be introduced.

The problem is how to properly measure cost and utility. Such models tend to be incomplete and therefore in the end at least partially flawed. Ironically, scholars and policy makers wishing to implement an economic approach to law and policy may find themselves in the same situation as the buyers in the market for lemons phenomenon: since the utility and cost of certain aspects is so difficult to measure, focus is placed on the aspects that are more easily measured—namely the pecuniary aspects. As a result, the solutions that seem to give rise to the lowest pecuniary costs are chosen over others that may (or may not) produce more utility at a higher pecuniary cost.

A similar problem arises if the decision maker is short-sighted and/or has a too narrow perspective. Suppose, for instance, that the broker's and the notary's duty of counsel were abolished. That would presumably lower transaction costs in the short run. However, suppose the lack of advice leads buyers and sellers to hire their separate legal counsel instead. The fee for one solicitor/attorney would offset the lowered transaction costs. Since solicitors/attorneys are bound to unilaterally safeguard the interests of their client, they will of course pay no heed to the interests of their client's counterpart. Suppose this leads to a development where buyers and sellers as a general rule are represented by their own solicitor/attorney. The fee for two solicitors/attorneys would exceed—likely greatly so—the cost of the broker's/notary's duty to counsel.

The economic impact of law and policy is a perspective of great importance and should be both studied and observed. However, before analyzing the relative merits of a particular piece of regulation, one must be certain that all relevant factors are accounted for. It is imperative to have a reasonably long-term perspective. Even then, there are going to be factors that are not easily measured. One such factor, embedded in the field of law-and-economics, is the idea of liberty and the postulate that state intervention should be kept at a minimum. How does one put a price on such

[557] Any skeptics would do well to ponder the necessity of competition/antitrust laws.

an ideal? How does one put a price on diverging or opposing views? Another factor is consumer protection. While consumer protection can in part be justified in terms of consumers being more willing to spend money in the marketplace if they know that they have adequate protection, such as cooling-off periods and a duty of disclosure on the part of producers, there is at the heart of consumer protection policy the idea that those with less information and/or power should not be abused by those with more information and/or power. How does one put a price on that?

I am not contending that it is proven that the duty of impartiality and the duty to counsel are sound policy. I am, however, contending that it is not proven that they are not. I am further contending that economic analyses are so fraught with assumptions, some of which are quite bold, that one must be very careful in handling them whilst evaluating existing or proposed policies. Until the day we have better models and better data that account for the cost and utility of those things we cannot today measure, the merits of existing and proposed law and policy must ultimately be settled outside the boundaries of economics. If it is our desire to protect the weaker party in the marketplace, we must be content for now to do so not because it is expedient, but because it is right. And right it is.

13.4.2 The Freedom of Choice Alternative

Assuming that the duty to counsel of brokers and notaries is not abolished, there is an alternative that could perhaps satisfy both the resistance against compulsion by the state as well as the interest of consumer protection. While notaries are mandatory in real estate conveyances, in one transaction phase or the other, the use of brokers is voluntary. Granted, over 90 % of all conveyances in Sweden are accomplished through brokers, but there is still a freedom to refrain from availing oneself of their services. A house seller who disapproves strongly of the broker's duty of impartiality and/or duty to counsel is free to try to sell their property on their own; today it is quite possible to market one's own property on the Internet. For legal services, one can hire a lawyer. Should a broker be hired, she will be bound by her duties. This way, buyers and sellers can assess the level of protection by whether a broker is involved or not. This vision is not very distant, as long as brokers are given sufficient incentives—as discussed in the foregoing—to properly adhere to her duties.

As for the notary countries, could the same solution be applied there? Let us be realistic. Abolishing the mandatory intervention of notaries is not a viable option, at least not in the short run. In fact, there seems to be support among the population in civil law countries for the notary regime. The probable development is the introduction of free competition among notaries, not the abolishment of their mandatory intervention. It would, however, be possible to introduce a scheme whereby the notary's duty to counsel were made voluntary. Thus, the notary would still have to intervene formally and authenticate the deeds. This could be done at a reduced fee. To receive adequate legal advice, the parties (or the party wishing it) would have to pay an additional fee. Such a scheme would not be completely straightforward to introduce, at least in France, given that counsel is perceived as inherent in the act of authentication. It would, however, appear plausible.

Neither scenario is perfect. It is particularly problematic that the weaker party is likely to be left without protection in "opt-out" transactions. However, depending on the relative value one attaches to freedom of choice and protecting the weaker party, the idea could be worth considering.

14 Conclusions

In view of what has come to hand in this dissertation, my conclusions are the following.

1. The Swedish real estate broker and the Latin notary are both held to a duty of impartiality. With the exception for the former's obligation to observe the economic interests of her client if it is possible while still adhering to her legal obligations, and national variations with respect to notarial statutes, the duty of impartiality bars the Swedish broker and the Latin notary from favoring one party over the other and from engaging in activities where their integrity could be called into question.

2. The Swedish real estate broker and the Latin notary are both held to a duty to counsel. While in the latter case the extent of this duty varies across the civil law world, the duty is understood to address the validity of the deeds and to ensure that the deeds reflect the informed will of all parties.

3. As regards counsel to buyers and sellers in real estate conveyances, including the drawing up of contracts, the Swedish broker and the Latin notary are each other's functional equivalent.

4. The duty to counsel of the Swedish real estate broker and the French notary consists in four sub-duties: 1) to ascertain facts, 2) to disclose information, 3) to give adequate advice, and 4) to draw up deeds that are tailored to fit the instant transaction and the situation at hand. Based on these sub-duties, the duty to counsel can be defined as:

   the duty to diligently and prudently safeguard the interests of the parties, with particular regard to the validity and the efficacy of the transaction. That duty is accomplished by fulfilling the four sub-duties of ascertaining facts, disclosing relevant information, giving adequate advice, and drawing up deeds that are suitably tailored to the transaction at hand.

5. The duty of impartiality and the duty to counsel amounts to a function in the conveyance process that can be labeled *the impartial counsel function*.

6. To evaluate the relative merits of the different regimes for real estate conveyances, one must take into account each regime's *institutional robustness.* Institutional robustness addresses the question whether the regime can function properly given the incentives of the players involved, their level of training, and other factors. In the case of Sweden, the self-image and remuneration structure is a threat to the regime's institutional robustness, as is the insufficient legal training of most brokers. Another threat may be found in the ineffectiveness of supervision owing to the fact that the FMI does not supervise brokerage firms, only individual brokers. In the case of the notary, the institutional robustness may be challenged by self-image and a reductionist view among some members of the profession of the notarial tasks. However, more research must be conducted to draw any clear conclusions as to the institutional robustness of the two studied regimes.

7. The incentives to provide impartial counsel properly may be challenged when the professional is subject to competition, as players willing to provide high quality - on a level with or exceeding the demands of the law - may be outmatched in the marketplace by players who offer lower quality at a lower rate. Further studies on the subject would be valuable.

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