

EFFORT TO EXPAND “AUTHENTIC ACTS” IN EUROPE IMPERILS ECONOMIC FREEDOM

by

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During its 2008 rotating presidency of the European Union, France lobbied the European Parliament and European Commission to craft regional regulations that would ultimately result in the mutual recognition and enforcement¹ of EU member state ‘authentic acts’ legislation. Generally speaking, authentic acts are drawn up legal instruments that follow a prescribed form; recognize and provide conclusive evidence that specific private agreements have been reviewed and approved by empowered public officials; and render such agreements legally enforceable in a court of law. The concept of an authentic act does not, however, exist in common-law systems.

Pan-European notary trade associations have justified such proposed legislation as indispensable to promoting ‘economic efficiency’ and ‘consumer protection’ throughout the region. Juan Bol Alfonso, President of the Council of the Notariats of the European Union (CNUE) said that such a horizontal regulation would make it possible to “remove the procedural requirements involved until now in areas such as family law and company law”, and would bring “considerable...benefits...in terms of costs and time...for citizens, families and business...”.² Similarly, Rachida Dati, the French Minister of Justice, stated that, “the movement of authentic acts will help to advance the freedom to come and go within the European Union...[E]voking authentic acts means talking about everyone’s everyday life, it means taking stock of what remains to be integrated in Europe.”³

Authentic Authenticity? Notwithstanding these public representations, it is precisely because *les Francais* are the lead promoters of this proposal that the authenticity of its objectives must be questioned. Is it consumer protection or *industry* protection? And, is such legislation also intended to serve a higher purpose?

The December 2008 EU Parliament resolution proposing this regulatory solution *and* the literature surrounding it reveal that the French Government had sought early political support from the Parliament’s Legal Affairs Committee. Apparently, it was concerned about how the European Commission was being influenced by the Community’s growing number of practicing *avocats* consisting of both EU and non-EU transactional and litigation lawyers. These professionals are believed to be envious of the historic legal monopoly and lucrative fees earned by Europe’s civil law notaries, especially those licensed in France who handle real estate conveyances *in addition to* performing their official public duties, namely, authentic acts.

Indeed, in light of a competing 2008 study published by the Commission on the Latin notary system, it was feared that the Commission had already become biased against *les notaires*. In its reporting of this study’s findings, the World Bank emphasized how, “the highly regulated Latin notary system results in higher fees...[One] would be paying three times more in legal fees in France than in the Netherlands for the same 250,000 house.”⁴ It also cited study findings, showing how “current regulation, especially the use of fixed fee scales and absolute restrictions on entry, e.g. numerous clauses, are having an overall negative effect on

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consumer welfare.”⁵ Not surprisingly, the controversial study recommended the wholesale revision of the ‘Latin notary system.’⁶

Vive L’Authenticité. Furthermore, by establishing the French model for authentic instruments as a legal precondition to entering into practically any private transaction contemplated by businesses and individuals within the EU, the Sarkozy Government would succeed also in protecting at least two important French ‘cultural’ interests against the forces of globalization.

First, it will be able to protect its own notaries as well as those operating within other civil law EU jurisdictions from the threat of competition posed by EU and non-EU *avocats*, accountants and real estate agents. The fee income from authentic notarial acts accounts for an average of approximately 90% of a French notary’s earnings, and over half of a French notary’s average annual income is currently attributable to its quasi-monopoly over access to land registries. Second, if the French notary profession is as essential and “of continuing importance to the Continental European civil law system,” as one authentic acts expert has found,⁷ then France will be able to defend the Napoleonic Code-based civil law system of *preventive justice* via a proactive assault upon the evidentiary rules of the due process-based Anglo-American common law system. Her conclusions have been corroborated by a recent 2008 EU Parliament study prepared by the CNUE. In comparing the authentic act laws of various EU member states, the study found that “authentic instruments are *the* cornerstones of the concept of ‘preventive justice’” (emphasis added).⁸

According to the Parliament study, “Under the concept of preventive justice (‘voluntary jurisdiction’), the state does not *just* become involved in deciding legal disputes *ex post* (‘contentious jurisdiction’)...Instead, it provides for a preventive legal *control*⁹ through authentication by authentication authorities” (emphasis added).¹⁰ In other words, state officials are authorized to intrude into private transactions at their inception when the agreements they spawn can affect significant personal or property rights. Consequently, *before* a transaction may be completed, an “authenticating official [must] ensure that contractual provisions fully comply with the law..., that the parties have full (mental and legal) capacity to enter into their intended agreement and that they have fully understood the legal implications of their commitments.”¹¹

Actually, given their dual public-private professional roles, civil law notaries in France, Germany and Spain are duty-bound to intervene and render legal advice in the course of presiding over private transactions. In fact, the laws of such countries require that notaries provide advice also where the parties are well informed about the law and have legal representation. French law, in particular, indicates also that such “counseling obligation applies even where the notary is only charged with authenticating acts in which the terms have been laid down without his participation.”¹² And, the broad duty to intervene and dispense advice in private transactions arises under French law “where the notary realizes that a proposed contract clause is likely to cause future disputes, or where one of the parties is being unduly prejudiced.”¹³

Authentic Denial of Due Process and Attenuation of Private Property Rights. There are, of course, fundamental problems with universalizing any type of official instrument that, in the eyes of a judge, has “a greater probative value than a private agreement.”¹⁴ Most significantly, it offends the principle of due process of law which guarantees the determination of legal rights and obligations by the courts. According to the EU Commission study’s English reporters, “such an approach would [not only] be too intrusive [of private rights, but]...would [also] run counter to existing principles of the common law evidence rules...[In effect,]...the binding probative value attached to [an] authentic act [would]...require a common law judge to accept strict rules of evidence for foreign authentic instruments and deny the judge [or other trier-of-fact] any discretion in weighing the documentary evidence.”¹⁵

Consequently, by promoting the free movement of authentic acts to common law jurisdictions without simultaneously requiring the mutual recognition of UK, Irish and other common law nations’ deeds and non-real estate-related documentation within civil law countries, France will be able to create a more uneven playing field within Europe.¹⁶ And, should France be successful in this endeavor, there would be little to prevent such a useful regulatory template from being embraced and adopted throughout the world by the governments of Europe’s civil law-based trading partners, the businesses of which could ultimately obtain a competitive economic advantage over similarly situated Anglo-Americans.

Indeed, European governments’ track record of employing another key civil law precept that denies due process to businesses and individuals – the extra-WTO precautionary principle – as a disguised protectionist trade

barrier suggests that this may actually constitute a trend. It is in this context that the significance of the dual role played by *les notaires de France* in promoting legal certainty comes to light: 1) notaries can and do raise the awareness of private parties about the impact of public environmental and health laws grounded in the precautionary principle on their contemplated commercial transactions; and 2) notaries can and do largely assure via issuance of authenticating instruments that once those private contracts are executed, the parties to such agreements will comply with their terms and the requirements of the law, and will not readily pursue administrative actions or litigation against their contractual partners or the government. In other words, civil law notaries can potentially affect an almost infinite variety of private contractual business arrangements (e.g., purchase-sale, leasing, lending, licensing, manufacturing, formulating, processing, assembling, disposing, etc.) and personal matters, the subject matter of which include and go beyond real estate (e.g., recognition of paternity and consent to adoption; matrimonial and antenuptial agreements; wills and testaments; charitable donations; incorporation; partnership and joint venture agreements; stock transfers, etc.).¹⁷

If France's efforts are successful, therefore, the results could be quite sweeping. As one Italian legal commentator has noted, "The concept of the precautionary principle is different in civil law and common law, which have different approaches to the relationship between science and law. In the USA the regulation is 'science-based', meanwhile, in Europe the rule of science is determined through a 'policy-related' way."¹⁸

Under the common law notion of precaution (i.e., a precautionary approach), due process of law is maintained to the extent that laws and regulations recognize the evidentiary role played by administrative bodies, the courts and even juries, and the burden of proof is allocated accordingly. For example, government is required to prove conclusively that suspect products, processes or activities pose a significant ascertainable public environmental or health risk, as demonstrated by its performance of a scientific risk assessment and/or probabilistic risk computation, before the burden of production and persuasion shifts to the private party. In addition, due process is served to the extent government bears the burden, prior to the adoption of an economically significant regulation, to undertake an economic cost-benefit analysis showing that the public benefits to be derived by adopting and implementing said regulation in its proposed form will clearly outweigh its societal costs, including opportunity costs.

By contrast, under the civil law notion of precaution (i.e., the extra-WTO precautionary principle), the evidentiary requirement of due process is largely bypassed to the extent that: 1) governments' categorization *a priori* of particular substances, processes or activities as hazardous leads to a resulting strict liability-based regulation before a scientific risk assessment is ever performed; 2) governments fail to undertake a true economic cost-benefit analysis that maximizes net benefits prior to adopting said regulation; and 3) governments, based on 'public interest' concerns, fail to protect against unauthorized disclosure to third parties of exclusive private rights held in patents, copyrights and trade secrets associated with suspect products, processes or activities submitted to regulators to secure market authorization.¹⁹

International organizations and comparative law specialists have increasingly recognized that the attenuation of private property rights through denial of due process can be an unfortunate byproduct and/or feature of preventive justice. Consequently, they have suggested that policymakers and industry leaders devote more time and energy to reviewing the provisions of civil law country national constitutions.²⁰ Hopefully, such efforts will help to reduce the growing number of international public policy disputes that have arisen between common and civil law jurisdictions with respect to what may best be characterized as *creeping public interests*.

As is typically the case, if one digs deep enough among the nuances and verbiage accompanying proposed legislation, one will eventually unearth the true intentions of the promoter. Here, the evidence reveals that there is a whole lot more behind the Sarkozy Government's initiative than achieving trade protectionism. France's authentic acts proposal, indicative as it is of civil law's steady progression within and growing impact on international commercial and financial markets, seriously challenges the underlying foundations of the common law legal system, the economic freedoms it has provided and the Anglo-American way of life.

ENDNOTES

¹ In other words, France sought to harmonize EU member state authentic acts legislation upward to French standards.

² See "A European Initiative for Authentic Acts: A Project Serving Citizens and Business" - Press Release, Conseil des Notariats de l'Union Européenne (Dec. 2, 2008) at: <http://www.cnue-nouvelles.be/en/000/actualites/cp-etude-acte-authentique-02-12-08-en.pdf>.

³ See “Mrs Dati: The Movement of Authentic Acts is ‘What Still Has to be Integrated in Europe’” - Press Release, Conseil des Notariats de l’Union Européenne (Oct. 6, 2008) at: <http://pr.euractiv.com/?q=system/files/CP-Conférence-Acte-authentique-06-10-08-en.pdf>.

⁴ See *EU Executive to Shake up Notaries Services*, Doing Business Blog, World Bank Group (Feb. 19, 2008) at: <http://blog.doingbusiness.org/2008/02/eu-executive-re.html>.

⁵ See Christoph U. Schmid, Steffen Sebastian, Gabriel S. Lee, Marcel Fink, and Iain Paterson, *Conveyancing Services Market*, Study COMP/2006/D3/003 (Dec. 2007) at 16, at: http://ec.europa.eu/competition/sectors/professional_services/studies/csm_study_complete.pdf.

⁶ See Christoph U. Schmid, Steffen Sebastian, Gabriel S. Lee, Marcel Fink, and Iain Paterson, *Conveyancing Services Market*, Study COMP/2006/D3/003 (Dec. 2007) at 16, at: http://ec.europa.eu/competition/sectors/professional_services/studies/csm_study_complete.pdf.

⁷ See Gisela Shaw, *Notaires in France: An Unassailable Profession. Or are They?*, Notary Talk of England and Wales Blog (2007) at: http://www.notaries.org.uk/articles/articles/notaires_in_france.html.

⁸ See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, supra at Executive Summary, p. III and pp. 9 and 40, at: <http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>.

⁹ “[T]he authentication of a contract serves as a legal control by the state: that might be **preliminary legality control**...but includes also **notification** of controlling agencies...In particular, the notarial intervention in authenticating a contract also obliges the notary to deny authentication and to notify the authorities in case of a suspicion of **money laundering**...[and/or]... the authentication and the notification duties of the authenticating official might help the state in **collecting taxes**” (emphasis in original). *Id.*, at 24-25.

¹⁰ *Id.*, at Executive Summary, p. IV and p. 3.

¹¹ *Id.*, at Executive Summary, p. IV, and pp. 3-4.

¹² *Id.*, at 87.

¹³ *Id.*, at 87-88.

¹⁴ See European Parliament Resolution of 18 December 2008, with recommendations to the Commission on the European Authentic Act (2008/2124(INI)) supra at par. K.

¹⁵ See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, supra at 153.

¹⁶ Such nations would include Australia, Canada except for the Province of Quebec, England and Wales within the UK, Ireland, New Zealand and the United States except for the State of Louisiana. See Anthony Northey, *Bid By Civil Law Notaries to Protect Their Monopoly*, UK Law Society Gazette (Dec. 18, 2008) at: <http://www.lawgazette.co.uk/opinion/letters/bid-civil-law-notaries-protect-their-monopoly>; Paul Rogerson, *CCBE Warning on the Threat of Notaries*, UK Law Gazette (Dec. 4, 2008) at: <http://www.lawgazette.co.uk/news/ccbe-warning-threat-notaries>.

¹⁷ *Id.*, at 10; See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, supra at 21-22.

¹⁸ See Maria Vittoria Lumetti, *Precautionary Principle in Common Law and Civil Law*, Abstract of presentation made at the international conference, *The Precautionary EMF Approach: Rationale, Legislation and Implementation*, convened by the International Commission for Electromagnetic Safety (Feb. 2006) at: <http://www.icems.eu/docs/Lumetti.pdf>.

¹⁹ See Lawrence Kogan, *WTO Ruling on Biotech Foods Addresses ‘Precautionary Principle’*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.), Dec. 8, 2006, at: <http://www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf>; Peter Strauss, Turner T. Smith Jr. and Lucas Bergkamp, *Norm Creation in the European Union, Chapter 2 – Rulemaking*, American Bar Association, at 49, 53 (June 2007) at: http://www.abanet.org/adminlaw/eu/Reports_Rulemaking_06-07-2007.pdf; Jeroen H. J. den Hartog and Mark G. Paulson, *Europe’s ‘REACH’ Initiative Will Impact Trade Secrets*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.) (June 2006) at: <http://www.wlf.org/upload/061606dehartog.pdf>.

²⁰ See *Supplement to ITSSD Response to the WIPO Report on the International Patent System Paragraph 104* * (Document SCP/12/3), Institute for Trade, Standards and Sustainable Development (Nov. 7, 2008) at: http://www.wipo.int/scp/en/meetings/session_13/pdf/itssd_supplement.pdf.