

# Acceptance of English Notary Public Certificate of corporate representation without requirement of being a scrivener notary: recent decision of Regional Higher Court of Cologne

(concerning OLG Cologne, 28.4.2023 – case 18 Wx 8/23 o. 73 AR 185/23, below, p. 66, no. 3)  
Julian Gibbons, Great Yarmouth, United Kingdom\*

*The purpose of this article is to explain the professional standing, qualification, legal competence, regulatory equivalence, authority and evidential value of the acts of notaries public and scrivener notaries in England and Wales. This is considered necessary, as a number of German courts have, in recent years, rejected certificates of corporate representation issued by a notary public in England for use in Germany and elsewhere on the ground that they are not issued by a scrivener notary.*

In my capacity as President of the *Notaries Society of England and Wales*, I agreed to supply a statement in relation to the above matters in a legal challenge brought by *Alead Consulting UG* (with limited liability) in 2023, which has recently been upheld before the *Oberlandesgericht* Cologne. In a short judgment, they accepted the notarial certificate provided by a non-scrivener in relation to an application to move the registered seat of the applicant from Charlottenburg to Aachen.<sup>1</sup>

## I. Background

Firstly, some background. These types of cases normally relate to situations where an English parent company wishes to set up a German subsidiary, where the local district court judge (*Amtsrichter*) needs to be satisfied that the person signing the incorporation documents in Germany before a German notary had sufficient power and authority granted by the parent company under English law. Such evidence is normally presented by a certificate of corporate representation issued by an English notary public. Likewise, once the subsidiary is incorporated, any decision to change its registered seat or any other decision requiring registration at the district court trade registry will, in turn, require the court to be satisfied as to the authority of the parent company's representative to pass the relevant resolutions at the subsidiary's shareholder meeting.

German judicial acceptance of such certificates over recent years has involved a comparison of English and German corporate law, since the individual statutory authority conferred on a company's *Geschäftsführer* under German law, once registered at the company's *Amtsgericht*, is considerably greater than the statutory authority of a company director, registered in England and Wales with Companies House. However, such corporate law issues will be dealt with in a separate article. For the purposes of this article, it suffices to say that the *OLG* Cologne was satisfied as to the authority granted to the legal representative of *Alead Limited*, the parent company of *Alead Consulting UG* (with limited liability), on the evidence set out in the notarial certificate filed at court.

## II. Origin of German court requirement for use of scrivener notaries

The confusion in German legal literature between the status of the vast majority of notaries practising in England and Wales, as against the 35 or so notaries based primarily in the City of London who are scrivener notaries, appears to be based solely on an article written by a scrivener notary in 2002.<sup>2</sup> That article has subsequently been cited in other German legal commentaries.<sup>3</sup> It is extremely surprising to me, as an English lawyer, to see how findings of fact have been repeatedly made by German courts about a foreign lawyer's status and competence (indeed, upon the status and competence of a whole class of foreign lawyers) on the basis of one old, non-academic and non-peer-reviewed article.

Whatever may have been the position in 2002, much has changed in the intervening 22 years. The article's description of the English notarial profession then can no longer be regarded as factually or legally correct in 2024. This is certainly so in so far as it might suggest that there may still be any substantive differences in legal competence, skills or training between scrivener notaries on the one hand and the majority of the notarial profession on the other. This is dealt with more fully below.

## III. Critique of rationale for German court requirement to use scrivener notaries

The principal academic text book on notarial practice in England and Wales, *Brooke's Notary*,<sup>4</sup> does not suggest that there is any legal basis for the notarial acts of a certain sub-group of English notaries being legally different, better or more probative as compared with those of other notaries in describing the notarial function it refers only to notaries, without any distinction.<sup>5</sup> This is something that the English regulator of all notaries, the *Faculty Office*, has pointed out on many occasions.

The 2002 article already referred to appeared shortly after the coming into force of the Access to Justice Act 1999.<sup>6</sup> That Act abolished the monopoly of practice within the City of London and a three-mile radius of the City previously attaching to those notaries with the scrivener title. The Courts and Legal Services Act 1990 enabled the regulator, the *Master of the Faculties*, to make

\* BSc., M.A., President of the Notaries Society in England and Wales, Solicitor, notary public, Woodview, Main Road, Ormesby St. Michael, Great Yarmouth NR29 3LW United Kingdom.

1 Appeal against a decision of the Aachen district court dated 28.4.2023 – 18 Wx 8/23 o. 73 AR 185/23, IPRax 2025, 66 (in diesem Heft).

2 *Claudet*, National Report England, *Notarius International* 2002, 39. For the sake of accuracy, it should be made clear that this opinion relates solely to the situation in England and Wales. Scotland has a completely different legal system, as does Northern Ireland. In neither of those jurisdictions are there a group of notaries termed "scrivener notaries", i.e. a class which seeks to identify certain of its members by reference to a different name or title.

3 *Weidmann*, in: Gebele/Scholz (Hrsg.), *Beck'sches Formularbuch Bürgerliches Recht, Handels- und Wirtschaftsrecht*, 14. Auflage 2022, I. 48 Anm. 1; *Göthel/Graminsky*, *Trügerische Sicherheit – Die Grenzen der Rechtswahl in internationalen M&A-Verträgen*, BB 2020, 521.

4 *Ready*, *Brooke's Notary* (Fifteenth edition 2021).

5 *Ready*, *Brooke's Notary* 2–01 (Fifteenth edition 2021).

6 Access to Justice Act 1999, <https://www.legislation.gov.uk/ukpga/1999/22/contents> (last accessed 8.5.2024).

regulations for the training and regulation of all notaries.<sup>7</sup> It also abolished seven years apprenticeship as a route to qualification as a notary. This legislation says much about the changes which occurred in the legal landscape and which had a profound impact on the qualification, training, practice, regulation and privileges of all notaries in England and Wales. The *Master* has over the ensuing years passed a number of sets of regulations covering all these areas.<sup>8</sup>

It is right to point out that if the government of the day had wanted to create a two-tier notarial profession at any time between 1990 and 1999 (or indeed since) then these pieces of legislation would have presented the ideal opportunity to do so. In fact, the government did the opposite by removing an outdated monopoly and by strengthening the regulator's position, giving him the power to regulate entry to and practice in the profession.

In the debate on the abolition of the scriveners' monopoly by the Access to Justice Act 1999 the Solicitor-General stated in the House of Commons that:

"[...] there is no hard evidence that non-scriveners provide any lesser service than scriveners. The Archbishop of Canterbury's faculty office oversees the entire notarial profession and has made it clear that *all notaries are qualified to do all notarial acts*. The scriveners' monopoly is geographical and limited to certain areas of London"<sup>9</sup> (emphasis added).

The profession of notary public in England and Wales is therefore very different in 2024 from how it was in 2002. There are now some 794 notaries in England and Wales, amongst whom there are (as mentioned above) approximately 35 scrivener notaries admitted by the *Worshipful Company of Scriveners*, almost all of whom work in London. I allow myself one practical observation: if the distinction between members of the one notarial profession in England and Wales were to be correct, the practical effect would be that almost every single English notarial act would be notarised in London, by a tiny cohort of scrivener notaries. This would be wholly impracticable. One can imagine the outcry of users of *Notare* in Germany, for instance, if all German notarial acts had to be performed by a tiny cohort in, say, Berlin!

#### IV. Professional training requirements for all English notaries

I now turn to the question of professional training. Every scrivener notary follows the same initial educational training and qualification as all other notaries.

In order to qualify as a notary, an applicant must be either a solicitor, barrister, legal executive or hold a degree. It is not necessary for that degree to be in law. Indeed, a number of notaries, whether scriveners or general notaries, have a non-law degree (the writer holds a degree in physics).

In order to be admitted as a notary an applicant must show competence in a variety of legal subjects. This is done either by individual examination or by experience. Many solicitors who apply to become notaries are granted a certificate of exemption from the majority of examinations because of their substantial

experience working in the largest of the English legal professions. Those applicants who lack experience in any core area of law are required to study for and pass an examination in that subject. The subjects are set out in regulations made by the *Master of the Faculties*:

The Notaries (Qualification) Rules 2017, Rule 8.3 and Schedule 2 specifically require examination in the following subjects:

- a. Public/Constitutional Law
- b. The Law of Property
- c. The Law of Contract
- d. The Law of the European Union
- e. Equity and the Law of Trusts
- f. Conveyancing (law of the transfer of real property)
- g. The Law and Practice of Companies and Partnerships
- h. Wills, Probate & Administration.

In relation to the Law and Practice of Companies and Partnerships, the Rules set out that the examination undertaken must include:

- i. Company formation
- j. Articles of association
- k. Shares and debentures
- l. The members of a company, including rights of minority shareholders
- m. Company directors and other officers
- n. Administration
- o. Winding up and liquidation of companies
- p. Formation of partnerships
- q. Relationship between partners, including partners as agents
- r. Dissolution of partnerships
- s. Limited Liability Partnerships.

This demonstrates that the vast majority of notaries in England and Wales have a huge amount of experience in the practice of law, which is based to a very considerable extent on their valuable experience gained as solicitors or other legal professionals. The author qualified as a solicitor in 1981 and worked in a variety of fields, including criminal law, land law, commercial and company law and employment. He appeared regularly as advocate in the criminal and civil courts and in tribunals. This pattern is by no means unusual for English legal professionals.

To demonstrate competence in certain other areas of law, it is necessary for a prospective notary to attend a part-time, two-year course with University College London (UCL),<sup>10</sup> (previously run by the University of Cambridge), leading to a postgraduate diploma in notarial practice. UCL ranks 8<sup>th</sup> in the QS World University Rankings.<sup>11</sup> During this course the candidate studies Roman law and private international law in year 1 and notarial practice in year 2. This requirement applies to all notaries, including those wishing to become scrivener notaries.

It can thus be seen that many, indeed the majority of, notaries have extensive experience in English law, often gained over decades in practice. As notaries, they are subject to rules of continuing professional education, which includes mandatory annual

7 Courts and Legal Services Act 1990, <https://www.legislation.gov.uk/ukpga/1990/41/section/57> (last accessed 8.5.2024).

8 Rules and Requirements for Notaries – The Faculty Office, <https://www.facultyoffice.org.uk/notaries/rules-governing-notaries/> (last accessed 8.5.2024).

9 Hansard, Public Notaries: Abolition Of Scriveners' Monopoly – Hansard – UK Parliament, <https://hansard.parliament.uk/Commons/1999-06-22/debates/06a69c1a-a7f5-48d7-be0c-f73bb9cfff66/PublicNotariesAbolitionOfScrivenersMonopoly> (last accessed 8.5.2024).

10 UCL, Notarial Practice Course, UCL Faculty of Laws, <https://www.ucl.ac.uk/laws/study/continuing-professional-development/notarial-practice-course> (last accessed 8.5.2024).

11 UCL, Rankings, 2023, About UCL, <https://www.ucl.ac.uk/about/why/rankings> (last accessed 24.5.2024).

minimum training, including training in anti-money laundering provisions. The regulator inspects a number of notary practices annually, to maintain standards.

## V. Difference as regards scrivener notary training

How does the professional training of scrivener notaries compare with the training of the vast majority of the profession? The first point to make is that the *Worshipful Company of Scriveners* (to give it its full title) is a City (of London) livery company. It dates its origins to the 14<sup>th</sup> century. Its membership is not restricted to notaries or other types of lawyers. The majority of the members have no connection with the profession of notaries and there are notary members who are not “scrivener notaries;” the writer is one such member, being a “liveryman” of the company. The company is essentially a private organisation with largely charitable and social functions.<sup>12</sup>

Many scrivener candidates come with a non-law degree, or one combining law with other subjects. Often that degree relates to the study of one or more (usually European) languages. A scrivener candidate must, having passed or been exempted from the examinations in the subjects already referred to and qualified as a notary, enter into a training agreement with a scrivener notary, or a contract for supervised practice with a scrivener if they are already in practice as a notary. This stage lasts for two years, with part of a candidate’s training often being spent in one or more law firms abroad, though this is not obligatory.

However, under the general training required for all notaries all newly-qualified notaries, whether wishing to go on to become a scrivener notary or not, having passed or been exempted from the examinations in the subjects already referred to, practise under supervision for the first two years post-qualification and must undertake a professional development course specifically run for newly-qualified notaries, which are governed by regulations made by the *Master*.<sup>13</sup> To recap, all applicants to the notary profession must pass or be exempted from the same legal examinations held under the auspices of UCL and have a two-year, post-qualification supervision period.

## VI. Equivalence of training in the eyes of mutual regulator

The key point is that, insofar as their formal legal training in English law and notarial practice is concerned, all notaries are regarded by their mutual regulator, the *Faculty Office*, as entirely equivalent. It is simply not factually correct, having regard to the professional training requirements, to assert, as some have on occasion done, that only scrivener notaries are sufficiently trained to give competent opinions on English law, whether for the review of a corporate authority of representation or indeed any other area of private or corporate law. There are thus no “special rules” according a greater legal or evidential value to acts or opinions of a scrivener notary.

Scrivener candidates are further required either to pass an examination in foreign law relevant to notarial practice, covering

areas specified in Schedule 3 to the Scrivener (Qualification) Rules 2019,<sup>14</sup> or to hold an approved post-graduate degree. Incidentally, nowhere is it stated in Schedule 3 that the foreign law needs to be a civil law jurisdiction (as compared, for example, to a different common law, such as a US state, jurisdiction). These rules are made by the Scriveners Company with the approval of the *Master*.

Finally, they are examined in two foreign languages and advanced notarial practice.<sup>15</sup> Generally, the languages represented in scriveners’ practices are European and there is little or no representation of languages from the Middle East, Africa or Asia (or for that matter the Scandinavian languages). It is important to note that the syllabus for the “advanced notarial practice” examination, which is set out in Schedule 5 of the 2019 rules, mirrors and duplicates substantially the second-year topics of the UCL diploma course.<sup>16</sup> Indeed, the scriveners’ examination in advanced notarial practice relies on what is taught on the UCL year 2 course.<sup>17</sup> The writer is unaware of any more detailed published syllabus or set of learning objectives attaching to this scrivener notary examination beyond those in the UCL course brochure already referred to.

## VII. Minor differences in training immaterial to day-to-day notarial practice

Thus, whilst there are some differences in the qualification of notaries who adopt the scrivener title, these are immaterial to their education as to the substantive law of England and Wales and with regard to the day-to-day notarial practice of a notary public in England and Wales. Scriveners do have some experience in working in foreign legal systems (though there appears to be no formal procedure for updating that experience and ensuring that it is current) and training in foreign-specific law and practice. The areas of foreign law and practice undertaken by candidates is chosen by them alone and there are no minimum requirements laid down, beyond the formal approval of the choices made by the candidate by the Scriveners Company. They also possess skills in at least two foreign languages. However, it should be borne in mind that this is outside of the strict notarial function itself, in that it has no bearing on their skill and knowledge as an advisor on the substantive law of England and Wales or on the rules of notarial practice. It is always possible, in evidential terms, to produce a formal translation of any material document, whether originating from a notary, or anyone else. These translations do not have to originate from the notary him- or herself.

Conversely, the majority of notaries making up the English profession, who are not scriveners, have a great depth of knowledge and experience derived from being qualified (usually) as solicitors and working often for many years as legal practitioners. Whilst not examined on them, a significant number of notaries (outside the scriveners group) also possess foreign language skills. Amongst the fifteen members of the *Notaries Society* council alone there are fluent/competent users of French, Spanish, German and Italian (including a native Italian speaker who in addition to be-

12 Scriveners Company in London, <https://www.scriveners.org.uk/> (last accessed 8.5.2024).

13 The Faculty Office, Notaries (Post-Admission Supervision and Training) Rules 2019 (As amended December 2021), <https://www.facultyoffice.org.uk/notaries/rules-governing-notaries/> (last accessed 8.5.2024).

14 Qualification Rules, Scriveners Company, <https://www.scriveners.org.uk/qualification-rules> (last accessed 8.5.2024).

15 Qualification Rules, Scriveners Company, <https://www.scriveners.org.uk/qualification-rules> (last accessed 8.5.2024).

16 UCL Course Brochure 2023–2025 at [https://www.ucl.ac.uk/laws/sites/laws/files/ucl\\_notary\\_practice\\_course\\_brochure-2023-4.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/ucl_notary_practice_course_brochure-2023-4.pdf) (last accessed 8.5.2024).

17 Qualification Rules, Scriveners Company, <https://www.scriveners.org.uk/qualification-rules> (last accessed 8.5.2024).

ing an English notary and a solicitor is also an Italian *avvocato*). Their professional legal experience covers company and commercial law, employment, real property, intellectual property, data protection, private client (wills and inheritance), tax and litigation as well as regulatory and money laundering advice and guidance given to fellow professionals. In the wider community of notaries, speakers of Asian, Indian sub-continent and Middle Eastern languages are to be found. This is crucial for ensuring access to justice for the country's diverse communities. Indeed, a very small number of non-scrivener notaries either are, or have been, dual-qualified as solicitors in a second jurisdiction, normally in a bi-lingual capacity.

### VIII. Common oath sworn at time of admission to profession

All notaries must, in order to be admitted to practise, take an oath to the King and also a notarial oath in the following terms:

"I A.B. do swear, that I will faithfully exercise the office of a public notary; I will faithfully make contracts or instruments for or between any party or parties requiring the same, and I will not add or diminish anything without the knowledge and consent of such party or parties that may alter the substance of the fact; I will not make or attest any act, contract, or instrument in which I shall know there is violence or fraud; and in all things I will act uprightly and justly in the business of a public notary, according to the best of my skill and ability."<sup>18</sup>

### IX. Common evidential value of all notarial acts within English legal system

In recognition of the standing of notaries within the English legal system, the Civil Procedure Rules, which govern procedures in all the civil courts, contain a provision in rule 32.20 to the effect that:

"A notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved".<sup>19</sup>

This rule is stated as being: "A new rule 32.20, which gives probative force to notarial acts".

The same rule has been added in identical terms to other codes of procedure, namely the Family Procedure Rules 2010 and the Court of Protection Rules 2017. The latter governs proceedings involving minors or others who lack legal capacity and whose affairs need to be managed by an attorney or by a deputy appointed by the court. None of these rules draws any distinction between notarial acts produced by one notary or another.

### X. Conclusion

It is hoped this article clarifies that, whilst there are some differences in the qualification of notaries who adopt the scrivener title, they are not material to the joint education received by all applicants to the notary profession as to the substantive law of England and Wales and notarial practice in this country. All notaries are subject to regulation under a variety of common regulatory rules and practice rules by the *Faculty Office* and take the same oath upon taking-up office. Their notarial acts and instruments are receivable in evidence in England and Wales to the exact same extent and with the exact same probative value. As such, when their certificates are used abroad to certify matters of English law, no distinction ought to be made between whether those certificates are issued by a notary or a scrivener notary. Accordingly, the decision of *OLG Cologne* is to be applauded.<sup>20</sup>

<sup>18</sup> Public Notaries Act 1843, <https://www.legislation.gov.uk/ukpga/Vict/6-7/90> (last accessed 8.5.2024).

<sup>19</sup> PART 32 – EVIDENCE – Civil Procedure Rules, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32> (last accessed 8.5.2024).

<sup>20</sup> A version of this article is also available in the German language and may be found at the following link: [https://www.thenotariessociety.org.uk/uploads/optimadmin/document/document/1167/Article\\_of\\_Julian\\_Gibbons\\_acceptance\\_of\\_English\\_notarial\\_acts\\_-\\_translation.pdf](https://www.thenotariessociety.org.uk/uploads/optimadmin/document/document/1167/Article_of_Julian_Gibbons_acceptance_of_English_notarial_acts_-_translation.pdf).