

## What is behind the term 'authentic instrument'?

### Key points of the presentation:

- Authentic instruments largely unknown in the common law.
- Closest equivalent are public documents – i.e. documents emanating from State authorities such as registrars of births, deaths and marriages, company registries etc. These documents are self-proving or, as a civil-law practitioner would say, probative.
- Authentic instruments encompass a much wider category of document. Unlike our public documents they often concern matters in the private sphere – agreements, donations, wills etc. The overwhelming number of authentic instruments are issued by notaries. Other public officials may have similar powers – e.g. Youth Welfare Offices. Such documents are not merely probative, they are also executory – i.e. directly enforceable in the same way as a court decision.
- Notaries in civil-law countries occupy a very different position from notaries in common-law countries. In the United States for example a “notary public” is generally an ordinary citizen with no legal training who depending upon the individual State may or may not have passed a simple examination.
- In England and Wales and other Commonwealth jurisdictions notaries are generally lawyers – solicitors or attorneys – who qualify as notaries as an adjunct to their principal profession. Their principal role is to certify documents to be used in other countries.
- In civil-law countries such as France and Germany notaries are highly qualified jurists who, although practising as liberal professionals, exercise State authority - hence the executory force, i.e. the direct enforceability, of the instruments which they issue.
- There is a large category of documents which in order for their validity must be made before a notary in the form of authentic instruments. Depending upon the jurisdiction concerned, these would, by way of example, include transfers of real estate, mortgages, wills, company formation, gifts etc. In addition, there is a much broader category of legal acts which parties may choose to have embodied in an authentic instrument by appearing before a notary or other competent official and thus obtain all the advantages attaching to such instruments.
- These legal acts often include agreements or declarations whereby a party makes himself liable for the payment of a debt or to make a future payment. The advantages of doing so are not only to put the fact of the execution of the document and the fact of the statements of the parties beyond dispute, but to create a directly enforceable title, i.e. one that can be enforced without recourse to protracted and expensive litigation in court. Such instruments can only be deprived of their authenticity in exceptional cases by recourse to the courts following a particular procedure.

- Otherwise, in all respects an authentic instrument is equivalent to a judgment and their widespread use in civil-law countries is seen as a mechanism of “preventive justice” contrasting with the situation in common law jurisdictions where disputes arising from a document can ultimately be resolved only through litigation.
- The advantages of the authentic instrument in the context of child support are clear – a directly enforceable instrument setting out reciprocal rights and obligations made voluntarily and without acrimony by the parties, rather than imposed on an recalcitrant spouse by a court decision; enforcement without recourse to the courts (except in some jurisdictions by “rubber stamping” from the competent tribunal).
- Duty of notary or other public official to positively identify the parties, to ensure they understand the nature and terms of the instrument and that they are entering into it without compulsion.