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PART 1: HISTORICAL BACKGROUND AND SOURCES OF LAW

HK1.01

The People's Republic of China resumed sovereignty over the former British dependent territory of Hong Kong on July 1, 1997. On that date Hong Kong became a Special Administrative Region of the People's Republic. The Sino-British Joint Declaration on the Question of Hong Kong signed between the Chinese and British Governments on July 1, 1984 established the principle of "One Country, Two Systems" according to which the socialist systems and policies would not be applied in Hong Kong following the resumption of sovereignty by the People's Republic, and Hong Kong's capitalist system and life-style would remain unchanged for 50 years. This principle was subsequently enshrined in the Basic Law of the Hong Kong Special Administrative Region that was adopted on April 4, 1990 by the third Plenary of the Seventh National People's Congress of the People's Republic and entered into force on July 1, 1997. The Basic Law is in effect the constitutional document of the Hong Kong Special Administrative Region.

Chapter 1 of the Basic Law is entitled "General Principles" and the following provisions of that Chapter are relevant to this text: —

"Article 2

The National People's Congress authorises the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

Article 5

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 11

In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law."

In accordance with article 18 of the Basic Law, national laws of the People's Republic do not apply in Hong Kong except for those listed in Annex III to the Basic Law, which relate to defence and foreign affairs and other matters outside the limits of the autonomy of the Special Administrative Region.

Accordingly, the legal system in the Hong Kong Special Administrative Region continues to be based on the common law and rules of equity as originally developed in the courts of England and Wales, but supplemented by local primary legislation ("Ordinances"), subordinate legislation and customary law. For that reason much of the text of *Brooke's Notary* remains directly applicable to notarial practice in Hong Kong.

PART 2: APPOINTMENT, QUALIFICATIONS AND DISCIPLINE OF NOTARIES

Before Reunification

Until July 1, 1997, notaries in Hong Kong were appointed by the Court of Faculties of the Archbishop of Canterbury in accordance with the powers vested in the Archbishop under the Ecclesiastical Licences Act 1533 [3-01 to 3-04].¹ The first appointment of a notary in Hong Kong was made on May 24, 1844 in favour of Edward Francombe. It appears from a letter dated February 14, 1936 from the Incorporated Law Society of Hong Kong to the registrar of the Court of Faculties that there were then only seventeen notaries practising in Hong Kong. However, immediately prior to reunification their number had risen to some 400.

HK2.01

By orders of the Master of the Faculties dated December 11, 1989 and December 21, 1992 no person might be admitted to practise as a notary in Hong Kong unless such person, being otherwise qualified:

- (a) had satisfied the Master that he or she had during the period of seven years immediately prior to such admission been practising as a duly qualified and admitted lawyer in Hong Kong and continued to be in goodstanding in such profession; and
- (b) had passed an examination in notarial practice approved by the Court of Faculties in accordance with rules and regulations made by the Master.

Although it was unusual for a notary to be appointed in Hong Kong without the endorsement of the Hong Kong Society of Notaries, the Master ruled in an application made to him immediately prior to reunification² that such an endorsement was not a prerequisite for appointment.

Under section 41 of the Legal Practitioners Ordinance (Cap.159) a register of notaries public was kept by the Registrar of the High Court and by section 14(1) of the Hong Kong Reunification Ordinance (Instrument A601) every notary public who was so registered immediately before July 1, 1997 should on and after that date continue to be a notary public with all the powers which immediately before that date were exercisable by a notary public under the law of Hong Kong.

After Reunification

Following reunification, the appointment of notaries public in Hong Kong is regulated by Part IV of the Legal Practitioners Ordinance (Cap.159) as inserted by the Legal

HK2.02

¹ Numbers in bold in square brackets are references to the corresponding numbered paragraphs of *Brooke's Notary*, 15th edition (Sweet & Maxwell, 2021).

² *Re W* (unreported).

Practitioners (Amendment) Ordinance 1998,³ section 3. The Legal Practitioners Ordinance (Cap.159), as amended, is hereinafter referred to in this Part as "the Ordinance". In section 2(1) of the Ordinance, "notary public" means a person who is registered on the register of notaries public and who, at the material time, is not suspended from practice.

Qualifications for practising as a notary public

By section 40D of the Ordinance no person is qualified to practise as a notary public in Hong Kong unless:

- (a) his name is for the time being on the register of notaries public;
- (b) his name is for the time being on the roll of solicitors;
- (c) he is not suspended from practising as a notary public or as a solicitor;
- (d) he holds either a current practising certificate as a notary public or a current practising certificate as a solicitor issued by the Law Society of Hong Kong accompanied in the latter case by a current certificate of membership issued by the Hong Kong Society of Notaries;⁴
- (e) he complies with any indemnity rules made by the Council of the Society of Notaries under the Ordinance.⁵

The continuing rights to practise of notaries public registered on the register of notaries public prior to 30 June 2005 were expressly preserved by section 6 of the Legal Practitioners (Amendment) Ordinance 1998.

Appointment

Section 40A(1) of the Ordinance vests the power to appoint notaries public in Hong Kong in the Chief Judge of the High Court, but by section 40A(2) he may designate another judge of the High Court⁶ to exercise that power. The Chief Judge may appoint as a notary public in Hong Kong a person whom he considers to be a fit and proper person to hold that office and who:

- (a) satisfies the following requirements: —
 - (i) his name has been on the roll of solicitors continuously for the whole of the period of 7 years immediately before the date of his application for appointment;

³ 27 of 1998 (entered into force (except ss. 1 and 7) on June 30, 2005). The text of Part IV of the Ordinance is set out in Appendix 1.

⁴ The Society was incorporated as a company limited by guarantee on July 5, 1977 and its objects include the promotion of proper professional standards among notaries public, the regulation of the practice of notaries public and the performance or discharge of such duties or responsibilities as may be conferred on it under the Ordinance. For the rule-making powers of the Society, see s. 73D of the Ordinance.

⁵ See below at para.HK2.12.

⁶ The High Court of the Hong Kong Special Administrative Region consists of the Court of First Instance and the Court of Appeal (Hong Kong Reunification Ordinance, s. 8, substituting s. 3 of the Supreme Court Ordinance (Cap.4)).

- (ii) he has practised as a solicitor for a period or periods in aggregate of not less than 7 years;
 - (iii) he has, within the period of 1 year ending on the date of his application for appointment,⁷ passed any examination⁸ prescribed by the Council of the Society of Notaries under section 73D⁹ of the Ordinance; and
- (b) has complied with any other requirements prescribed by the Council of the Society of Notaries under section 73D with respect to persons applying for appointment as a notary public. These requirements are set out in the Notaries Public (Qualifications for Appointment) Rules (Cap.159AJ)¹⁰ and provide that¹¹ no person may apply for appointment as a notary public unless, at the date of his application:
- (a) he holds
 - (i) a current letter of no objection issued by the Society of Notaries,¹² or
 - (ii) a written notice of refusal to issue the letter of no objection served on him by the Society under section 4(8) of the Rules stating the grounds for refusal, or
 - (iii) a written notice of revocation of a letter of no objection served on him by the Society under section 6(3) of the Rules stating the grounds for revocation, and
 - (b) he has applied for membership of the Society of Notaries.

A solicitor who has been suspended from practice at any time within the seven-year period prior to the date of his application for appointment as a notary public is regarded as not having been on the roll of solicitors during the whole of the period of suspension.¹³

Application for appointment is made by motion in accordance with sections 12A to 12F of the Admission and Registration Rules (Cap.159B) of the High Court,¹⁴ accompanied by the documents therein mentioned¹⁵ and the prescribed fee.¹⁶ A copy of the notice of motion and of each accompanying document is served on the Secretary for Justice and the Society of Notaries.¹⁷

⁷ The Chief Judge has the power in any particular case to specify a different period (s.40A(4)); he may also designate a judge of the High Court to exercise this power (s.40A(4A)).

⁸ See below at para.HK2.05.

⁹ Inserted by Legal Practitioners (Amendment) Ordinance 1998, s.4.

¹⁰ The text of the Rules is set out in Appendix 2.

¹¹ s.3.

¹² See below at para.HK2.06.

¹³ Legal Practitioners Ordinance (Cap.159), s.40A(3), as inserted by Legal Practitioners (Amendment) Ordinance 1998.

¹⁴ As inserted by the Admission and Registration (Amendment) Rules 2005; the text of these Rules is set out in Appendix 3.

¹⁵ See Rule 12B as inserted by the Admission and Registration (Amendment) Rules 2005.

¹⁶ Currently HK\$1,135 (Legal Practitioners (Fees) (Amendment) Rules 2005 (Cap.159D), r. 3).

¹⁷ Admission and Registration Rules (Cap.159B), s.12C, as inserted by the Admission and Registration (Amendment) Rules 2005.

Examinations

HK2.05

As we have mentioned, section 40A of the Ordinance requires a person applying for appointment as a notary public to have passed within the twelve months preceding his application such examination as the Council of the Society of Notaries may prescribe under section 73D. Pursuant to that section, the Council has made the Notaries Public (Examinations) Rules (Cap.159AH) that came into force on June 30, 2005.¹⁸ These provide for an examination in the following subjects:

- (a) bills of exchange
- (b) notarial practice.

The examination is based on a syllabus as determined from time to time by the Council. Although there is no limit on the number of resits, a pass must be obtained in each of the subjects on the same occasion.¹⁹ An application and examination fee is payable to the Council.²⁰

Application for letter of no objection

HK2.06

An application for a letter of no objection may be made to the Society by a person who has passed the examination mentioned above. The application must be accompanied by:

- (a) certified copies of the following documents:
 - (i) a certificate issued by the Registrar of the High Court certifying that the applicant's name has been on the roll of solicitors continuously for the whole of the period of seven years immediately before the date of his application;
 - (ii) a certificate issued by the Law Society of Hong Kong confirming that the applicant has practised as a solicitor for a period or periods in aggregate of not less than seven years;
 - (iii) a certificate from the Society of Notaries certifying that the applicant has passed the prescribed examination;

(b) a draft of the affidavit in support referred to in section 12B(2)(e) of the Admission and Registration Rules (Cap.159B);²²

(c) a letter of support endorsed by at least thirty signatories indicating their personal support of the applicant. The signatories must include:

- (i) at least 5 judicial officers²³

¹⁸ The text of the Rules is set out in Appendix 5.

¹⁹ Notaries Public (Examinations) Rules, s.7.

²⁰ Currently HK\$2,000 and HK\$10,000 respectively (*ibid.* Schedule).

²¹ See Notaries Public (Qualifications for Appointment) Rules (Cap.159AJ), s.4.

²² As inserted by the Admission and Registration (Amendment) Rules 2005; see Appendix 3 below.

²³ As defined in the Judicial Officers Recommendation Commission Ordinance (Cap.92), s.2.

- (ii) at least 10 practising notaries public, solicitors or barristers.

The remaining signatories must be persons of good standing.

- (d) A statutory declaration to the effect that at the date of the application:
 - (i) the applicant is not suspended from practising either as a notary public or as a solicitor; and
 - (ii) if the applicant is entitled to practise the law of a foreign jurisdiction he is not suspended from so practising; and
 - (iii) the applicant has not been convicted in Hong Kong or elsewhere of an offence involving fraud, dishonesty or moral turpitude; and
- (e) such other information as the Society may reasonably require to substantiate the applicant's compliance with paragraphs (a) to (d) above; and
- (f) the prescribed application fee.²⁴

Refusal of application for letter of no objection

The Society may not refuse the application without first giving the applicant an opportunity to make written representations as to why the application should not be refused. Any decision to refuse an application must be notified to the applicant in writing stating the grounds of the refusal²⁵ in order to enable him to pursue, if so advised, his application for appointment notwithstanding that refusal.

HK2.07

Register of notaries public²⁶

The register of notaries public continues to be kept by the Registrar of the High Court and may be inspected by any person without payment. Upon production of a certificate of appointment signed by the Chief Judge and upon payment to the Registrar and to the Society of Notaries of any fees prescribed by the Chief Justice²⁷ of the Court of Final Appeal, the Registrar enters the person appointed on the register of notaries.²⁸

HK2.08

Practising certificates²⁹

Practising certificates as a notary public are issued by the Society of Notaries on application made to the Society in writing in the month of November in any year.³⁰ A

HK2.09

²⁴ Currently HK\$3000 (see Notaries Public (Qualifications for Appointment) Rules (Cap.159AJ), Schedule).

²⁵ Notaries Public (Qualifications for Appointment) Rules (Cap.159AJ), s.4 (7) and (8).

²⁶ See Legal Practitioners Ordinance (Cap.159), s.40C, as inserted by Legal Practitioners (Amendment) Ordinance 1998.

²⁷ Currently HK\$360 (Legal Practitioners (Fees) (Amendment) Rules 2005, s.2).

²⁸ See Rule 12F of Admission and Registration Rules (Cap.159B), as inserted by the Admission and Registration (Amendment) Rules 2002.

²⁹ See Legal Practitioners Ordinance (Cap.159), ss.40D(1)(d) and 40E, as inserted by Legal Practitioners (Amendment) Ordinance 1998.

³⁰ But see *ibid.* s.40E(5). For documents accompanying the application, see Notaries Public (Practising Certificates) Rules (Cap.159AG), s.2, the text of which is set out in Appendix 6 below.

person who holds a current practising certificate as a solicitor is not required to obtain a separate practising certificate as a notary public provided that he holds a current certificate of membership issued by the Society of Notaries.³¹ Certificates run for a period of one year from 1 January next following the date of application.³² Applications must be made on a form approved by the Council of the Society of Notaries and accompanied by such fee as the Council may prescribe.³³ A practising certificate may not be issued unless the applicant complies with the indemnity rules made by the Council under section 73E of the Ordinance³⁴ or is exempt from such rules and has paid to the Society the membership subscription in respect of the year for which the practising certificate is to be issued.³⁵

Refusal to issue practising certificate; issue of conditional certificate

HK2.10

Section 40E(6) of the Ordinance enables the Society of Notaries to refuse to issue a certificate on grounds prescribed by the Council of the Society.³⁶ It may also issue a practising certificate subject to conditions prescribed by the Council or amend a certificate already issued by adding conditions so prescribed. Failure to comply with any conditions imposed by a notary's practising certificate may lead to suspension or cancellation of the certificate.³⁷ A practising certificate automatically determines in the event of the notary's removal from or striking off the register or if he becomes bankrupt.³⁸ A list of the names and addresses of the notaries public who have obtained practising certificates is published by the Society in the Hong Kong Government Gazette and inclusion of a person on that list is evidence, unless the contrary is proved, that he is qualified to act as a notary.³⁹

Discipline of notaries public; handling of complaints

HK2.11

Section 40G of the Ordinance requires the Chief Justice to appoint a Notaries Public Disciplinary Tribunal Panel consisting of practising notaries and lay persons. In the circumstances specified in section 40F of the Ordinance, a notary public is liable to be disciplined by a Notaries Public Disciplinary Tribunal which consists of two notaries

public and one lay person all appointed from the Panel.⁴⁰ The Panel consists of no fewer than 10 and no more than 20 practising notaries public of at least 5 years standing, and not fewer than 5 and no more than 10 lay persons unconnected in any way with practice as a notary public or the practice of law.⁴¹ Members of the Council of the Society of Notaries are ineligible for appointment to the Panel.⁴² The Chief Justice appoints one of the notaries on the Panel as Tribunal Convenor for a three-year period; he may also appoint another notary on the Panel as Deputy Tribunal Convenor.⁴³ Where the Council considers, as a result of a complaint made to it or otherwise, that the notary may be liable to be disciplined the matter is submitted to the Convenor who thereupon constitutes a Notaries Public Disciplinary Tribunal to inquire into the notary's conduct.⁴⁴ In the event of the Council's delay for more than six months in submitting a complaint to the Convenor, the Chief Judge may, on application by any person or on his own initiative, submit the matter to the Convenor.⁴⁵ The Convenor appoints one of the members of the Tribunal as chairman.⁴⁶

The Tribunal has power to inquire into the conduct of any person in respect of whom it was constituted.⁴⁷ The ancillary powers of the Tribunal are extensive and it may *inter alia* enforce the attendance of witnesses, examine them under oath, compel the production of documents and order the inspection of any property.⁴⁸ The Tribunal's proceedings are as a general rule held *in camera*.⁴⁹ On completion of its inquiry, the Tribunal has power to make such order as it thinks fit (including dismissing the complaint) and such order may include provision for all or any of the following matters:⁵⁰

- (a) striking off the register of notaries public the name of the notary public to whom the inquiry relates;
- (b) suspending the notary public from practice for such period as the Tribunal thinks fit;
- (c) permitting the notary public to continue practice, but subject to conditions which may be imposed for up to 3 years;
- (d) payment by the notary public to the complainant of an amount not exceeding the amount paid or payable to the notary public in relation to the complainant's matters in dispute;

³¹ Legal Practitioners Ordinance (Cap.159) s.40D(2) as inserted by Legal Practitioners (Amendment) Ordinance 1998.

³² *ibid.* s.40E(1), but see s.40E(5).

³³ Currently HK\$2000 on first issue or renewal (Notaries Public (Practising Certificate) Rules (Cap.159AG, Schedule 1)).

³⁴ See below para.HK2.12.

³⁵ Legal Practitioners Ordinance (Cap.159) s.40E(4), as inserted by Legal Practitioners (Amendment) Ordinance 1998.

³⁶ See Notaries Public (Grounds for Refusal to Issue Practising Certificates) Rules (Cap.159AF), the text of which is set out in Appendix 7 below.

³⁷ Legal Practitioners Ordinance (Cap.159), s.40E(7), as inserted by Legal Practitioners (Amendment) Ordinance 1998.

³⁸ *ibid.* s.40E(8).

³⁹ *ibid.* s.40E(9).

⁴⁰ *ibid.* s.40I.

⁴¹ *ibid.* s.40G(1).

⁴² *ibid.* s.40G(2).

⁴³ *ibid.* s.40G(4).

⁴⁴ *ibid.* s.40H(1).

⁴⁵ *ibid.* s.40H(2).

⁴⁶ *ibid.* s.40I(3).

⁴⁷ *ibid.* s.40J(1).

⁴⁸ *ibid.* s.40K. For detailed rules of procedure, see Notaries Public (Disciplinary Tribunal Proceedings) Rules (Cap.159AE), the text of which is set out in Appendix 8 below.

⁴⁹ Legal Practitioners Ordinance (Cap.159), s.40I(7) as inserted by Legal Practitioners (Amendment) Ordinance 1998.

⁵⁰ *ibid.* s.40J(2).

- (e) payment by the notary public to a fund established under rules prescribed under section 73E⁵¹ of an amount not greater than an amount paid out of the fund in respect of that notary;
- (f) payment by the notary public of a penalty not exceeding \$500,000 which shall be paid into the general revenue;
- (g) censure of the notary public;
- (h) payment by any party of the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigation in relation to the matters before the Tribunal, to be taxed by a Master of the High Court on a full indemnity basis, or payment of any amount that the Tribunal considers is a reasonable contribution towards those costs.

Appeal against any order of the Tribunal lies to the Court of Appeal.⁵² Where a solicitor who is also a notary public is struck off the roll of solicitors, the Registrar is required to strike him off the register of notaries public.⁵³ Likewise, where such a notary is suspended from practice as a solicitor, he is deemed to be suspended from practice as a notary public for the same period.⁵⁴ The Society of Notaries has a general right of audience before a Disciplinary Tribunal and also in the High Court on the hearing of any matter under the Ordinance affecting notaries public.⁵⁵

Indemnity insurance

HK2.12 Section 73E of the Ordinance enables the Council of the Society of Notaries to make rules concerning indemnity against loss arising from claims in respect of civil liability incurred:

- (a) by notaries public or former notaries public in connection with their practice;
- (b) by employees or former employees of a notary public in connection with that notary's practice.

These rules may *inter alia* require notaries or specified classes of notaries to take out and maintain insurance with authorized insurers and prescribe the conditions that a policy must satisfy. They may also authorize or require the Society of Notaries, by itself or jointly with the Law Society, to take out and maintain insurance and require notaries to pay premiums to such policies. The Council may also establish a fund or funds to provide indemnity and require notaries to contribute to any such fund.

⁵¹ See below para.HK2.12.

⁵² Legal Practitioners Ordinance (Cap.159), s.40M as inserted by Legal Practitioners (Amendment) Ordinance 1998.

⁵³ *Ibid.* s.40M(1).

⁵⁴ *Ibid.* s.40M(2).

⁵⁵ *Ibid.* s.40M.

PART 3: POWERS AND DUTIES OF NOTARIES PUBLIC [2-01 to 2-26]

By section 40B of the Legal Practitioners Ordinance (Cap.159), a notary public, whether his appointment was made before or after reunification, has all the powers which immediately prior to reunification were exercisable by a notary public under the law of Hong Kong. These include:

- (a) the power to attest, authenticate or certify the due execution of documents [2-03];
- (b) the power to note or protest bills of exchange and to attest by act of honour payment of bills of exchange for honour supra protest [2-06];⁵⁶
- (c) the power to administer oaths, affirmations or declarations [2-09].⁵⁷

In addition to the powers specifically mentioned in the Ordinance, notaries public in Hong Kong continue to deal with the following matters in the same manner as they did prior to reunification:

- (a) share and bond drawing operations; [10-01 to 10-08]
- (b) drafting and attestation of mercantile documents; [2-02][2-03][2-04]
- (c) drafting and attestation of wills; [2-08]
- (d) drafting and attestation of powers of attorney granted by individuals and corporations; [8-01 to 8-59]
- (e) certification of copies of documents⁵⁸ [2-07] and translations;⁵⁹ [2-04, 2-05]
- (f) noting and drawing up of ship protests. [2-10, 9-32, 9-33]

Notaries public in Hong Kong are included within the categories of persons authorized to undertake conveyancing and probate work for reward.⁶⁰ In practice, however, notaries public in Hong Kong handle conveyancing and probate matters in their capacity of solicitors.

⁵⁶ And see Part 5 below.

⁵⁷ And see Part 6 below.

⁵⁸ Notaries public are specifically authorized to certify copies of entries in ship log books for the purposes of the Shipping and Port Control Ordinance (Cap.313) (s.76), the Merchant Shipping (Safety) Ordinance (Cap.369) (s.122) and the Merchant Shipping (Seafarers) Ordinance (Cap.478) (s.34). Note also the Companies Ordinance (Cap.622), s.775 concerning the certification of copy documents relating to non-Hong Kong companies (as defined in the Ordinance).

⁵⁹ See in particular the Companies Ordinance (Cap.622), s.4.

⁶⁰ Legal Practitioners Ordinance (Cap.159), ss.47 and 48.

Duties of notaries public [2-16 to 2-26]

The Notaries Public (Practice) Rules (Cap.159A1),⁶¹ which came into operation on September 29, 2005, regulate the conduct of notaries in Hong Kong. Section 3 (General Conduct) was based on rule 5 of the Notaries Practice Rules 2009⁶² applicable to notaries in England and Wales. The following specific provisions of the Hong Kong rules should be noted:

1. Practice Promotion⁶³

A Hong Kong notary or the firm in which he practises may engage in practice promotion by way of advertising or marketing and permit practice promotion on his or its behalf. Such promotion must be truthful, not contain any indecent material, be carried out lawfully and otherwise comply with the Schedule to the Notaries Public (Practice) Rules (Cap.159A1).

2. Profit sharing⁶⁴

A notary, subject to very limited exceptions, may not share any profit costs arising from his practice as a notary other than with notaries public and solicitors who practise in the same firm in Hong Kong.

3. Inspection of documents by Council of the Society of Notaries⁶⁵

The Rules make provision for the inspection by the Council of any books, records or other documents of a notary public relating to his practice as a notary.

4. Register of records of notarial works⁶⁶

The Rules provide that a notary public must establish and maintain a register of all the notarial works carried out by him. Particulars entered in the register must be retained for not less than six years and in respect of each item of notarial work the notary must enter the following particulars:

- (a) the date on which the work is carried out;
- (b) the name of the client;

⁶¹ The text of the Rules is set out in Appendix 9.

⁶² The current practice rules in England and Wales are the Notaries Practice Rules 2019 [A2-15] replacing the 2009 and 2014 Rules. The corresponding provisions in the 2019 Rules are rules 4 and 7.

⁶³ Notaries Public (Practice) Rules, (Cap.159A1), s.4.

⁶⁴ *ibid.* s.6.

⁶⁵ *ibid.* s.9.

⁶⁶ *ibid.* s.10. The rule makes no distinction between notarial acts in the private form and those in the public form [5-02 to 5-05]. In England and Wales, the Notaries Practice Rules 2019, r.24.3 (formerly r.20 of the Notaries Practice Rules 2009) require a notary to maintain and permanently preserve a protocol of acts in the public form. The keeping of a notarial protocol is a universal requirement in civil-law jurisdictions and although not mandatory for Hong Kong notaries is nonetheless good practice.

- (c) a brief description of the work involved;
- (d) the nature of the document involved.

Compliance with anti-money laundering and anti-terrorism financing legislation [2-24]

The following Ordinances form the legislative basis for the anti-money laundering and anti-terrorism financing⁶⁷ procedures with which Hong Kong notaries must comply:

- the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) ("DTRPO");
- the Organized and Serious Crimes Ordinance (Cap.455) ("OSCO");
- the United Nations (Anti-Terrorism Measures) Ordinance (Cap.575) ("UNATMO");
- the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap.615) ("AMLO").

It is important for notaries to be aware of these provisions and to minimise the risk of committing a criminal offence by:

- assisting persons known or suspected to be laundering money generated by drug trafficking or any indictable offence;
- providing or collecting funds used to commit terrorist acts or making funds available to terrorists or terrorist associates;
- failing to report a suspicious case of money laundering or terrorist financing;
- tipping off clients who are subject to investigation for an offence of money laundering or terrorist financing;
- failing to comply with court orders for the purpose of investigation of crime and to make information available.

AMLO was amended in 2018 (section 5A) to extend its record keeping and due diligence requirements to *inter alios* "legal professionals"⁶⁸ as defined in Schedule 1, Part 2, namely solicitors and foreign lawyers, both as defined in the Legal Practitioners

⁶⁷ The Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap.615) Sched., Pt 1 defines money laundering activities as an "act intended to have the effect of making any property —

- (a) that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or
- (b) that in whole or in part, directly or indirectly, represents such proceeds, not to appear to be or so represent such proceeds."

⁶⁸ Under AMLO, "legal professionals" fall within the broader category of "DNFBPs", the acronym for persons in the category described as designated non-financial businesses and professions in the Financial Action Task Force's Recommendations (Sched.1 Part 2, para.1).

Ordinance (Cap.159, section 2(1)), when undertaking specified activities.⁶⁹ AMLO⁷⁰ also enables regulatory bodies, including the Law Society of Hong Kong, to publish in the Hong Kong Government Gazette guidance in relation to customer due diligence and record keeping; the courts are required to take that guidance into account in any proceedings under that Ordinance.

For general guidance on the anti-money laundering and anti-terrorism financing legislation and procedures to be adopted to comply with that legislation (including client identification, verification and due diligence, record keeping, staff awareness and training) notaries are referred to Practice Direction P (Guidelines on Anti-Money Laundering and Terrorist Financing) issued by the Law Society of Hong Kong.⁷¹

⁶⁹ These are (s.5A(3)) transactions concerning:

- (a) the buying or selling of real estate;
- (b) the managing of client money, securities or other assets;
- (c) the management of bank, savings or securities accounts;
- (d) the organization of contributions for the creation, operation or management of corporations;
- (e) the creation, operation or management of —
 - (i) legal persons; or
 - (ii) legal arrangements;
- (f) the buying or selling of business entities;
- (g) trust or company services.

⁷⁰ s. 7.

⁷¹ The power of the Law Society to determine the content of Practice Direction P is specifically preserved by AMLO, s.7 (5A).

PART 4: EVIDENTIARY STATUS OF NOTARIAL ACTS

Admissibility of hearsay evidence in civil proceedings [6-03]

For the provisions corresponding to sections 1, 4 and 9 of the Civil Evidence Act 1995 see the Evidence Ordinance (Cap.8), sections 47, 49 and 54.

HK4.01

Judicial notice of a notary's signature and seal [6-04]

The Evidence Ordinance (Cap.8) provides:

HK4.02

“33. Swearing of answer, etc., in High Court in England, etc.

- (1) All answers to interrogatories, disclaimers, examinations, affidavits, and attestations of honour, and all other documents required to be sworn in causes or matters depending in the High Court, and also acknowledgements required for the purpose of enrolling any deed in the said court, shall and may be sworn and taken in England, Scotland, or Northern Ireland, or the Channel Islands, or in any other colony or place under the dominion of Her Majesty before any court, judge, notary public or person lawfully authorized to administer oaths in such country, colony, or place respectively, or before any of Her Majesty's consular officers in any place out of Her Majesty's dominions.
- (2) The judges and officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, or consular officer attached, appended, or subscribed to any such document as aforesaid.”

Admissibility of notarial instruments in civil proceedings [6-07]

The Evidence Ordinance (Cap.8), section 35A is based on rule 32.20 of the Civil Procedure Rules 1998 which regulate procedure in civil cases in the Senior Courts of England and Wales. However, unlike rule 32.20 which would appear to extend the rebuttable presumption of authenticity to the acts of notaries public admitted outside England and Wales, the operation of Section 35A is limited to the acts of notaries public qualified to practise in Hong Kong.

HK4.03

Section 35A provides as follows:

- “(1) A notarial instrument may be received in evidence in civil proceedings, without further proof, as duly authenticated unless the contrary is proved.