

Abstract

With regard to entry into contract or any transaction, every party needs an evidence to make sure that rights or facts are actually happened. Moreover they need to ensure that by entering into contract or transaction to bind themselves will not cause any dispute thereafter.

Presently, officials authorized as a witness under the Thai law are mostly government officials. They have so many works that they are unable to thoroughly review documents submitted for certification of titles, status and facts. This leads to mistake of certification of titles, status and facts or registration and affects relevant parties to this document or this registration. Moreover, a power to authenticate of officials is granted by different law so it is limited only to the extent that such law provides.

In foreign countries, a system which has an official acting as a witness under the law is called “notary”. It can be divided into 2 systems: Common Law notary and Civil Law notary, both of which are authorized to certify any rights and facts in accordance with their specified law. The Civil Law notary or known as “Latin notary” also has a duty to prepare and keep an evidence of substantial juristic act which is mentioned by law including certifying legal rights of person and juristic relations. Moreover, the notary has a power to issue a written decree in the topic mentioned by law or a written notice as an evidence of juristic act which is enforceable without need to go to the court if the parties consent or agree in advance.

With regard to Thailand, a system regarding official authorized as a witness or a notary has not been established yet, unlike other countries. The authority having the same duty as the notary in foreign countries is the Department of Consular Affairs, the Ministry of Foreign Affairs. Nevertheless, the document authentication by the Department of Consular Affairs, the Ministry of Foreign Affairs has not covered every type of the authentication, dissimilar to the notary abroad. Moreover, the Notarial Services Attorney which was created by the Lawyers Council of Thailand has a duty to

record, authenticate documents, juristic acts, facts and persons; however, it has not had any law recognizing the aforesaid power.

With regard to the certification of titles, status and facts in regard to limited company, currently it is under the authority of the Department of Business Development, the Ministry of Commerce. This author finds some obstacles which can be concisely itemized as follows.

The first issue, the power of attorney of the company: there is a problem when the representative of the juristic person or director of the company, without any power under the law or the articles of association, authorizes the power. Consequently, the company can refuse that such act of the proxy is not the company's act. The third party who enters into juristic act or any act with such proxy cannot claim any right which he/she should have from the company.

The second issue, registration of the company: the first issue is about the request for the share payment before setting up the company. According to the Rule of Office of the Central Company Limited and Partnership Registration on Partnership and Company Registration, the requirement for company registration is only the share payment certificate which is issued to the shareholder. Thus, the registrar cannot examine whether the director actually requested for payment or not. Moreover there is a point when the director asked for the first payment in part but registered as full payment. After the company has been registered, this registered capital will appear in the certificate of registration of the company which people can check and ask for certification from the Ministry of Commerce.

In relation to the request for payment of the share value after the establishment of the company, there is a problem when the director asked for the first payment in part and later requested for the rest. However, the paid-up capital is different from the one mentioned in the book of shareholders' registration of the company. The third party or creditor of the company, examining the book of shareholders' registration, possibly understands that shareholders have still not fully paid for the share. As a result, it leads to filing a case for the unpaid capital.

Another issue concerning with the registration of the company is the false minutes of the meeting. The Civil and Commercial Code only prescribes that the minutes of the meeting is needed to be signed by the president of the meeting or of the next meeting. Therefore, it leaves the door open for making the false minutes of the meeting. Additionally, the company tends to let its employee sign as a witness certifying the signature of the director who signs in the registration application. Such application may have a content which is not true but the registrar is unable to check whether such fact is correct as indicated in the application. After the registrar accepts the registration, the company registration, including important documents regarding the company will be kept in the Office of the Company Limited and Partnership Registration where people can request for review and ask the registrar certify the correctness of the aforesaid documents. In particular, the registration of the company is the public document which is assumed to be genuine and correct according to Section 127 of the Civil Procedure Code.

The last issue, share transfer: the found problem is that the company only registers and submits the name of the shareholder in the book of shareholders' registration to the Office of the Company Limited and Partnership Registration without actual transfer of share owing to the fact that the registrar has a duty only to acknowledge the copy of the list of shareholders' names, which is filed to the Office of the Company Limited and Partnership Registration. When there is a person requesting to check such document, the registrar only certifies that the texts in the book of shareholders' registration are as same as the texts submitted by the company.

From all of the abovementioned problems, this author renders an opinion that if Thailand has the system which has an official acting as a witness under the law or the notary in civil law system, it will mitigate these problems. This is due to the fact that the authentication system for evidence will be developed to be more unambiguous and confident. The document which the notary makes or certifies, moreover, is valued as the public document so the court can admit without taking additional evidence. In view of the foregoing, it can reduce a number of cases. It can impose the notary to be one type

of State agents authorized by law and having an authority in the judicial process in order to prevent the dispute. The notary is a freelance which has a public power under the supervision of the Notary Council. Besides, the notary is under the monitor of the Minister of Ministry of Justice regarding the legality in performing duty as well as the notary is entitled to collect a fee from the work as well as cost occurred from the rendered service.