INFORME DE INVESTIGACIÓN CIJUL

TEMA: SISTEMA DE NOTARIADO CUBANO Y JAPONES.

RESUMEN
El presente informe contiene una investigación acerca de sistema de notariado tanto en Japón como en Cuba

SUMARIO

Índice de contenido

DOCTRINA

SISTEMA NOTARIADO CUBANO[1]

El notario como protector y garante de la seguridad jurídica cumple un rol estratégico en la sociedad. La necesidad de conjugar la seguridad jurídica y la justicia como valores superiores del ordenamiento jurídico y jerárquicamente diferentes, reclama concebir el derecho como un fenómeno integral espacial-temporal, formado por normas, principios, valores e instituciones, como un sistema científicamente elaborado y aplicado de manera tal que permita a través de la seguridad alcanzar la justicia. La asunción de la seguridad jurídica como un peldaño previo para alcanzar la justicia, y presupuesto obligado del derecho, reclama entender esta afirmación no sólo como instrumento del límite, sino de previsión, reafirmación y cambio en la actividad jurídica. Por tanto la figura del notario público es de absoluta necesidad para salvaguardar la seguridad jurídica en un acuerdo entre partes cuando se haga imprescindible la presencia de un tercero de confianza.

El notario dota de certeza las relaciones entre los particulares al brindarles asesoría técnico-legal y ajustar su voluntad a lo establecido en las leyes, bajo la investidura estatal de la fe pública. Esta función medular de la actividad notarial, ante el auge del comercio electrónico, hace necesario que se replanteen muchos de los principios e instituciones por los que se rige, para seguir siendo útil como herramienta eficaz en el complejo engranaje que implica la contratación electrónica y la utilización de documentos electrónicos en aras de poder garantizar la confidencialidad de las comunicaciones, la identidad y capacidad de las partes contratantes, la integridad y autenticidad de los mensajes en todo el proceso de intercambio electrónico de información en actos jurídicos de naturaleza civil o mercantil.

Hay quienes consideran que nos encontramos ante la presencia de una nueva institución: la fe pública informática, cuyo depositario cumple el rol de tercero certificador neutral, como dador de una nueva clase de fe pública que, a diferencia de la fe pública tradicional, no se otorga sobre la base de la autentificación de la capacidad de personas, del cumplimiento de formalidades en los instrumentos notariales o a los certificados de hechos, sino que se aplica a la certificación de procesos tecnológicos, de resultados digitales y códigos y firmas electrónicas.

El notario, funcionario público autorizado para dar fe conforme a las leyes de los contratos y otros actos extrajudiciales, está además reconocido, en el Sistema de Derecho Romano francés, como un profesional del derecho, reconocido por el ordenamiento y con tal perfil, las legislaciones notariales latinas le reservan la misión de asesorar y aconsejar los medios jurídicos más adecuados para orientar lícitamente la voluntad de quien le reclame su ministerio. Entendiéndose de esta afirmación que el notario debe atemperar su actuación al desarrollo de la sociedad en que vive y desempeña su labor profesional.

El Estado Cubano reconoce la existencia del Notario como funcionario público que realiza importantes funciones relacionadas con el cumplimiento de la legalidad, en la actividad extrajudicial de las personas naturales y jurídicas, por ende, el Notario, se califica como "el funcionario público facultado para dar fe de los actos jurídicos extrajudiciales en los que por razón de su cargo interviene, de conformidad con lo establecido en la ley"[iv].

Este funcionario público por la función legal de "dar fe de hechos, actos o circunstancias de relevancia jurídica de los que se deriven o declaren derechos o intereses legítimos para las personas o de cualquier otro acto de declaración lícita" de la que está investido, puede jugar un rol de verdadera importancia en la protección de los derechos de autoría sobre un programa de ordenador, permitiendo ofrecer mediante su intervención una presunción de autoría sobre el código fuente de un software determinado o asumiendo la custodia de los códigos fuentes de un programa de computación.

A modo de reflexión en lo relativo a la utilidad de la figura notarial en la protección del software podemos referir la relativa a la presunción de autoría que puede lograrse con la concurrencia del notario público cuando se solicita que éste de fe del desarrollo de un software en cualquiera de sus fases, lo que evidencia que en este caso el notario procede tal como si fuera una autoridad de registro. En este caso el juez de paz está dando fe de todos los materiales aportados por la parte interesada la que obviamente podría utilizar los elementos presentados junto con la fecha y hora en que quedan consignados ante notario para presentar un medio de prueba en caso de existir algún procedimiento por infracción de los derechos de Propiedad Intelectual.

De igual forma se logra plena protección legal cuando, como en los casos en que se suscribe un contrato de Escrow, el usuario de un programa de ordenador logra tener garantía de mantenimiento para

el software que ha adquirido para su explotación por un tiempo determinado. Haciéndose posible mediante la estipulación de las cláusulas pertinentes que el usuario no quede desamparado ante la posibilidad, por derecho, que el desarrollador del software que ha comprado no desee poner en su poder los códigos fuentes del programa de ordenador.

Por todo lo antes expuesto nos podemos percatar de la importancia que puede tener la intervención del notario en este tipo de actos a través de un contrato de depósito de fuentes. Pero en la doctrina internacional en materia notarial existen discrepancias acerca de si la expresión más adecuada del Depósito debe ser a través de un contrato o de un acta notarial. La doctrina española[v] de forma general, entiende que el depósito es un acta, solo porque la legislación notarial española así lo dispone; pero, que indiscutiblemente su expresión documental, como contrato que es y contiene, debía ser una escritura.

No obstante esta idea no resulta criterio unánime, Rodríguez Andrados, citando un ejemplo explica la posición del Reglamento Notarial Español de la siguiente forma:

"Hay que tener en cuenta que el deposito es un contrato real, que se constituye desde que uno recibe la cosa ajena con la obligación de guardarla y restituirla…y que salvo pacto en contrario, es un contrato gratuito y por tanto unilateral, del que no surgen obligaciones para el depositante. No parece absurdo, en consecuencia, que la documentación se contraiga solamente al hecho de la recepción de una cosa en deposito (y por tanto en un acta y no en una escritura) puesto que de este hecho derivan las dos obligaciones fundamentales del depositario, la de guardarla, y la de restituirla…"

Resulta válido para nosotros y para aquellas legislaciones que regulan el contrato de depósito como consensual, oneroso o gratuito[vi], llegar a esta reflexión, según el argumento a favor de la formalización en acta del deposito ante notario, ya que en un contrato consensual de deposito, si la entrega del mueble objeto del mismo no llegara a realizarse, se extinguirían las obligaciones generales para las partes (si es oneroso) por imposibilidad en la ejecución del pacto. Por lo tanto la recepción de la cosa a custodiar por el depositario viene a ser un hecho dentro de la relación obligatoria perfecta de depósito que abre la posibilidad de ejecución de la misma al depositario, único obligado en caso de ser el contrato de custodia gratuito. En la legislación cubana el contrato de depósito requiere la forma escrita, excepto en el caso en que tenga por objeto bienes de

escaso valor o la custodia se confíe por breve tiempo y sea usual que la devolución se garantice con un comprobante de la entrega[vii].

El notario público en Cuba suele utilizar en su práctica profesional con más frecuencia el acta de depósito que el contrato de depósito por seguir los principios de la parte del notariado latino que aboga por concebir a la figura del depósito por medio del acta notarial. Las actas notariales son uno de los documentos públicos que redacta y autoriza el notario, en las que se hacen constar hechos, actos o circunstancias que, por su naturaleza no constituyen actos jurídicos.

El acta de depósito notarial documenta la entrega del mueble objeto de custodia al depositante; con ello puede que se perfeccione el contrato de depósito o puede que simplemente exprese la materialización documental de una de las obligaciones contraídas por el depositario, según se reconozca o no por la legislación interna el carácter real del contrato de depósito. El notario no podrá conformar en acta de depósito un contrato de tal tipo en que reciba remuneración por la custodia. Tal contrato será lícito, pero no podrá ser documentado por el propio notario; si no, por otro avista de la inhabilitación para actuar como dador de fe que surge a partir de su interés en el asunto.

Otra cuestión que salta a la vista en las actas de depósito es la finalidad que persigue el depositante con la actuación notarial que solicita. Generalmente, las legislaciones notariales latinas le atribuyen consecuencias jurídicas de garantía o de custodia, aunque evidentemente, y en la mayoría de los casos lo que se persigue son unos determinados efectos documentales referidos a asegurar frente a terceros la existencia e identidad de la cosa depositada en la fecha de constitución del depósito, de su conservación y devolución.

SISTEMA DE NOTARIADO JAPONES.[2]

1. Features of Japan's notary system

1.1 What does a notary do?
A notary attached to the Legal Affairs Bureau or a District Legal Affairs Bureau, is a type of public official appointed by the Minister of Justice, who undertakes notarisation duties.The duties

of a notary include creation of notarial deeds, authentication of private documents and articles of incorporation, and the attachment of officially-attested dates.

1.2 Who can become a notary?

Currently, any person who fulfils the following criteria is eligible for appointment by the Minister of Justice: (1) any person qualified as a judge, public prosecutor or attorney;(2) any person selected by the Notary Selection Committee, who possesses academic and practical skills similar to those professionals listed under above, and who has been engaged in legal affairs for many years.

1.3 How did Japan's notary system develop?

Japan's notary system was established with the promulgation of the Notary Rule in 1886. While this Notary Rule was modelled on the French notary system, apparently it was also influenced by the laws of the Netherlands. Under this Rule the notary's authority was limited to the creation of notarial deeds.

The current Notary Law, influenced by Germany (then Prussia), was passed later in 1909 and the Notary Rule was abolished. This law cites the authentication of private documents, along with the creation of notarial deeds, as part of the notary's work authority.

The Notary Law has since been revised several times to achieve its current form. In 1938, the authentication of articles of incorporation when a company is established was added to the notary's role. In 1996, a system of sworn statements (affidavits) for the attestation of private documents was established. Then, in 2000, additional authority was given for electronic notarisation including assignment of an electronic officially-attested date and electronic authentication of private documents. In 2002 this was extended to the electronic authentication of articles of incorporation.

2. Types of notarial deeds

2.1 What is a notarial deed?

A notarial deed is an official document prepared by a legal specialist called a notary in accordance with the law. As these are official documents, in addition to a high level of evidential power, if an obligor (debtor) defaults on a debt, it is possible for compulsory seizure to be executed immediately against the debtor's real estate, personal assets and claimable assets in Japan without any court judgement being rendered.

2.2 What types of notarial deeds are there?

Notarial deeds include, without limitation:

- notarised wills/will deeds;
- notarial deeds for contracts pertaining to monetary loans;
- notarial deeds related to payment of damages for mental anguish or payment of child support, in connection with divorce; and notarial deeds relating to the leasing of land or buildings.

2.3 Can I have a notarised will made even if I am a foreign national?

If a foreign national resident in Japan has a will prepared at a notary office in accordance with Japanese law, the form of that will is valid in Japan. However, unless the laws of the person's nationality allow to apply the laws of Japan to the formation and validity of the will, or rules pertaining to inheritance, then they will be subject to the laws of the person's nationality. This in turn requires a thorough knowledge of that country's laws.

3. Authenticating private documents

3.1 What is an authenticated private document?

A notary, as a public organization, certifies that the creation or description of general private documents was made through a just procedure. Specifically, a person takes a private document to a notary office and either signs it in the presence of the notary, or in cases such as where the individual acknowledges that the signature on the private document is their own in the presence of the notary, the notary adds a note to that effect on the private document whereby by virtue of its evidential power the genuineness of the execution of that document is certified.

As the notarising authority of a notary is limited to private documents, official documents will never be the subject of authentication.

The content of documents to be authenticated must be lawful. Any documents containing matter that contravenes public policy or content that is illegal or invalid, or documents that might possibly be used in a crime cannot be authenticated.

Depending on the circumstances, any document to be authenticated that has had text inserted, deleted or altered may be ineligible for authentication, or the notary may record those circumstances on the authenticated document.

3.2 When is private document authentication required?

Even when a private document is received with the signature or name-seal of the writer, it is not known whether the person who prepared it actually signed or affixed their name-seal on it. Authentication by a notary is a system certifying that the person did prepare the document.

In particular, documents used overseas often require

authentication by a notary.

3.3 What documents are required for authentication of private documents to be presented in a foreign country?
Below is the procedure followed when the signatory of a private document comes to a notary office seeking authentication. In addition to the document to be authenticated, please bring any one of the following four types of document.
(1) Passport
(2) Driver's Licence
(3) Basic Resident Register Card (to be attached with a full-frontal face photograph)
(4) Certificate of seal impression and the registered seal
(If an impression of your seal has been registered with the city hall or ward office, this is the document that certifies this fact. The 'registered seal' refers to the seal of which the seal impression was registered with the city hall or ward office.

3.4 Can I have a copy of a passport notarised?
As a passport is a form of official document, it cannot be notarised even if it is a copy. However, if the passport-holder writes out the content of the passport as a declaration it is possible to notarise that declaration.

3.5 How do I obtain authentication of private documents, such as certificates issued by private universities or banks, for which it is difficult in practice to obtain power of attorney from the issuer for the purpose of authentication?
Leaving aside the issue of evidential power in a foreign country, if the person writes out the content of the bank or other certificate as a declaration, it is possible to authenticate that declaration.

3.6 What are the fees for private document authentication?
The fee for authentication of private documents written in a foreign language is normally 11,500 yen per document. However, powers of attorney written in a foreign language are 9,500 yen per document.

3.7 Affidavits
(1) What is an affidavit or sworn statement?
This involves swearing in front of a notary that the content of the private document is true. Sanctions will be applied in case of perjury. In some instances a public office in a foreign country requires submission of private documents sworn by the party concerned as to the truthfulness of its contents and notarisation by a notary to that effect. In these cases, please use an affidavit.

(2) What are the fees for notarisation of affidavit?
The fee for notarisation of an affidavit written in a foreign language is 17,000 yen per document.

3.8 What should I do after I obtain authentication from a notary?
(1)When a private document is to be presented in a foreign country, sole authentication by a notary is insufficient.
In general, once authentication from a notary has been received, further authentication must be obtained from a Director of the Legal Affairs Bureau (District Legal Affairs Bureau) to which that notary is attached, that the authentication attached to the private document was made by that notary. The Ministry of Foreign Affairs then attests that the official seal of the Director of the Legal Affairs Bureau is true and finally the consulate of the country in Japan to which the documents will be presented makes its certification (called "consular authentication").
In instances where the overseas recipient of the private document is an organisation such as a private company, and where there is no objection by the other party such as when there is no requirement for submission to an official body in the recipient country, then sole authentication by a notary is sometimes acceptable.
(2) Formalities for obtaining "consular authentication" are complicated and the smooth passage of private documents can be obstructed. Japan is a member country of the Hague Convention under which authentication by a consular official is unnecessary. Therefore, if used among member countries of the convention, as long as the apostille of the Ministry of Foreign Affairs is obtained in the form prescribed by the convention, "consular authentication" is not required and the private document may be sent immediately to the overseas party.

(3) If the recipient is located in a foreign country which is a member country of the Hague Convention, the notary offices in Tokyo and Kanagawa Prefecture will produce authenticated documents with an apostille affixed so that once a notary authentication is obtained the document can be immediately submitted to the overseas party. Even if the document is sent to a foreign country which is not a member country of the Hague Convention, the above notary offices will prepare authentication documents attested by the Director of the Legal Affairs Bureau and the Ministry of Foreign Affairs, which means there is no need to go to either of these offices again, and after receipt of notary authentication, all that remains is "consular authentication" from a local embassy or consulate.

The notary offices in Toyo and Kanagawa Prefecture have simplified the procedure even more. For details please enquire at your nearest notary office.

(4) Please refer to the Ministry of Foreign Affairs Home Page for a list of member countries of the Hague Convention.
(5) Even if a country is not a member country of the Hague Convention, there are several countries that allow special simplified treatment. Please ask at your nearest notary office.
4.Authentication of articles of incorporation

4.1 What are articles of incorporation?
Articles of incorporation are essentially the constitution of a corporation and are rules relating to its purpose, internal organisation and activities. This term can also be used to refer to written documents that record these or to an electronic record of the same.When certain companies like a stock corporation (kabushiki kaisha) are set up, the validity of its articles of incorporation will not be recognised unless they are notarised by a notary. The work associated with this authentication shall be handled by a notary attached to the Legal Affairs Bureau or the District Legal Affairs Bureau that has territorial jurisdiction over the district in which the company's head office is located.
Articles of incorporation changed after the company is set up need not be notarised by a notary.

4.2 What are the fees for notarising articles of incorporation?
The fee for notarising articles of incorporation is 50,000 yen excluding the cost of a certified copy. Stamp duty incurs an additional cost of 40,000 yen.

5.Officially-attesting dates
5.1 What is the legal effect of an officially-attested date?
An officially-attested date is the certification of a date. Some legal acts include the first in time principle that rights belong to the person who concluded a contract first. Examples include the assignment of a claim or a pledge of rights. In the assignment of a claim, in order to have priority over a third party, the date of a contract must be clearly certified using an officially-attested date. An officially-attested date is utilised in such instances. However, an officially-attested date is only the confirmation of a date and it does not certify matters such as the genuineness of the creation of the document.

5.2 How do I obtain an officially-attested date?
As an officially-attested date is simply the certification of a

date, the person who created the document does not need to appear before the notary. Neither a power of attorney nor a certificate of seal impression is required.
The document which is the subject of the attachment of an officially-attested date, however, must be a private document duly prepared. In other words, it must contain the signature or the name-seal of the person who prepared it.

5.3 What are the fees for attesting official dates?
The fee for attaching an officially-attested date is 700 yen per document.

FUENTES UTILIZADAS

1 REVISTA DE DERECHO INFORMATICO ALFA REDI. Consultado el 8 de febrero del 2007 en: http://www.alfa-redi.org/rdi-articulo.shtml?x=6500
2 NIPPON KOSHONIN RENGOKAI (JAPÓN). Consultado el 8 de febrero del 2007 en: http://www.koshonin.gr.jp/index2.html