

# China's notary offices: an enduring arm of government

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## 1. Introduction

An official from the Notaries Association of Guangdong said to me that the role of law in China is to keep order, not to punish any disorder.<sup>1</sup>

If this is true then the Notary office in China has an important bureaucratic role in ensuring that laws are followed and disorder does not arise.

The notary system in China follows closely the old Soviet Union concept and in part the general framework mirrors it.

Offices exist at multi-levels, namely in each province, district, economic zone, major city, administrative centre. The notaries themselves perform many functions which in our system would be done by solicitors, commissioners for oaths and Justices of the Peace.

In order to understand this, we in the West generally regard legal institutions, such as China's Notary offices, as each being autonomous and performing a specific function in the line of justice. In Australia we regard the notary as merely part of the legal chain when documents are required to be witnessed. The Chinese, however, consider legal institutions as thematically part of socialist ideology. This ideology changes with time from the old strict Chinese Communist view to what we have today, to 'socialism with Chinese characteristics'.<sup>2</sup> This means that the Chinese legal institution is dynamic through time and changes its approach according to existing political ideology. History shows the role of the Chinese notary having changed from a bureau used by the government to regulate and police society to what it is today, an office to ensure that citizens understand their rights and to instil a sense of public service and institutional stability.

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2 Attributed to Deng Xiaoping.

## 2. The aim of notarisation

One aim of notarisation is to verify the truth of the facts and thereafter notarisation gives legality<sup>3</sup> to these facts. This is done by checking the facts and often requires physically travelling to remote parts of a province to verify factual information. This ensures that the legal interests of the citizen are protected and minimises litigation through enhancing certainty.

The other aim, a political one, is to strengthen socialist aims of fairness and truth and to preserve political stability and to unify society.

The importance of upholding socialist principles was illustrated in an article by Ching Chia-Yung in the Peoples Daily on 25th March, 1955, in which the author pointed out that the Notary offices had the dual role of not only approving a contract but also educating the parties on their obligations. This should be achieved by increasing their 'sense of responsibility in carrying out contracts and improving their style of doing economic work so that eventually managed enterprises and departments could even better handle their tasks according to the state policy'.

## 3. Position of notaries in the legal system

The legal profession in China consists of lawyers and notaries. According to the Law Year Book of China 1991, in 1989 there were 2,900 Notarial offices in China employing 15,000 notaries. This is unlike our system where notaries perform ancillary evidentiary work besides carrying out their main duties as solicitors.

China's notaries have a monopoly on their particular functions which cannot be usurped by other professions, officials or individuals. The specific acts they perform are those transactions of a person in society with their fellows that is, those which concern the status of individuals, and such acts must necessarily be passed before a notary if they are to have validity. Other acts may be passed before a notary to give them authenticity, or merely put into writing and signed by the parties to signify their accuracy.

Notarial work is regulated by the *Provisional Regulations on Notaries* and supplemented by the *Provisional Measures on the Handling of Several Major Notarial Activities* both enacted in 1982. In 1986 the *Provisional Detailed Rules on Notarial Procedures* were also enacted. Under these regulations, administrative control is under the auspices of the Ministry of Justice, but the regulations operate independently of each other.

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3 Mr. Liang Er Chang, Director of Notaries Association of Guangdong, also Director of Notary office of Guangdong Province. The use of the word 'legality' is deliberate to distinguish it from our understanding of the word validity. This usage becomes clear later in the paper.

Like lawyers, notaries are employees of the State, and therefore, applicants for notarisation are clients of the State and not of the individual employed notary. This means that all requirements of notarisation must be attended to upon the payment of the prescribed fee.

#### 4. Qualifications of notaries

- 1 Chinese citizenship. Citizenship arises by way of birth or acceptance of Chinese citizenship. This means that when Hong Kong reverts to China in 1997, any Hong Kong citizen who remains in Hong Kong and elects to accept Chinese citizenship will be eligible for appointment.
- 2 Graduates in Law from any Chinese university with at least twelve months experience in legal work of any kind, *or*
- 3 Judges or procurators<sup>4</sup> who have served in the Peoples' Courts or Peoples' Procuracies, *or*
- 4 Persons who have legal knowledge equivalent to a law graduate and who have worked in the state judicial administrative organs for over two years or for over five years in any state organisation or enterprise, *or*
- 5 Persons who have worked as assistant notaries for over two years.

The general educational qualifications for notaries are slightly lower than for lawyers. Law graduates perceive that being a notary is less prestigious than being a lawyer, judge or procurator and consequently the majority of appointments are made from categories (4) and (5) above.

#### 5. Duties of a notary office

Article 4 of the *Provisional Regulations* sets out fourteen duties<sup>5</sup> to be carried out by notary offices which may be grouped:

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- 4 A procurator is a person working in the People's Procurates. This is an organ of government akin to the peoples' courts which operate at various levels of government. Article 129 of the *Constitution 1982* defines the Peoples' Procurates as the legal supervisory organs of the State. These functions are:
    - reviewing of cases and deciding whether a prosecution is warranted or not in a criminal case;
    - investigating criminal matters involving violating rights of a citizen by a public official;
    - intervening by appeal in first instance decisions in criminal matters;
    - supervising the activities of public security and prison authorities.
 The Procurates' function is a combination of the public defender's role whilst at the same time carrying out an administration of justice function.
  - 5 This means that if, for example, an agreement to repay a debt has been notarised, it does not have to be proved in court and the court simply makes an order on the basis of the notarised agreement.

- (a) Certification of juridical acts by either one party or multi party legal behaviour, namely:
  - (i) Certification of wills and powers of attorney;
  - (ii) Certification of gifts and inheritance;
  - (iii) Certification of gifts and division of property; and
  - (iv) Certification of adoptions.
- (b) Certification of legal facts acts and documents:
  - (i) Certification of family relationships;
  - (ii) Certification of identity, academic qualifications and experience;
  - (iii) Certification of signatures and seals; and
  - (iv) Certification of births, marital status and deaths.
- (c) Certification of documents having compulsory legal effect:<sup>6</sup>
  - (i) Certification of writs of execution upon uncontested debts or goods;
  - (ii) Certification of sentencing documents, judgment orders of the Peoples' Court.
- (d) Work of a supplementary nature:
  - (i) Preservation of evidence to ensure its veracity;
  - (ii) Safekeeping of wills and other documents; and
  - (iii) Technical services, for example, drafting of notarial documents for public certification and handling other notarial matters as permitted by international customary practice.

## **6. Principles used by notaries**

The principles observed by a notary in the performance of their duties include:

- (a) Article 4 of the Rules on Notarial Procedures require that all certification must be dealt with on the basis of truthfulness and lawfulness. This means examining the personal identity of the party or parties concerned and his/her or their ability to exercise rights and responsibilities. For example, to issue an inheritance of rights certificate, the certificate must comply with the inheritance laws that protect the beneficiaries' rights. It should not follow the traditional Chinese approach of stripping away the inheritance rights of women and grandchildren on the daughters' side.
- (b) A notary office must prepare its facts in such a way as not to inconvenience the public. Simplicity, convenience and speed are its imperatives. Where certification is requested, if the facts are clear and easily authenticated the office should deal with the matter immediately. If supplementary material is required it should be applied for without delay. Where the place of certification is in the countryside or the applicants are elderly, weak, sick, disabled or

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6 See Appendix A which sets out the documentation and materials required for various notarial certificates.

otherwise unable to attend at the notary office then personnel should 'deliver the certificate to the door'. This is clearly designed for the public's convenience.

- (c) Article 12 states where there is an application for a certificate in a non-litigious matter then it must be attended to forthwith. In recent years, with the economic reform of China and its open-door policy, legislation on economic contracts requires that the interests of the state are paramount and must be protected, namely, preserve the legal rights and interests of the state, collectives and individuals as well as ensure the stability of the socialist economic order and unity of society.

At first it might even seem to be a contradiction that the individual's wishes are being ridden over by the State. However, as public consciousness and understanding of the certification process increases, a view is developing in China that certification gives the imprimatur of legality to any certified document.

- (d) Notary personnel must be fair and objective when dealing with certification. The requirements provide that an applicant must be informed that they have the right to ask for a certain person to deal with their case. Additionally, personnel must disqualify themselves where friends, relatives or close relatives are concerned or where they have a financial or other interest in the matter.<sup>7</sup>
- (e) Article 23 states that notary office personnel must maintain confidentiality. Confidentiality is important for leakages lead to disputes, concealing of property, disturbing the harmony and unity of family, thereby upsetting the stability of society. It can also harm the reputation of the notary office. However, certain public documents are not confidential, for example, economic contracts,<sup>8</sup> birth and death certificates.

7 From discussions with Chinese student leaders in New South Wales this is not adhered to and often abused.

8 The term 'economic contract' refers to any contract made under *The General Principles of Civil Law 1986*. This legislation deals comprehensively with civil laws, although economic contracts can also be made under the following:

- *The Law of Economic Contracts 1981*;
- *The Law of Foreign-related Economic Contracts 1985*;
- *The Law of Technology Contracts 1987*;
- *The Patent Law 1984*;
- *The Trademark Law 1982*;
- *The Copyright Law 1980*;
- *The Marriage Law 1980*;
- *The Succession Law 1985*.

These contracts regulate economic management between State organs in the hierarchy and economic contracts between parties that also fulfil the general aim of fitting into China's economic plan for development of the country.

- (f) Article 20 states that public certification personnel should produce public certification documents in accordance with the formal requirements of the Justice Department. The policy of the Justice Department is that all documentation must be in Chinese and it can only certify documents written in Chinese. This means that all documents written in foreign languages must be translated into Chinese before certification and the translated version should be attached to the original. A note of warning is in place here. Translation of documents into the Chinese language should be such as to be acceptable to Chinese notarial authorities. This means that in Australia often a qualified NAATI translation may not be accepted if the translation is not done in the pure Mandarin language. Often a translation done by a Hong Kong person is different in content to a mainland Chinese translation and therefore is not acceptable.

It must also be remembered that while China is an independent sovereign state, at the same time it is made up of ethnic races who have their own languages. Article 4(4) of the *Constitution 1982* provides an exception allowing ethnic notaries to 'have the freedom to use and develop their own spoken and written languages'.

The policy here is that the Justice Department will provide translators for those parties not conversant with the local language and at the same time will prepare the documentation in the local ethnic language. Done this way it allows ethnic parties to exercise their rights in a fair and honest manner.

## **7. Notarisation procedure**

Whilst the *Public Certification Temporary Regulations 1982* set out procedures for certification, these were strengthened and made more uniform in December 1986, when the Justice Department annexed the *Procedures for Dealing with Public Certificate Temporary Detailed Rules*.

The steps are as follows:

- (a) *Application and acceptance*—The applicant personally completes a written application form and produces his/her personal identity card to verify the applicant's identity. This can also be done by looking at the census register, work certificate, union membership card, passport or other travel document. Where the identity of a 'legal person' such as a business enterprise is concerned, this can be done by checking enterprise registrations of state or local departments of industry and commerce. The identity of state agencies or organisations can be verified by examining the law creating that agency.

Where an application is made by an agent, that agent must present a letter of authority ('entrustment letter'). This means

certification by the Notary office, by an organisation in a foreign country recognised by the Ministry of Justice or by the Chinese Embassy in the foreign country.

In China itself, any state organisation enterprise work unit can be represented by its representative who has a letter of entrustment. However, the following notarisations cannot be done by agency—application for letter of entrustment, adoptions, wills and any matter requiring signature and seal.

- (b) *Examination by Notary office*—The office decides whether the matter requiring certification is factually true and legally valid. This involves ensuring that it complies with laws, regulations and Party policy and that the parties have the practical ability to carry out their respective obligations. This could require field visits, consultations with experts or further information from the applicant to ensure the legality and truthfulness of the application.

As previously mentioned Article 2 states inter alia 'notarisation is carried out by the state notarial organs by law *according to the application* of their clients to certify legal acts'. This means that notarisation is generally a voluntary personal act. Yet according to some regulations, such as those applying to Shenzhen real estate, the sale, transfer, mortgage and leasing of premises must be notarised.

The actual steps for a certification of real estate are as follows:

- (i) Conditions required to be met by a real estate agent are:
- (1) The real estate agent must be a legal person and should have a business licence with the right to deal in real estate.
  - (2) The real estate agent must provide the following materials:
    - (a) The Business Licence of a legal person or Certificate of a Legal Representative;
    - (b) Written Approval for Use of Land; Certificate of Right to use Land;
    - (c) Building Permit; Construction Permit and Inspection Certificate of Completion of Construction;
    - (d) Certificate of Selling Real Estate approved by the authorities concerned.
- (ii) The purchaser of real estate is required to provide the following:
- (1) If the purchaser is an individual:
    - (a) Purchaser's valid Entry Card, or they may appoint an agent to handle the matter. The agent must have a Power of Attorney. If the agent is entrusted by a person living abroad, the power of attorney is required to have diplomatic authentication;
    - (b) Payment receipt for purchasing the house;
    - (c) Certificate stating that they will not buy or build any house for rental purposes.
  - (2) If the purchaser is an organisation, corporation or state body:

- (a) Business Licence of the enterprise as a legal person, approval of founding by the authorities concerned or commercial registration certificate or the company's registration certificate;
- (b) If a Board of Directors is established, the legal person is required to provide written resolution of the Board and the Power of Attorney by the board;
- (c) Certificate of Legal Representative, Identity Card or the Power of Attorney of the legal representative and their Identity Card;
- (d) Payment receipt.

Adoptions provide another example of the notarisation procedure. China's *Marriage Law 1980* in art. 20 simply states that lawful adoption must be protected, but no details are provided in the law. We then need to turn to the *Adoption Law 1992* which sets out certain guidelines aiming to combine Party policy and a series of government directives.

These guidelines are:

- (i) Resident booklet, residential Identity Card or other identity certificates of the adopting parents, the adopted person and the natural parents together with an adoption registration certificate.
- (ii) A certificate from the adopting persons setting out the names, sexes, dates of birth, occupations, marriage status (married, single or divorced, widows or widowers), maternal child's details, financial situation, health, police records of the adopting persons and the name, sex, date of birth, address of the adopted person.

If the adopting persons reside abroad, the abovementioned certificates are required to be notarised and to be diplomatically authenticated in the country where the adopting person is residing. If the adopting person lives in Hong Kong, the above certificates must be issued by lawyers and solicitors in Hong Kong who are so authorised by the Ministry of Justice. If the adopting persons reside in China, the above certificates must be issued by the Personnel Department of the employer of the adopting persons or by the street, office or town government bureau in charge of household registers.

- (iii) Adopting persons residing outside China must also submit any materials and certificates required by an adoption agency in the country where they are residing. They are required to have these materials and certificates notarised in the country where they are residing and attested by the Chinese Embassy in that foreign country.
- (iv) If the adopting person is a Chinese citizen and of child bearing age, he/she must be prepared to present a certificate setting out he/she is unable to have children (or a certificate of operation of sterilisation) issued by a people's hospital at country (regional) level and above.



- (v) If adopting an orphan from a hospital or a social welfare institution, the adopting person must submit a certificate setting out where the child is coming from and an approval certificate issued by this unit.
- (vi) The natural parents of the child are required to detail their marriage and their legitimate children in a certificate issued by the Personnel Department of their employer or the bureau where their household register is kept together with an approval certificate issued by a birth control department.
- (vii) To notarise the adoption, the natural parents, the adopting parents and the adopted person must attend at a Notary office personally and sign an agreement for adoption. The statement must show that they agree to adopt a child (or their child to be adopted). If an adopting couple live in Hong Kong, Macau or another location outside the People's Republic, and both cannot return to China, one party must return and the other party who cannot return must submit a statement and a Power of Attorney which has now been notarised, authenticated and certified by:
  - (a) a Notary office of the country where he/she is residing; or
  - (b) lawyers and solicitors authorised by the Ministry of Justice or China's consulate in a foreign country.
- (viii) If overseas Chinese have adopted a child in the mainland and now apply for a notarial certificate they must submit original proof of adoption, for example a deed, adoption agreement certificate showing they live together, for example a residential booklet, certificate of support, for example a money order, tax order, correspondences and two personal witnesses. These witnesses are also required to show to a notary documentation about the adoption relationship before the notary can make an investigation and confirm the adoption.
- (ix) If a certificate of adoption is to be used in a foreign country, the translated name of the adopting persons and adopted person must be submitted.
- (x) Any other documents and materials that are required by the notary office.

If after investigation, any of the guidelines are found to have been breached an application will be refused. However, if there is any fraud or violation of any law, this must also be reported to the Public Security Bureau and then go to the People's Procurate for investigation and possible prosecution.

If the document issued is wrongly drafted then the Notary office must reinvestigate the application and issue a new notary certificate. This further notarisation must be carried out within three months of the error being discovered.

## 8. Items requiring public certification

With the intensification of reform of economic structures and the introduction of economic legislation to aid reconstruction, legal measures have also been introduced to bolster and manage the economy—law has become a management tool. One way of doing this is to ensure uniformity in the administration of legal rules by public certification.<sup>9</sup> A summary of the major rules regarding certification since 1980 are as follows:

### Central Government rules

- 1 For bank accounts and deposits, after the death of the depositor, the beneficiary under the laws of inheritance needs to apply to a public certification department for a certificate of right of venture before the bank will transfer or allow withdrawal of money. Documents needed for certification are the death certificate and personal identity card. If a beneficiary resides outside China, then certification by the Chinese Embassy or consulate in that country is required before submitting the relevant documentation for public certification.
- 2 Independently financed study overseas: a guarantee of all expenses must be publicly certified and, if the guarantee is provided by friends or relatives overseas, then the same procedure for certification of residency must be initially attended to.
- 3 Labour contract agreements require public certification. For example, under the *Mineral Enterprise Shift Work System Practice Trial Regulations*, September, 1984, after the signing of a shift work agreement, enterprises must have the agreement publicly certified and then sent to the government department controlling the enterprise and the labour department for recording purposes.
- 4 Invitations to Tender and Tender Bids must be submitted and supervised by public certification personnel. The State Economic Committee announced in July 1986: 'Applications for imported engineering and electrical equipment invitation for tender under the *State Temporary Rules* state the provisions of assessment of tender proceeds must be supervised by public certification personnel'.
- 5 State run business rental contracts must be publicly certified as set out in the 1987 State Department Circular Issue No. 55 on State Rental Contracts.
- 6 Secured loans made by the Bank of China require public certification. This is set out in art. 17 of the *Foreign Investment Enterprise Loan Method by the Bank of China*, April 1987.

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9 The term 'public certification' has the same meaning as notorisation and as the author understands applies to agreements/documents requiring notarisation under economic legislation.

Also art. 18 of the *Construction Bank Loan Contract Guarantee Method (Trial) Loan Regulations*, July 1987, state that loan contracts made by the Construction Bank must be publicly certified.

Under art. 11 of the *Chinese Industrial and Commerce Bank Security Loan Management Temporary Methods Regulations*, July 1987, loan contracts and related materials must also be publicly certified as to their truthfulness and legality.

### **Provincial Government rules**

Rules on Economy Standing Reform: Many provinces that promote economic reform and encourage investment have passed rules in many areas considered important to facilitate economic reform.

Some examples are:

*Liaoning Provincial Government*—Some Rules on a Step Forward to Promote Crossing to Economic Reform.

*Hubei Province*—Trial Method of a Step Forward to Promote Crossing to Reform.

*Jiangsu Province*—Engineering Construction Invitation and Bidding of Tender Temporary Methods.

*Human Province*—Labour Contract System Practices Trial Method.

Article 8 of *Jiangsu Engineering Design Invitation and Bidding for Tender Temporary Method* provides that after inviting tenders the selected tender unit must sign and publicly certify the contract.

Article 8 of *Shenzen City Large and Medium Size Enterprise Management (Trial) Method* provides that once agreement is reached by the management and following discussion between the employee's representative and the management of the enterprise upon the contents of a work agreement, the contract once signed and publicly certified has legal effect from the date of certification.

Article 8 of the *Human Province City and Town Labour Contract System Practice Trial Method* stipulates that after signing of the labour contract it should be publicly certified and sent to the contracting department and the local labour department for recording.

It can be seen that labour contracts in China are akin to our system of registration of certified agreements under the *Industrial Relations Act 1988* (Cwlth)<sup>10</sup> or an enterprise agreement<sup>11</sup> under *Industrial Relations*

10 Section 134A and following.

11 Section 115 and following.

*Act 1991 (NSW)* whereby employment conditions are regulated at the workplace between management and the employees.

### **Non-moveable assets requiring public certification**

This covers state operated rental of property, food services, land management, residential and commercial rental of property. All major provinces have rules and regulations regarding these and require public certification.

Some examples:

Article 8 of the *Shenzhen Special Economic Zone Merchandise, Properties and Land Management Rules* states that contracts of transfer of property and land, sale and pre-sale of property and land, mortgage of property and land, and rental of property and land should be certified by the Shenzhen City Public Certification Department.

Article 24 of the *Hainan Land Management Method Rules* provide that for transfer of right of land use including gift, sale, exchange and legal inheritance, the format of the transfer may be decided by the parties concerned, but the resultant transfer or exchange should be certified by the public certification organisation.

### **Economic matters involving foreign countries**

Foreign Economic Contracts include Chinese/Foreign Joint Ventures, Management Contracts, Contracts of Exploration and Development of National Resources.

Such contracts require not only the signatures of the parties, but also approval by the relevant government departments. The idea of this is to ensure that the approval meets with China's overall economic development plan and concurs with all relevant laws and policies. Whilst notarisation of the agreement is not generally made mandatory by statute or Chinese law, the contracting parties will in the vast majority of cases insist on notarisation of the contractual agreement. The Chinese party generally insists on notarisation, the justification being that it helps to prevent potential contractual disputes.

The Ministry of Justice and the State Administration of Industry and Commerce in a joint circular entitled the Certification and Notarisation of Economic Contracts, 13 August 1993, stated that once both certification and notarisation is performed, the process serves to maintain a socialist economic order to protect the lawful rights and interests of the parties to the economic contract.

Certification refers to the fact that the relevant government department has examined the contract from the viewpoint of authenticity and legality of its contents. Notarisation occurs when the Notary office certifies that the above certification process has been carried out in accordance with statutory requirements and that both

parties have voluntarily agreed to have the certified agreement notarised.<sup>12</sup> The case of Beijing Hehua Industry Company (BHI) and the Heze City Notary office, Shandong,<sup>13</sup> illustrates the importance of notarisation.

Here BHI purported to have entered a contract to sell US Diamino to a Shandong Company. Upon signing the contracts BHI asked the buyer to pay 25% of the contract price on exchange of contracts.

Article 19 of the *Provisional Notarisation Regulations* provides that where a notary has doubts about documentation presented by a party, the notary must enquire of all relevant departments.

The Notary office was then asked to notarise the contract. The office as part of its authenticating procedure carried out checks with the Department of Industry and Commerce in Beijing and the Bank of Industry and Commerce and found the following discrepancies:

- 1 The source of the products was unclear.
- 2 The business licence of BHI was issued prior to a change in licence issuing procedures for companies.
- 3 The reason for the down payment of 25% was not clearly stated in the contract.

The Notary office reported the discrepancies to the Public Security Bureau, resulting in the arrest of certain BHI staff on fraud charges.

The idea of notarisation of these contracts is mainly evidentiary with the hope that it will prevent disputes and lessen litigation making both parties think about the contract before entering into it. All provinces that have been categorised as Special Economic Zones have such provisions in their implementing rules. An example can be found in the *Shenzen Special Economic Zone Enterprises Management Implementation Detailed Rules* approved by Guangdong Provincial Government, which clearly require the public certification of economic matters involving foreign countries.

Again, in the *Shandong Provincial Rules*, seventy two items are listed as economic matters involving foreign countries and requiring certification.

## 9. Notarisation involving foreign countries

This is set out as a separate category because once the document is certified the foreign country is bound by the law of China as well as the law of the country where it is used. There is no inconsistency in this because if it is later used in China then Chinese law applies. But naturally, if used in a foreign country then that country's law applies.

The category of documents requiring notarisation is broad—including study overseas, visits to relatives, residents seeking employment overseas, legal inheritance, injury compensation, receipt of

12 *Interim Regulations Governing Notarisation*, art. 2.

13 *China Law and Practice*, Vol. 1 No. 9, p. 37, 2 November 1987.

old age pensions from overseas countries, welfare benefits, and adoption.

The procedure for notarisation in these cases is as follows:

- 1 applicant hands in a completed application form to the local public certification office<sup>14</sup> stating clearly in the application the purpose, usage and the country in which the document will be used.
- 2 applicant needs to show personal identity papers, residence book. In certain circumstances letters from relatives in foreign countries must also be supplied for certification.
- 3 applicants from a foreign country using a relative to process the papers must also provide an entrustment letter duly certified.
- 4 having examined, investigated and found the statement true to the best of their knowledge, the Notary office issues the notarised certificate.

Since the implementation of the open door policy in China, there has been an increasing need for notarisation of documents in the area of foreign trade, economic cooperation and technical exchange.

As an example in Shenzhen Special Economic Zone in the first six months of 1988 a total of 9,565 matters were notarised, an increase of 79 percent compared with the same period in the previous year. Of these, 5453 certificates involved foreign contracts, an increase of 35 percent compared with the same period in the previous year.

Civil matters in the same period numbered 2083, an increase of 68 percent compared with the previous year. Of these, 70 percent were sent to the United States of America, Australia and Hong Kong.

## **10. The effect of notarisation**

Once the investigating work has been carried out and the notarisation process completed the document has the following force and effect:

- (a) Evidentiary force;
- (b) Executory force;
- (c) Validating effect.

### **Evidentiary Force**

A notarised document has evidentiary force and provides irrefutable proof in litigation brought before the Peoples' Court. Article 59 of the *Civil Litigation Law (Trial) Procedures* provides:

The Peoples' Court shall recognise the force of certificates, legal behaviour, legal facts and papers that have gone through public certification.

Judges can presume that there is no need to further investigate the certified matter and the notarised certificate can be accepted as evidence

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14 The term 'public certification office/department' can be used synonymously with notary office.

in deciding an issue. This makes the resolution of disputes easy and expedient.

Articles 55 and 57 also reinforce the view that the evidentiary force of public certified documents is higher than all other paper evidence. However, in any case the other party can still produce other evidence in an effort to overturn the evidentiary force of the certified document, and in fact, this is provided for in the *Civil Litigation (Trial) Law*. The rationale for this is that the truth and legal nature of certification is paramount and if it is contravened then its evidentiary force does not naturally exist.

It also recognises that mistakes in the notarisation process can occur because of negligence, the parties' lack of experience or inadequacy of certain relevant laws.

This means in dealing with a case a court should, on the one hand, emphasise the evidentiary force of publicly certified documents, but on the other hand, analyse and investigate evidence comprehensively to enhance the quality of judicial decision making by judges.

### **Executory Force**

This refers to any publicly notarised document certifying liability as a matter of right, for example, if a debtor does not clear the debt in time, the creditor can apply direct to a Peoples' Court for execution without the matter being litigated and ask for judgment in favour of the creditor. This is set out in art. 24 as follows: 'According to Article 4 Section 10, liability rights documents certified by the Public Certification Department will have compulsory execution force, when one party does not fulfil requirements in the document, the other party may apply to the Peoples' Court for execution.'

Article 168 of *Civil Litigation (Trial) Law* provides:

The liability right document granted with compulsory execution force by public certificate organisations in accordance with laws whereas one party concerned does not fulfil its obligations, the opposite party concerned may apply to the Peoples' Court for execution.

If the court discovers errors in the document the court will not grant execution and must inform the original public certification organisation.

The force of compulsory execution has a number of advantages such as protection of legal rights, saving of time and 'stability of socialist economic order'. Obviously not all publicly notarised papers have this executory force. It is limited to situations such as verifying a debt for return of monies or articles where both parties cannot dispute the recitals and contents of the document and the agreement should have been complied with by the defendant, but this obviously has not been done.

### **Validating Effect**

This refers to the fact that certain orders, regulations, facts and documents must be notarised to acquire validity.

- (a) Some laws, administrative regulations and rules provide that certain legal behaviour must be notarised, for example, art. 17 of *Methods of Loan of Bank of China for Foreign Business Investment Enterprises 1987*, states: 'for secured loans, security documents signed between enterprises and the Bank of China must be notarised.'
- (b) China's international policies and bilateral agreements generally provide for documents used outside the country to be notarised, for example, certificates of academic qualifications and relationship certificates.
- (c) Certain legal Acts set out in accordance with the terms of an agreement between the parties require notarisation. If this is not done, then the agreement is null and void and must be re-executed.

For example,<sup>15</sup> in 1988 a property and land company (Party A) presold to an enterprise company (Party B) a factory for Reminbi. The contract stated that it only had force if it was publicly certified. Both parties however did not apply for public certification after signing, and in the meantime the price of the property increased. Party B tried to uphold the original contract before the Peoples' Court, but the court refused as it was not notarised.

- (d) Article 67 of *The Law of Civil Procedure 1991* requires the Court to accept notarised legal acts, facts and documents as the basis to determine relevant facts, except if there is evidence to prove the contrary.

Also art. 218 provides a notarised document of indebtedness is directly enforceable upon application to the Court by one party against another who has failed to perform their obligations.

- (e) Articles 17 and 20 of the *Law of Succession 1985* states that a notarised will cannot be superseded by a later will that has not been notarised.

Decisions such as the one above and substantive laws and regulations requiring notarisation for certain Acts mean that the notary office has played a significant part in China's legal and economic development.

### **11. Implications**

It can be seen that in China after notarisation a document has validity, evidentiary and executory value. This is akin to the civil or common law idea that the document has the character of authenticity, that is, it is drawn up in a formal way by a public officer and it is clothed with all

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<sup>15</sup> Example given by Guangdong Province Notary office.



the requisite formalities as required by the particular piece of legislation or jurisdiction (for example, court orders and death certificates).

Where the procedure of authentication has been carried out by the Notary office, the document is fully valid unless proved to be fraudulent. This means the document has great evidentiary (or probative) force because of its form and the authority given to it because of its notarisation.

On the other hand, for a record of events which have taken place other than in the presence of the notary, the notarisation is proof that the parties have made certain declarations but not that the declarations are true. This aspect is becoming more important because of the increasing use of economic contracts and venture agreements with overseas partners.

It appears in China that an instrument that on its face purports to have been drafted by and executed under the supervision of a Notary office, is what might be called a public act and is conclusive evidence of three things:

- 1 It was so drafted and executed.
- 2 The recitals and agreements expressed in the instrument are accurate reports of the parties' statements and agreements.
- 3 Any fact that the instrument recites to have occurred in the presence of the notary did occur and any act recited to have been performed was performed.

The faith and credit granted a notarised document has been termed in socialist terms 'a potent force for civilisation and order'.

In China notarisation is not a substitute for judicial proceedings, rather it is an aid in reducing litigation.

Notarial authentication in China, as in civil law jurisdictions, provides conclusive truth of the transaction. The morality of the common law tradition has militated against this development. In Australian courts, notarisation is subject to the hearsay rule. This is a rule operating to exclude evidence otherwise relevant and admissible. It may be broadly described as the narration by a witness of what a person said out of court, where this statement is relied upon to establish the truth of the facts asserted in it.

Notarisation is also subject to the principle that in any court hearing the best proof is given by a witness under oath. Therefore, under the common law system of Australia, a document duly notarised with a notarisation certificate usually (subject to certain exceptions to the hearsay rule) cannot be accepted in court as evidence of a fact in dispute, unless the person who made the document and certificate is a witness.

Whilst it is acknowledged that Australian courts have been searching for ways to increase the number of exceptions to the hearsay rule, the bottom line is that notarisation certificates at the moment must be proved in court via oral testimony. Perhaps our legislators may in the

future address this question and either give notarisation certificates the status of public or business documents, or at the very least give them evidentiary weight. This would require an extension of notarial duties to allow them to enquire into the truth of the statement alleged.

It is a paradox that China accords full recognition to an instrument authenticated by an Australian notary, provided it has been legalised by the Australian Foreign Affairs Department and the Chinese Consulate. Yet such an instrument will not be accepted as having even probative value by an Australian Court. Unlike Australia, in China once a document has been notarised, the court has a duty to hold the contents of the writing to be true except where there is proof to the contrary, that is, fraud or where the Notary's office has made an error in checking the facts. This probative effect appears to extend to the successors of the parties to the notarised document and will obviously work either for or against them.

## **12. A historical and political perspective**

The concept of the notary developed from the simple idea that an independent impartial person was needed to witness marriages, agreements, documents, gifts to friends and relatives or to take down the narrative statements made by a citizen.

With the beginning of China's socialist transformation in the 1950's, and the beginning of the First Five Year Plan between 1953 and 1957, Notary offices (known as notarial bureaus) were empowered with the duty of supervising contracts between private enterprises and state managed enterprises. Their function here was twofold:

- 1 Ascertaining the legality of contracts and to ensure that the contracts were consistent with state policy.
- 2 Liaising with the relevant government departments and the labour union to ascertain whether the private enterprise had the productive ability to fulfil the contract.

If the contract was approved, the Notary office then also had the duty of 'educating both parties as to their obligations under the contract'. The government's aim was to imbue a sense of social responsibility in carrying out work and to facilitate the state plan. In turn, the union and the private enterprise was given a copy of the contract. This enabled the Notary office to work closely with the union to ensure that the enterprise performed efficiently to lessen 'cheating' by the enterprise.

By 1956 the Communist policy was to nationalise all private industry and commercial activities. This meant that the role of the Notary office became less important as an instrument of government control. However, the volume of work did not decrease for compensating work came in the form of assistance to the vast overseas Chinese population who always considered China as home, and invariably still had property in China. Work grew gradually in the area of: notarising identity certificates; disposing of property; making wills;

and aiding in interpretation and inheritance matters. An example, the author recalls, was where his grandfather, an emigrant from China, who owned a house in Guanzhou, wished to make a gift of it to a nephew. The grandfather was required to sign a deed of gift prepared in Chinese by the Notary office and for that document to be signed and witnessed by an Australian Notary authenticated by the Department of Foreign Affairs, the Chinese Embassy and then returned to the Guanzhou Notary office.

Coinciding with internal political stability towards the end of 1956 and early 1957, the Notary office also changed its paramount aim of enforcing the state plan, to that of informing and protecting the rights of the Chinese citizen. It did this by publicising information on how to prevent litigation which could arise from simple transactions such as: the buying and selling of real estate; the enforcement of debts; the entrusting of duties to another via a power of attorney; and the force and effect of wills.

By 1958 all provinces had at least one Notary office. From 1959 to 1965 the Notary office system remained virtually unchanged in evidencing documentation, wills and inheritances and powers of attorney.

However, during this period the legal climate was already changing, and progressively the door closed on any legal developments. Initially lawyers were condemned as rightists and the courts' independence and the procuracy's role as the guardian of socialist legality were reinterpreted as using the law against the Party.<sup>16</sup>

The dark age of legalism came with the Cultural Revolution (1966-1976) when China was purged of lawyers and the law. With this collapse of the legal system, Notary offices came into their own, as the institution of law was now inadequate, and indeed, the Notary office carried out many functions previously vested in the court system, such as settling contractual disputes. This brought into vogue a system of regional jurisdiction, and the Notary office settled disputes between citizens besides its usual functions of transferring property, will making and interpretation. The Notary office now performed both a limited judicial function together with an administrative function, and above all, a political role of spreading the ideology of the Cultural Revolution.

The period from 1976 onwards was one marked by legal restoration and development. This policy helped in gaining support for people who had become demoralised by the years of chaos and terror, and it led to security and stability. The strengthening of the legal system also had an economic goal in creating an environment where productivity could rise.

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16 See Hsia, Tao-Tai, 'Guide to Selected Legal Sources of Mainland China' (1967) *Washington DC—Library of Congress*, 286-91.

The Notary office was part of this legal restoration. On the 5 March 1980, the Ministry of Justice recognised that every district should have its own local Notary office and that notaries would henceforth be appointed locally and not by the Ministry of Justice. This resulted in a unification of Notary offices and at the same time decentralisation.

The Notary offices were now in effect, representative of all geographic areas and ethnic groupings.

The Ministry of Justice in 1985, at a meeting in Beijing of representatives of all China's Notary offices, recognised the role the Notary offices could play in assisting the country's economic development by ensuring that in future all joint venture contracts involving a foreign partner be notarised. This meant that the central government could have accurate reliable figures upon the growth of foreign investment in China for policy planning purposes.

It also had another immediate effect, that of discovering false documentation and fraud, as the agreements and attachments had to be notarised. An example was the use of fraudulent documents to borrow money from the Bank of China.

The Notary office therefore had a dual role of assisting in the implementation of government policy and upholding order, whilst at the same time protecting the citizen and the foreign party in a joint venture.

It can be seen that even on a histo-political interpretation, the creation of the Notary office had an impact on the development of the Chinese legal system and its jurisprudence. Throughout the period since the 1950's it is the one institution that has survived political change and served to harmonise conflict and inconsistencies of interpretation, for its interpretative role was of a grass roots nature, suited to the need of its users.

It is submitted that the Notary office was the link between the state and the individual and, in its dealings with citizens, it recognised the equality of all parties involved in civil matters whether the party was an individual, a family, a work unit or a state institution or a foreign party. Put another way, the Notary office emphasised the bond between community and country by putting forward a social concept of law and implementation of national policies at the grass roots level.

### **13. The cultural context**

The Western concept of law is based on a conflict model where law and its various institutions are a panacea. Only the law can restore order if the model or someone in the model falters. The law is there to restore order and punish offenders.

In Australia, a notary has a role in this model, namely, to attest and certify deeds and other documents, to note and certify transactions relating to negotiable instruments, to draw up protests and formal documents relating to ships' voyages, to administer oaths and to take affidavits.

It can be seen that the role of the notary in Australian law is a non-active one. The notary is not involved in making law, as do judges, nor does s/he spread the message of the law, as in the case of a solicitor working in a legal aid centre, a chamber magistrate or a lawyer working for the underprivileged. All the notary does is to ensure documentation, attestation and certification is correct, as it is just one step in a chain of legal events leading to a conclusion.

Chinese law has a Confucian base. Confucianism teaches that man is compelled by his nature to live in the company of other men, that is, society.

Confucianism is, in many ways, a rule by man rather than a law. The concept of an impersonal abstract law which is binding upon all persons at all times and in all situations is alien to Confucian thought. The maintenance of peace and harmonious relations within a community is more important than a notion of absolute human rights. Consequently, peacemakers and middle-men are continually mediating disputes and settling all sorts of conflicts even where in China, in accordance with the prescriptions of established custom, tradition and the circumstances of the particular case, justice was what local opinion thought fair and reasonable to all concerned under the circumstances, and decisions were made only after arbitration and compromise. No one party was considered completely right or completely wrong. The view of Confucianism is that expressed in the Analects as:

Lead the people by laws and regulate them by penalties and the people will try to keep out of jail but will have no sense of shame.

This preempted the debate in China between Legalism and Confucianism, a debate which has created in China a deep understanding between rule by law and rule by man. It highlighted the idea that justice is not an intellectual principle enshrined in legislation, but that beyond the statute there is the quality of sympathy which must enter into each decision.

Within the Confucian rule of law, the Notary office plays an essential proactive role as an organ in the framework of law.

By apprising citizens of their rights in relation to legal matters whilst at the same time acting and advising the citizen of the best approach in settling their basic civil rights and duties, not only to each other but to society, the notary system ensures a humane community and order.

The Notary office has an integral role as China moves into the international economic community because of trade and investment. The Notary office recognises that economic authority rests with those who have non-commercial motives of a high order, but have a shrewd understanding of commercial reality. Its role is to ensure that the policy results of that economic authority do not impinge upon those policies, and the general good of the country is carried forward.

#### **14. Comparison with notaries in Australia**

The certificate of a notary in a Notary office bearing the signature and official seal, is accepted as proof of the acts done in the notary's presence in all countries where notarial acts are recognised.

The *raison d'être* of notarisaton is to give this cachet of authenticity to documents intended to be used abroad. It was because of this character of authenticity that the office of Notary Public was established in England and Australia. The development of this office was an interesting result of the contact of two distinct systems of law, common and civil.

In Australia public notaries are also practising solicitors. In China, the notary has not expanded into other areas of legal work and is a separate profession unto itself. Upon completion of legal training, a graduate may either become a notary or a lawyer and each has distinct complementary roles: the notary has the role of authentication and the lawyer has the role of advocacy. In entering notary practice on behalf of the State, the young graduate joins a bureaucracy that has a political function in that the Notary office is used, as explained earlier, to implement policy.

In Australia all notaries are members of a professional association. For example, in New South Wales, notaries are members of The Society of Notaries of NSW which has the following objects and rules:

- 1 To support and protect the character, status and interests of notaries generally in New South Wales.
- 2 To promote honourable practice, to repress malpractice, and to settle disputed points of practice.
- 3 To decide all questions of professional usage or courtesy between or amongst notaries.
- 4 To consider all questions affecting the interests of notaries and to initiate and watch over, and, if necessary, to procure changes of law or practice, and the promotion of improvements in the principles of the law.
- 5 To consider all future applications of persons applying for appointment as notaries and to support or reject or oppose same.
- 6 To acquire, by purchase, donation, or otherwise a library, and maintain same.
- 7 To provide rooms or other facilities for the holding of meetings of the Society or other matters.
- 9 To encourage the study of the law, and provide all information on the subjects specially amended to by notaries.

Professionalism is also emphasised in China for in all the provinces notaries are also members of a notaries' association. For example, in Guangdong the Notaries Association was formed on 23 November 1990. Its constitution provides for assistance to members in the following areas:

- 1 Undertake ideological and vocational ethics education to the members, and organise them to study the state policies, laws and professional knowledge of notarisation;
- 2 Propagate notarial regulations and knowledge;
- 3 Carry out investigation and research, sum up and exchange work experience;
- 4 Support the notarial staff in performing their duties by law and defend the legal rights and interests of the members by assisting the units concerned to adopt proper measures to deal with the illegal offenders or even demanding for legal responsibilities of them when the notarial staff are falsely accused or beaten up at the time of doing their duties;
- 5 Publish periodicals and compile and print notarial materials;
- 6 Run welfare projects for members;
- 7 Organise professional exchange between the members and the notarial organs outside the province and develop relations with foreign notarial public and notarial communities as well as those in Hong Kong, Macau and Taiwan.

## 15. Summary

### A Practical Interpretation

The Chinese Notary office is there to prevent litigation and to assist in keeping law and order. The notary, as an individual, is a public servant who is paid a salary by the state.

Notarial acts can be categorised as:

- 1 certification of documents.
- 2 certification of legal transactions.
- 3 safe keeping of documents or securities.

If false information has been supplied to the Notary officer, then criminal penalties apply and the matter is referred to the local procuracy for a decision on prosecution action.

Finally, Notary offices also give general legal advice and assistance. Not only do they explain a client's rights and duties, but like a chess game, they must anticipate the consequences of notarial activities so that any lack of legal information does not work against the person seeking advice. To illustrate this—a woman seeking to make a gift of property to a relative was advised to make it a condition that the relative support her for life, as she did not have a family to look after her.<sup>17</sup>

### A Political Interpretation

The Notary office can be looked upon as an administrative law institution. In a country developing economically and as rapidly as China, it should astonish no-one that such a legal institution with offices throughout the country, should be used to disseminate information to

<sup>17</sup> Example given by Guangdong Province Notary office.

enforce government policy and also, more importantly, to shape opinion and law to suit government policy.

### **A Lesson for Australia**

Taking the Chinese Notary office out of its Chinese context, there are some lessons for Australia. As indicated earlier in the paper, the only Western equivalent besides the notary public was the old scribes<sup>18</sup> who were originally scribes, but soon took to drafting for the public, documents such as deeds and bonds and also acting as intermediaries between borrowers and lenders. In New South Wales, we have the more specialised land agent whose previous important role of education and representing the electorate has now dwindled due to increased literacy and the diminishing availability of Crown land.<sup>19</sup>

It can be argued that together with the declining role of the notary public, unlike the Chinese system, the whole idea of educating the people and not letting brush fires begin is an ideology ignored by our legal system. Too much emphasis has been placed on mediation and conciliation of disputes after a problem has escalated into a conflict situation. This is indeed encouraged by our legal education system where the conflict model is the basis of teaching.

Yet the lesson is that practical management begins with training and educating staff at the beginning together with understanding the workplace and its culture.

The lesson from China's notary system is that above all, we should institute an educating spirit at the beginning and encourage lawyers and citizens to discuss and anticipate problem areas before conflict occurs. Perhaps we need a specialist agency akin to the Chinese Notary office to do just that and to look forward and not as we do now, look backwards.

## **16. Appendix A**

### **Documentation requirements**

This Appendix sets out the requirements for notarisation of many of the relevant certificates used in the Guangdong Province Notary office. The original applications are in the Chinese language but have been translated into English.

The general requirements of the Notary office are:

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- 18 See generally Gutteridge, H.C., 'The Profession of Notaries', (1926) *Cambridge Legal Essays* and Tawney, R.H. (ed), 1925, *A Discourse upon Usury*, G. Bell & Sons Ltd, London.
  - 19 See *Aubin and the Land Agents Act 1927* an unreported decision of the Land and Environment Court, 1984, summarised in Ryan, P. (ed), 'Land use and urban planning: NSW' (1985) 2 *Environmental and Planning Law Journal* 155.



- 1 Completed relevant application or the general application form where none exists.
- 2 Applicants' personal details such as identity card, passport and photographs.
- 3 Applicant to supply the relevant documentation as required for the particular certificate.
  - (1) Certificate of Adoption;
  - (2) Certificate of Birth;
  - (3) Certificate of Divorce;
  - (4) Certificate of Education;
  - (5) Certificate of Having Never Been Married;
  - (6) Certificate of Inheritance;
  - (7) Certificate of Loan Mortgage;
  - (8) Certificate of Marriage;
  - (9) Certificate of No Criminal Record;
  - (10) Certificate of Power of Attorney;
  - (11) Certificate of Relationship;
  - (12) Certificate for Sale, Purchase or Transfer of Real Estate;
  - (13) Certificate of Work.

### **(1) Certificate of Adoption**

- (i) Resident booklet, residential Identity Card or other identity certificates of the adopting persons, the adopted person and the natural parents together with an adoption registration certificate.
- (ii) A certificate from the adopting persons setting out the names, sexes, dates of birth, occupations, marital status (married, single or divorced, widows or widowers), maternal child's details, financial situation, health, police records of the adopting persons and the name, sex, date of birth, address of the adopted person.
 

If the adopting persons reside abroad, the abovementioned certificates are required to be notarised and to be diplomatically authenticated in the country where the adopting person is residing. If the adopting person lives in Hong Kong, the above certificates must be issued by lawyers and solicitors in Hong Kong who are authorised by the Ministry of Justice. If the adopting persons reside in China, the above certificates must be issued by the Personnel Department of the employer of the adopting persons or by the street, office or town government bureau in charge of household registers.
- (iii) Adopting persons residing outside China must also submit any materials and certificates required by an adoption agency in the country where they are residing. They are required to have these materials and certificates notarised in the country where they are residing and attested by the Chinese Embassy in that foreign country.

- (iv) If the adopting person is a Chinese citizen and of child bearing age, he/she must be prepared to present a certificate setting out she is unable to have children (or a certificate of operation of sterilisation) issued by a people's hospital at country (regional) level and above.
- (v) If adopting an orphan from a hospital or a social welfare institution, the adopting person must submit a certificate setting out where the child is coming from and an approval certificate issued by this institution.
- (vi) The natural parents of the child are required to detail their marriage and their legitimate children in a certificate issued by the Personnel Department of their employer or the bureau where their household register is kept together with an approval certificate issued by a birth control department.
- (vii) To notarise the adoption, the natural parents, the adopting parents and the adopted person must go to the Notary office personally and sign an agreement for adoption. The statement must show that they agree to adopt a child (or their child to be adopted). An adopting couple who live in Hong Kong, Macau or another location outside the People's Republic and both cannot return to China, one party must return and the other party who cannot return must submit a statement and a power of attorney which has been notarised, authenticated and certified by:
  - a Notary office of the country where she/he is residing;
  - lawyers and solicitors authorised by the Ministry of justice of China's consulate in foreign countries; or
  - lawyers and solicitors authorised by the Ministry of Justice or China's consulate in a foreign country.
- (viii) If overseas Chinese have adopted a child in the mainland and now apply for a notarial certificate they must submit: the original proof of adoption, e.g. deed; an adoption agreement certificate showing they live together, e.g. residential booklet; a certificate of support, e.g. money order, tax order, correspondences, etc; and two personal witnesses. These witnesses are required to go to a Notary office personally with their residential booklets and Identity Cards and execute the document before a Notary. The adopting persons are also required to show to a Notary documentation about the adoption relationship before the Notary can make an investigation and confirm the adoption.
- (ix) If a certificate of adoption is used in foreign countries, the translated name of the adopting persons and adopted person must be submitted.
- (x) Any other documents and materials that are required by the Notary office.

**(2) Certificate of Birth**

- (i) Residence booklet, residential Identity Card or other identification certificates of each applicant.
- (ii) The original birth certificate of each applicant.
- (iii) An applicant who was born before the establishment of the People's Republic in 1949, or after this but has no original birth certificate, must submit the certificate issued by the Government Bureau. This certificate must state the name of the applicant, sex, date and place of birth, names of parents and his/her present address.
- (iv) If the applicant was born before 1949 and left China before or after 1949 and he/she has no record of household registration to search he/she must submit his/her original birth certificate or other documents that can be used as evidence. If there is no written evidence, he/she may ask two witnesses who are aware of the birth of the applicant and who are over ten years older than the applicant to bear witness. The witnesses must bring their residence booklets or other identification documents to the Notary office personally to bear witness and execute documentation.
- (v) If the applicant resides abroad or in Hong Kong or Macau and cannot return and apply for a notarial certificate personally, he/she is required to submit the original copy of a power of attorney and duplicate copy of his/her Identity Card. If they are in Hong Kong, they may submit a Certificate for Returning to Hong Kong. If they are residing in the United States they may submit an employment authorisation or certificate of tax revenue or driver's licence together with a completed form. The written application must indicate date and place of birth, name of natural parents, date of exit and the last residential address.

**(3) Certificate of Divorce**

- (i) Residence booklet, residential Identity Card or other identification certificate for each applicant.
- (ii) The original divorce certificate, or certificate for mediation of divorce, or the court verdict of divorce. Duplicate copies of these certificates are also required to be filed at the Notary office.
- (iii) Applicants who have lost the original divorce certificate are required to submit a Certificate of Dissolution of Marriage issued by the marriage registration office.
- (iv) If the applicant divorced before 1949, he/she is required to submit the certificate issued by the personnel department of his/her work unit or by the subdistrict office or by the government of his/her village (town). This certificate must give names of the parties to the divorce, their sex, date of birth and date and place of divorce. If they are unable to obtain certificates

issued by their work unit, they must submit affidavits from two witnesses supporting this fact. The witnesses attend personally at the Notary office with their residence booklet or other identification certificate to execute the document.

- (v) Translated name of the applicant.
- (vi) Other documents related to this notarial certificate that are required by the Notary office.

**(4) Certificate of Education**

- (i) Residence booklet, residential Identity Card or other identification documents for each applicant.
- (ii) The original or duplicate copy of applicant's schooling certificate, e.g. graduation certificate, completion certificate, baccalaureate certificate and transcript.
- (iii) If the applicant has lost the original of his/her schooling certificate, he/she should request the school they attended to issue a duplicate. If this school no longer exists, he/she is required to apply to the higher competent institution of the former school for a certificate. An applicant who wants to have the certificate notarised, but does not have the original schooling certificate must present three passport size photographs, together with the certificate.
- (iv) Translated name for each applicant.
- (v) Any other documents and materials required by the Notary office.

**(5) Certificate of Having Never Been Married**

- (i) The applicant's residential Identity Card, residence booklet and the duplicate copies of them. If he/she has left China, the applicant must submit duplicate copies of his/her passport or valid travel document. If his/her residence registration has been cancelled, the applicant is required to submit a certificate of personal details sufficient to allow the local household register where he/she resided to be searched.
- (ii) Certificate of never registering for marriage issued by the Personnel Department of a unit where the applicant is working or a government bureau where his/her household register is recorded.

If there is not any Personnel Department in a unit where the applicant works, the relevant certificate must be issued by the most senior member of the unit.

- (iii) The applicant's foreign translated name.
- (iv) Any other materials, documents and certificates related to the notarial certificate required by the Notary office.

**(6) Certificate of Inheritance**

- (i) The heir's residential Identity Card, resident booklet or other identity certificates.
- (ii) The deceased's Certificate of Death, such as a report of death issued by a hospital or a public security bureau or cremation receipt issued by a funeral parlour. If the deceased dies abroad, a Death Certificate is required to be notarised by a Notary in the country of residence before death and have diplomatic authentication.
- (iii) Evidence of real and personal property inherited such as certificate of title, certificate of deposit, share certificate and so on. A duplicate copy of the above documents must be filed at the Notary office. If the will is made outside China, probate must be granted by that country where he/she lives and authenticated diplomatically.
- (iv) All the lawful heirs must present a credentials certificate issued by the Personnel Department of their employers or the Provincial Governments where their household records are registered. This sets out name, sex, date of birth, occupation, address and relationship with the deceased. If an heir is deceased, the date and the place of his/her death and certificate of relationship with his/her wife/husband and children must also be submitted. These certificates if made outside China are required to be notarised and authenticated diplomatically.
- (v) An heir who renounces rights of inheritance is required to present a Declaration of Renunciation of Succession so that an heir residing inside China can apply for a notarised certificate personally at a Notary office closest to the place of residence. If residing in Hong Kong he/she can go to a law office authorised by the Ministry of Justice or return personally to a mainland Notary office to make an application. If residing overseas, application can be made to a Notary at the country of residence and have it authenticated diplomatically.
- (vi) If the deceased or a deceased heir died before liberation or after liberation but has no death certificate; the applicant must present proof and evidence to certify death.
- (vii) If an heir cannot be traced, the applicant is required to apply for a declaration of disappearance or death to a People's Court according to the 'General Rules of the Civil Law'.
- (viii) If the inheritance is located in a foreign country or in Hong Kong or Macau the heir needs to obtain from the Bank of China an official letter showing that they agree to accept the attorney and then to apply for a relevant notarial certificate in a Notary office.
- (ix) Other documents or materials that are required.

**(7) Certificate of Mortgage Loan Contract**

Both parties of the contract are required to apply to a Notary office. Apart from the Mortgage Contract, they are also required to provide the following:

- (i) Business Licence issued by an industrial and commercial administration organ.
- (ii) The Loan Approval and Certificate of Authority both given by the Board of the Sino Foreign joint venture or foreign investment enterprise.
- (iii) Loan Application and Certificate of Legal Representative Power of Attorney issued by the state-owned enterprise.
- (iv) All items of fixed assets of enterprise and approval of the relevant planning department.
- (v) The mortgage document must set out:
  - (a) inventory of items;
  - (b) ownership certificate of these items;
  - (c) if the items are imported, materials requiring special import approval, this approval must be annexed to the mortgage.

**(8) Certificate of Marriage**

- (i) Residence booklet, residential Identity Cards and other identification certificates of both applicants.
- (ii) Original marriage certificate of both parties.
- (iii) Applicants who were married before the Marriage Law, i.e., before 1 May 1950, are required to present the certificates issued by the Personnel Department(s) of the work unit(s) of both parties or by the subdistrict office or by the government of their village (towns). These certificates should state the names of the couple, their sex, date of birth, date (year/month/day) and place of marriage. It may be impossible for some applicants residing in Hong Kong or Macau or other locations outside the People's Republic to obtain a certificate issued by their former work unit or by a subdistrict office or the government of village (town) of their former residence. In such cases, they should provide affidavits from two witnesses who knew them. The witnesses should bring their residence booklets or other Identification Certificates and personally go to the Notary office to bear witness, and set their hands and seals.
- (iv) If the applicants were married after the Marriage Law, i.e., after 1 May 1950, and they have not had their marriage registered, ie a de facto marriage, they can remedy the situation by registering their marriage, obtain a marriage certificate and the apply for a notarial certificate of marriage in the Notary office.
- (v) Applicants who have lost their marriage certificate must obtain a Certificate of Conjugal Relations issued by the Marriage

Registration office and apply for a notarial certificate from the Notary office.

- (vi) If the applicants reside abroad or in Hong Kong or Macau, the couple should make personal application to the Notary Public office. If it is impossible for them to personally attend they may, by power of attorney, submit the relevant documents or provide the witnesses as indicated in the above items 1 to 5. If they were married before 1 May 1950, they are also required to submit an affidavit that has been notarised, authenticated or certified by the above institutions, a lawyer or by the Chinese Embassy or Consulate abroad. The affidavit must give the names of the couple, their sex, their date of birth and the date (year/month/day) and place of their marriage.
- (vii) If a widow/er applies, the death certificate of the deceased is required.
- (viii) Three passport size photos of the couple must also be supplied.
- (ix) Translated names of the couple.
- (x) Any other documents or materials related to this notarial certificate that are required by the Notary office.

#### **(9) Certificate of No Criminal Record**

- (i) Resident booklet certificate, Identity Card or other identity certificate of the applicant. If the applicant is overseas, he/she is required to provide their passport.
- (ii) A certificate setting out the name, sex, date of birth and criminal record issued by the Personnel Department or Security Department of the applicant's employer or by a police officer of the town, district, street or any other competent government authority.
- (iii) If the applicant has committed offences, a copy of the judgment and a Certificate of Release after serving the sentence.
- (iv) If the applicant resides for example in Guangzhou, and has no employer and cannot obtain a certificate from the applicant's work unit, he/she is required to provide a written report, setting out his/her name, sex, date of birth and work experience from age 14, current address or former address in Guangzhou and their no-crime record.
- (v) The applicant's translated name.
- (vi) Other documents or materials required by the Notary office.

#### **(10) Certificate of Power of Attorney**

- (i) Resident booklet, Identity Card or other identity certificate of grantor.
- (ii) Evidence of subject of the power of attorney e.g. certificate of title for the property.

- (iii) The power of attorney must set out the grantor and grantee's name, sex, date of birth, address, capacity and period of power of attorney, any conditions and limitations and date of attorney, and must be signed and sealed by the grantor.
- (iv) The grantor is generally required to personally apply at a Notary office. If the grantor cannot personally go to the Notary office because of illness or other special reasons, the office makes house calls.
- (v) The grantee accepts the power of attorney orally or in writing. Evidence must be by way of affidavit.
- (vi) If the grantor wishes to cancel the power of attorney during the period of attorney, an application must be made to the Notary office.
- (vii) Provide any other documents or materials required by the Notary office.

**(11) Certificate of Relationship**

- (i) The applicant's residence booklet, residential Identity Card or other identity certificates.
- (ii) Certificates issued by the Personnel Department of the unit where the applicant works or the government bureau in which the applicant's household register is recorded. Details setting out name, sex, dates of birth, present address and the relations between the applicant and the related person must be listed in the certificate. Should the applicant apply for a Notarial Certificate of Relationship to reside in Canada, besides the above contents, the name, date of birth of the applicant's spouse, date and place of their marriage and the name, sex, present address, and other details of their parents and children under 21 years old are also required to be set out in the certificate. If the applicant's parents are deceased this must be stated.
- (iii) The latest letter posted by the related person.
- (iv) The applicant's and the related person's foreign translated names.
- (v) Any other materials and documents related to this notarial certificate as required by the Notary office.

**(12) Certificate for Sale, Purchase or Transfer of Real Estate**

- (i) Conditions required to be met by a real estate agent are :
  - (1) The real estate agent must be a legal person and should hold a business licence with the right to deal in real estate business.
  - (2) The real estate agent must provide the following materials:
    - The Business Licence of a Legal Person or Certificate of a Legal Representative;



- Written Approval for Use of Land; Certificate of Right to Use Land;
  - Building Permit, Construction Permit and Inspection Certificate of Completion of Construction;
  - Certificate of Selling Real Estate approved by the authorities concerned.
- (ii) The clients purchasing real estate are required to provide the following:
- (1) If the purchaser is an individual:
- Purchaser's valid Identity Card, or they may appoint an agent to handle the matter. The agent must have a Power of Attorney. If the agent is entrusted by a person living abroad, the Power of Attorney is required to have diplomatic authentication;
  - Payment receipt for purchasing the house;
  - Certificate stating that they will not buy or build any house for rental purposes.
- (2) If the purchaser is an organisation, corporation or state body:
- Business Licence of the enterprise as a legal person, approval of funding by the authorities concerned or commercial registration certificate or the company's registration certificate;
  - If a Board of Directors is established, the legal person is required to provide a written resolution of the Board and the Power of Attorney by the Board;
  - Certificate of Legal Representative, Identity Card, or the Power of Attorney of the legal representative and their Identity Card;
  - Payment receipt.

### **(13) Certificate of Work**

- (i) Resident booklet, Identity Card or other identity certificate of the applicant.
- (ii) Certificate from original work unit that the applicant was assigned.
- (iii) Certificates of work from all subsequent work units. If there is not a Personnel Department in a unit, then the certificates must issue from the most senior member of the unit.
- (iv) The applicant's foreign translated name.
- (v) Any other material and documents relating to the Notarial Certificate required by the Notary office.

