



WITNESSING DOCUMENTS THROUGH VIDEO CALL

The prevailing technological advancement today in the form of electronic platforms such as Facebook, Twitter, Instagram, Whatsapp, Facetime, Maybank2u, CIMB Clicks and other similar mobile apps are fully utilised to conduct various types of interaction and commercial transactions between different parties. For conveyancing practice in Malaysia, apart from the instruments provided under the National Land Code, one of the most crucial documents is the Sale and Purchase Agreement (S&P).

Fundamentally, there are procedures that must be adhered to in order to give a legal effect to the documents or transactions as set out in the statutory provisions. The question is how far do these tools bind legally and how far are they admissible in court?

Rationale of Witnessing the Signatories of Client and Why it is Imperative?

The rationale for the witnessing requirements of certain documents is to reduce the risk of people entering into fraudulent agreements and executing the documents without consent.

An agreement is a contract when they are made by the free consent of parties, made in writing or in the presence of witness or any law relating to the registration of documents.¹ It is clear that the law has provided this formula for an agreement to become a valid contract which it must be made in the physical presence of witness and must be consented by both parties.

The issue at hand is whether witnessing documents can be done via video call such as Facetime Video Call, Whatsapp Video Call and Skype. In Malaysia, the Electronic Commerce Act 2006 ("**EA**") was legislated in order to deal with some of the latest technological strides, apart from contributing to business efficacy and public at large. Therefore, it is important to make reference to this Act and also Contract Act in determining this direction of this issue.

¹ Section 10 of Contract Act 1950

What is the Requirement of Witnessing Documents?

We must first understand the requirements for attesting or witnessing documents. One of the crucial requirements is the attesting witness must certify that they were present at the time the document was signed. Dr Seddon² has raised the possibility that the statutory requirements may not necessarily require the witness to see the person signing the deed, citing ***Shah v Shah***³. However, that view has been criticised in the Australia state as the use of the term “witness” in the legislation would suggest that the person in question has actually witnessed the activity attested. It was cited by Edelman J in ***Netglory v Caratti***⁴, as an authority clarifying that the witness is to be physically present to sign the documents as a requirement.

The next requirement is the contract or agreement must be made by free consent and voluntarily by the parties as specified in the Contract Act 1950. This is also supported by the case of ***Burns v Lorac Mining***⁵ where it was held that the document must be signed voluntarily, making the signatory liable for his/her own act. Specifically, the witness must be physically present for the signing, and the witness must be certain that the documents that later received are the same ones that the witness had seen being signed, and the witness must be certain that the agreement was signed voluntarily as there could be other possibilities in play including someone behind a camera who is placing the signor under duress, coercion, etc.

Consequences of Invalid Witnessing?

Next, we must understand the consequences of invalid witnessing. Firstly, the agreement may not have any legal effect as stated in ***Netglory v Caratti***. Secondly, the agreement might become voidable if it breaches provisions under the Contract Act 1950, for instance, an agreement must be made by free consent, without any uncertainty, and others. Besides that, in the case of incorrect witnessing by a solicitor, it may lead the attestation to liability for misleading conduct or negligence or amount to unacceptable professional conduct⁶.

² Seddon on Deeds (Federation Press, Sydney, 2015)

³ *Shah v Shah* [2002] QB 35.

⁴ [2013] WASC 364.

⁵ (1985) 4 FCR 301

⁶ (Seddon N, Seddon on Deeds, The Federation Press, Sydney, 2015)

In these circumstances, it is up to the parties to decide how to record their agreement in a way that they consider will provide sufficient evidence should they be required in the future. However, based on section **68 of Evidence Act**, if a document required by law is to be attested, it shall not be used as evidence until that attesting witness has been called for proving its execution. The party involved will be called to the court in order to prove the authenticity of the signature.

No controversy shall arise if the agreement is executed by adhering to the statutory requirements, which typically includes that it is recorded “in writing” or in a “document”, which includes the components of “signed” and “witness” by the relevant parties. Parties will also need to consider the evidential weight which may be given to the signature if there is a dispute, for example, who in fact signed the document, whether they intended to be bound, or about the content of the document. Therefore, witnessing or attesting a document via video call may cause an uncertainty in many aspects and would lead the agreement to be become invalid.

To recapitulate, the rationale of witnessing of documents is to prove the genuineness of the documents, and also to avoid risk of fraudulent agreements. The element of vagueness might emerge when deciding whether witnessing can be conducted via video call although the basic requirements of witnessing documents can be fulfilled, and the genuineness can be proven. The case remains that the documents must be witnessed physically rather than virtually for the time being since it has a high risk to be contested as there is no specific authority supporting witnessing via video call. However, as human beings progressing together with the technological advancement era, there is a possibility in the future that witnessing documents via video call can be adopted by practitioners with certain formalities or procedure to be followed in order for it to be applicable according to the law.

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