DEVELOPMENT OF NOTARIES IN REAL ESTATE

REGISTRATION IN THAILAND

BY

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2018

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FACULTY OF LAW

THESIS

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ENTITLED

DEVELOPMENT OF NOTARIES IN REAL ESTATE REGISTRATION
IN THAILAND

was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)
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ABSTRACT

Real estate disputes are one of the most common type of arguments in Thailand for decades and this is because the real estate administration is inefficiency. In particular, there is a failure in Thai real estate registration and land titling, so the title deeds are unreliable and cause insecurity in the real estate business. Therefore, this thesis look into the causes and the consequences of the current real estate registration process in Thailand. Then, the thesis study on the intermediary that the four foreign countries, namely France, Germany, the United Kingdom (England and Wales) and the United States of America, used in their real estate registration for preventing real estate disputes. The intermediary used in the civil-law countries and the common-law countries are quite distinct, so the thesis will compare the intermediary in civil-law countries and common-
law countries in order to suggest the best solutions for solving the real estate situation in Thailand.

**Keywords:** Land, Real Estate, Notaries
ACKNOWLEDGEMENTS

This thesis is one of the greatest challenges in my life. I have studied and written this work with my best effort, but this thesis will not be successful without supports from several people around me, especially these following people:

First and foremost, I would like to express my gratitude to my advisor, Professor Dr. Nontawat Nawatrakulpisut, for his valuable advice and support throughout the study. This thesis will not be completed without his guidance, supervision and motivation. I have learnt so much on how to conduct a research and learnt critical thinking skill from him. Beside my advisor, I would also want to thank you my thesis committees: Associate Professor Dr. Pinai Nanakorn, Assistant Professor Dr. Munin Pronsapan and Dr. Panumas Sittivaekin for their useful comments and suggestions to improve the quality of my work.

Another important person who helps me to accomplish my study is my boss, Professor. Lisa White, from Oxford University. She gave a tremendous support and understanding to me and my study from the first day that I applied for my LL.M. program at Thammasat University until the end of my course. Without her generosity and inspiration, I may not finish my study.

Last but not least, I would like to thank you all my friends and family for the understanding, love and encouragement during the tough time. I may not achieve this goal if I do not get the support and morale from everyone, so THANK YOU very much.

I hope that this thesis will be useful for anyone who interest in this topics, however I would like to apologize if there is any mistakes.

Miss Divaree Fransen
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CHAPTER 1  
INTRODUCTION

1.1 Background and Issue

The arrangement of real estate property is extremely important under the Thai jurisdiction, as can be seen from many topics related to immovable properties in different Codes and Acts. Firstly, it is stated in the Land Code that everyone who possesses land must register and earn the title deed to prove his right to it.\(^1\) Subsequently, according to the Thai Civil and Commercial Code, any transaction involving immovable properties must be made in writing and registered with a competent official or it will be void.\(^2\) A mortgage transaction or hire of real estate property is also required to be in writing for it to be enforceable.\(^3\) These formalities and requirements are meant to protect the person with the right to the immovable property, whether an individual or the State, to claim against fraudulent conveyancers and intruders.

Although all kinds of real estate properties must be registered and the transfer of real estate rights has special requirements, numerous journalists and news broadcasters have reported incidents of land grabbing and land invasion in various places for the past several years. Real estate litigation is one of the common arguments between individuals.

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\(^1\) Thai Land Code B.E.2497 §5-§7  
\(^2\) Thai Civil and Commercial Code §456  
\(^3\) Thai Civil and Commercial Code §538 and §714
and there are numerous tricks to seize the land of others in these modern times. Since these tricks may only be used based on loopholes in the legal system or the shortcoming of land management, they reflect the failure of the Thai real estate system and law. Some tricks may be screened out by a scrupulous investigation during the registration process, but the investigation may be insufficiently effective, since there are still many disputes over real estate properties. Not only are there arguments between individuals, but there are also arguments between State authorities and individuals. Some of the notable land invasions during the past decades have taken place in the “Wang Nam Khieo” district, Khao Kor-Phetchaboon and Pa Bang Kanoon-Phuket. These are evidence of insecure registration and unreliable certification of ownership because, although the possessor has a legitimate certificate of ownership, he can still lose his right to the land. These legitimate certificates of ownership are issued for land owned by other local individuals or land that

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is under the supervision of other organisations and this causes a conflict of interest that subsequently leads to litigation. The consequences of the weakness of the Thai land registration system can be pointed out in three major problems: 1) uncertain real estate information; 2) transfer of land without ownership; and 3) use of a nominee in the real estate transaction. These problems with the current land administration in Thailand cause many arguments over land and make people feel insecure about their right to possession.

It has been observed that the problems and disputes about land in Thailand are the consequences of several flaws in land administration. Primarily, too many organisations are responsible for land management, but the overall land management is still poor. Each organisation follows its own mission and function and only works within its own scope and area, and sometimes their work overlaps and is fragmented; for example, in the Wang Nam Khieo district, the Forestry department\(^7\) is working to protect the national parks and reserved forests, while the Land Development department\(^8\) follows its mission by issuing reformed land to local people so that they can use it to make a living. Furthermore, there is no definite boundary for public land, forestland, national park land or waste land in Thailand. Although they are all clearly identified as state property, their expositions are blurred. The organisations that are responsible for the same plot of land may misconceive the extent of their authority, which provides an opportunity for misconduct and unfair benefits. As a result, the conflicting missions, scopes of duties and

\[^7\text{กรมป่าไม้ กระทรวงทรัพยากรธรรมชาติและสิ่งแวดล้อม}\]

\[^8\text{กรมพัฒนาที่ดิน กระทรวงเกษตรและสหกรณ์}\]
information possessed by these organisations result in uncertain real estate information and unreliable real estate transactions.

Furthermore, the poor land administration causes confusion and uncertainty at the registration stage. Public officials from each department only perform and understand the work within the scope of their own organisation. There is no mediator, whether a person or electronic system, to facilitate a connection between these organisations. The absence of a central land information system or intermediary who can assist the parties to verify the status of the title deeds and their rights and abilities in real estate transactions, pushes them to complete the land registration process themselves. This includes checking the certificate of title, ascertaining the legal zone status of the property and completing the entire registration process until the contract has been executed and the relevant tax paid. This causes a number of land disputes because many Thai people have no knowledge of the real estate process. Some buyers hire a legal professional or lawyer to help them with the transaction, but this is not a requirement. Hence, there are not enough checks and balances in cases where no legal professional or lawyer is involved because most people have insufficient knowledge and understanding of the process or any regulations related to real estate transactions.

On the other hand, a legal professional called a “notary” has a duty to certify the status and capability of real estate properties before the registration stage in many countries, such as France, Germany, the United Kingdom, the Netherlands, etc. Therefore, notaries play a significant role in real estate transactions in many countries. Transactions are invalid and unenforceable against third parties without an authentic notarial deed. The
duties of a notary often start at the beginning of the real estate transaction when he checks the title deed of the property and then gives advice and drafts a contract for the parties until the registration and payment have been completed, although the notarial act is only mandatory at some stages. As a result, real estate transaction is one of the main missions of notaries in many countries, especially civil law counties, such as France, where it was reported in January 2017 that more than half of French notaries’ activities involved real estate transactions.\(^9\)

The use of a notary is considered to be a worthy intervention for reducing real estate transaction disputes. It can be observed that post-contractual disputes in countries with civil law notaries only account for 0.2 percent of all disputes, while the rate of post-contractual disputes in the United States is approximately 10 percent.\(^10\) Therefore, many countries include a “notarial act” in their Real Estate registration system. Furthermore, notaries have already appeared in the real estate transactions of some Asian countries, such as Japan\(^11\) and China,\(^12\) although the role of the notary in the real estate field in these countries is still not mandatory, unlike European countries.


\(^10\) Ibid


\(^12\) Lei Chen, ‘Property Registration System in China: Theory, Practice and Future Challenges’ (SSRN, 2013)
Notaries or Public Notaries have been studied and discussed for decades in Thailand and a few theses have also been based on this profession, although they were mainly focused on the role of a notary in drafting and certifying general documents. In fact, civil law notaries have many missions and are engaged in many activities, such as corporate affairs, real estate conveyancing, inheritance and marital issues. Although it was recommended in one thesis based on land subdivision that a notary should also be involved in real estate transactions in Thailand, neither this thesis nor any other work has investigated notaries with a real estate mission. Since notaries and notary acts are quite important in European countries, it may be that their existence and implementation are what reduces the number of disputes over land in this region. Therefore, it may be worth

13 จุฬชฎางค์ สวัสดิยากร, ‘แนวทางการจัดตั้งระบบงานในราชการปัปลิกในประเทศไทย’ (ชูกลางกรร มหาวิทยาลัย, 2549)(Chulachadang Swasdiyakorn, Establishment of a Notarial System in Thailand (Chulalongkorn University, 1996))

14 Id. Chanida Laophiphatanakul
studying notaries and their real estate mission to find a way to improve the system of real estate registration in Thailand.

1.2 Hypothesis

The possession of land in Thailand is insecure because there is no central land information system or intermediary to verify the background of the land and the parties in real estate transactions. Hence, it is very important to undertake a thorough investigation during the real estate registration process because an inefficient investigation may lead to subsequent disputes and the injured parties bear the risk of loss and damage. However, in real estate transactions in some countries, there is an intermediary called a “notary”, who is responsible for verifying the status of the land and the abilities of the parties before the transaction can be registered. Therefore, the involvement of an intermediary in real estate transactions will assure parties that the transaction is secure and reliable. Notaries must act based on a professional standard and the rules and regulations of the profession, since they will be held responsible for any loss and damage caused by their actions.

1.3 Objective of study

This thesis has the following five objectives;

1) To study the laws and regulations for the land registration process in Thailand;
2) To study and analyse the problems that arise from the current land registration process in Thailand;

3) To explore foreign real estate conveyancing and land registration processes and the interventional measures they use to prevent post-contractual disputes;

4) To study the notary profession from the development of a notary and the controls and regulations to the role and responsibilities of a notary in general circumstances and particularly in the context of real estate conveyancing in both Civil Law and Common Law systems;

5) To propose recommendations for the land registration process in Thailand to resolve the current problems and improve the effectiveness and efficiency of the land registration system.

1.4 Scope of study

The scope of this thesis is the real estate conveyancing process and the land registration process in Thailand and another four countries, namely, France, Germany, the United Kingdom (England and Wales), and the United States of America. The study focuses on the intermediary profession called “Notary”, that some foreign countries use in their conveyancing process as an interventional measure, by examining the development of Notary, the control and regulations, the role and responsibilities of Notary in general circumstances and also in the real estate conveyancing process context, in both Civil Law and Common Law systems. The thesis also examines the land
registration system in Thailand and how the loophole in Thai registration process causes problems. The analysis, subsequently, deliberate and implement the development of Notary in Thailand in order to ameliorate current problems resulting from the inefficient land registration process.

1.5 Methodology

This thesis is a documentary research based on various books, articles, academic journals and publications, domestic and foreign laws and regulations, court decisions, reports from conferences, organisations’ websites, and newspapers.

1.6 Expected Results

The study is expected to yield the following results;

1) An understanding of the law, regulations and real estate registration process in Thailand;
2) An understanding and better awareness of the loopholes in the Thai real estate registration system and subsequent problems;
3) An understanding of the interventional measure used to prevent possible post-contractual disputes in foreign countries;
4) An understanding of the notary profession in general, as well as in the context of real estate conveyancing in Civil Law and Common Law systems;
5) Some recommendations for the development of the Thai law and regulations in terms of the land registration process in order to resolve the current problems and improve the effectiveness and efficiency of Thailand’s land registration system.
CHAPTER 2

REAL ESTATE REGISTRATION IN THAILAND:
PROCESSING & PROBLEMS

2.1 Real Estate Registration Processes

There have been disputes about the possession of land or immovable property since ancient times. For example, in Thailand, the land administration and certificate of land possession were established in the Ayuthaya period\(^\text{15}\) in an attempt to solve disputes over boundaries and the possession of land, and also for the benefit of tax collection. The land administration was developed more intensively in the Rattanakosin period\(^\text{16}\) with the advent of technology. Cadastral surveys and land registration were introduced and the land law was established in 1954 by the Act Promulgating the Land Code, B.E. 2497.\(^\text{17}\)

It is concisely stated in several clauses of the Thai Civil and Commercial Code that certain kinds of immovable property transactions are required to be made in writing and registered in the public records by a competent official.\(^\text{18}\) These important conditions affect the validity or enforceability of the transaction, depending on the type of business.

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\(^\text{15}\) Ayutthaya era B.E. 1893-2310 (1350-1767)
\(^\text{16}\) Rattanakosin era B.E. 2325-present (1782-present)
\(^\text{17}\) กรมที่ดิน, ‘ความเป็นมาของการออกโฉนดที่ดิน’ (กรมที่ดิน, 2559) (Department of Lands, ‘History of Title Deed’ (Department of Lands, 2016)) retrieved from http://nam.dol.go.th/Pages/ความเป็นมาของการออกโฉนดที่ดิน.aspx (accessed 1 Dec 2017)
\(^\text{18}\) Thai Civil and Commercial Code §456, §525, §538, §714, §1299, §1702
Although the law sets these requirements in special clauses only for common real estate transactions, such as sales, long-term rental, mortgage, and hire of immovable properties, the cover is extended to other kinds of real estate transactions in Section 1299 of the Thai Civil and Commercial Code. Section 1299 is not limited to the acquisition of immovable properties, but extends the cover to the rights related to real estate properties. As a result, all kinds of rights related to real estate properties must be made in writing and/or registered with a competent official, or they cannot be claimed against any third party who acquires the same property in good faith and has registered his right to such property. Hence, the possessor may not enjoy the full force and benefit of the property without registration or a written document.

It can be seen from the law that all real estate activities are controlled by the State and any transfer or change of rights and duties of immovable properties must be reported to the State Authority in the form of the Department of Land. This Department currently has many regional offices in various districts to serve the public by closely facilitating real estate administration work. The land officials at regional/provincial offices are given the power to register all transactions for the public so that individuals can contact any provincial land office to register their real estate transactions unless an announcement needs to be made first, in which case the transaction must be registered at the provincial office where the land is located.\(^{19}\)

Real estate is usually registered by individual transferors and transferees because there are no notaries in Thailand. Transferors and transferees contact the provincial land

\(^{19}\) Thai Land Code B.E.2497 §71-§72
office for registration. All the parties must present themselves at the registry office to prove and affirm their identities and intentions, but if one party is not able to attend, he can empower someone else to act on his behalf. The transferees normally undertake the duties and work before the registration stage because these are actions that benefit them. They may have to start from checking the property, making an agreement, preparing the paperwork and operating the process until the transaction is complete. Most of the duties and work at the registration stage are undertaken by the land official, who will investigate several aspects of the property and the parties in order to protect the real possessor or the public from any dispute or damage that may occur in the future.

Although lawyers may play a role in real estate conveyancing in some cases from the time the agreement is made to the registration stage, they do not appear in every real estate transaction. This is because Thai law does not require any mediator in a real estate transaction and the use of a lawyer or legal professional will add to the expense for the contractual parties. The consequence of the absence of a middleman or facilitator, who can assist the contractual parties and the registrar, is that mistakes can be made during the registration, since many individuals are unfamiliar with the registration process and, at the same time, the registrar may not spot all the details because of a heavy workload. As a result, it is inevitable that an inefficient registration system may cause some problems later. This chapter will contain a discussion of the common practice of Thai real estate transactions by separating it into two parts, namely, the time before the registration stage and the time during it. Then, the three major problems caused by the poor registration system in Thailand will also be discussed.
2.1.1 Pre-Registration Stage

It seems that there are currently a great many disputes and cases of fraud in real estate transactions involving fake title deeds, unclear boundaries, unauthorised sales, etc. Hence, counterparties are encouraged to make certain arrangements before the registration stage to avoid problems and prevent loss from deception and misinformation. They are advised to make a written agreement at the pre-registration stage and do some preliminary checks on the property and the counterparty to ascertain the legal status of the property, the right of the owner or possessor to the property, the charge on immovable property, or check the real estate itself, etc., before entering into the agreement. These preliminary checks may vary in different kinds of transactions and/or by the agreement of the parties. It is quite common for parties to make a written contract prior to the registration stage for reciprocal agreements in which both sides benefit, such as sales or mortgage agreements, while there are no proper formalities between the parties in unilateral contracts, such as gift contracts or inheritance, which only benefit the receiving party. Nevertheless, there is no particular legal provision requiring any checks prior to real estate registration in Thailand; therefore, counterparties parties only make them for their own benefit because they will help them to make more precise agreements prior to the registration. They are free to choose whether to make one or more checks, or none at all. The practices during the pre-registration stage in some circumstances are discussed below.
2.1.1 Sales Transactions

The practice of buying and selling real estate property should be discussed first, since this is the major real estate activity; hence, it is important that the parties, especially the buyer, should act with discretion and make thorough checks in order to prevent loss and disadvantage. When purchasing real estate, buyers must check the property, its status and documents, and the right of the seller, before making an agreement. Therefore, buyers should usually do a preliminary check on the property to determine its condition, such as how it looks, if it is in a good area, if anyone is living there, etc. They should then contact the provincial land office to check that the details on the title held by the seller are correct and the same as the duplicate version at the land office. They should also ask the land office official to check the status of the title in terms of whether there are any obligations attached to it, such as more than three years’ hire, mortgage or consignment contract, or any litigation or other attachment over the property because the charges on immovable property normally affect its price; moreover, they should ask the land office official to check the appraised value\(^2\) of the real estate property. Although it is not necessary for the buyer and seller to buy-sell at this price, the appraised price will help

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\(^2\) The appraised value or appraised price of land is the price set by the Department of Land. The appraised value of each piece of land varies based on its location, uniqueness and the demand for that particular piece of land. The Departments of Land usually assesses every piece of land and establishes a price chart every four years showing the current value of each piece to enable the general public to estimate the value of real estate at that time. The registry fee and tax will also be calculated based on the appraised price.
buyers to make a decision on the selling-buying price so that they pay a price that is close to its true value. Furthermore, in cases where buyers are unsure of the boundary and the area of the land, they can also contact the provincial land office for a cadastral survey. Although a cadastral survey is only required in cases of land subdivision or the issuance of a new title deed, it may be necessary in a sales transaction if the coordinating mark is unclear or different from its title deed. Nevertheless, cadastral surveys are costly and time-consuming.

Having ascertained the salient information about the property, whether there has been a preliminary check or not, the parties normally make a contract called a “to buy and to sell contract21” before going to the land office for registration. This kind of contract is mainly made when trading immovable properties because the law states that the validity of real estate transactions is subject to a written agreement and registration before a competent official; hence, the actual contract of sale of immovable properties can only be formed at the moment of registration. Therefore, contracts of real estate sales made prior to registration are invalid. A solid agreement pre-registration can only be in the form of a “to-buy-and-to-sell” contract. This kind of contract usually includes an agreement about the price, when and how the payment will be made, the date and place of registration and a deposit in some cases. While it is unnecessary to have a written agreement or a deposit, they will give both the buyer and seller a certain degree of security because it is a promise that they will both perform their duties as agreed in the

21 To buy and to sell contract is a contract which create rights and duties over the parties.
contract. If one party breaches his duty, the other can file a claim to the court or reclaim the deposit. Nevertheless, the contract will only be enforceable and accepted in court if it contains a clause indicating the duty of the counterparty to register the transaction at the land office on a specified date. Without such a clause, the contract is considered to be a sales contract, which can only be valid when it is registered before a competent official. Therefore, it is important for counterparties to have some legal knowledge or experience of land registration, or someone who can advise them. This is why it is common for counterparties in real estate sales transactions in Thailand to have their own lawyer, who will assist in the negotiation, prepare the required documents, and facilitate the registration process until the end of the transaction. However, the lawyer does not have the duty to certify the transaction, nor can he be held responsible for any mistake that is not his fault.

2.1.1.2 Mortgage Transactions

Mortgage is another frequent real estate transaction. Mortgage agreements are another kind of suretyship contract with immovable property as the collateral for the loan. These transactions can either consist of a loan between individuals or a loan between an individual and a financial institution. Mortgage contacts are sometimes made at the same time as sales agreements; for example, when buying a new house, the house itself is used to guarantee the loan. Similar to sales contracts, there are no particular

22 Thai Civil and Commercial Code §377
23 Thai Civil and Commercial Code §378
24 Thai Supreme Court Judgements: 6503/2545, 599/2546, 144/2549, 14921/2555
requirements before a mortgage registration; however, in practice, there is usually an initial agreement about the loan or mortgage beforehand and the same contract is written and re-issued by the registrar at the registration stage in order to keep a record. An initial contract is an agreement between the parties about the terms and conditions of the loan and repayment. Hence, the mortgagee should check whether there is any charge on the immovable real estate property before entering into such an agreement because the charge on the property may have some influence on the decision-making about the terms and conditions and/or the assessment of the property’s value. If the mortgage is with a financial institution, the institution normally checks the background of the real estate before creating the mortgage contract so that it can establish terms and conditions to suit the value of the collateral and the borrower’s capability to repay the debt. However, these practices are only for their own benefit, since there is no specific legal requirement for real estate mortgage cases, similar to the sale of immovable property.

2.1.1.3 Gift Transactions

Unlike the other above-mentioned contracts, there are no formalities before the registration of gift contracts because these are unilateral contracts that only benefit one side, namely, the receiver. In normal circumstances, a gift contract is valid when the gift has been delivered to the receiver;\(^{25}\) therefore, it is not necessary for the donor and donee to make any agreement in advance or check the gift beforehand, since the donee can only accept the gift in its current condition. The donee will only receive the rights and

\(^{25}\) Thai Civil and Commercial Code §523
duties of the donor of the property. However, a gift of real estate is like any other kind of real estate transaction in which the law states that the transfer of real estate property will only be valid when it is registered by the competent official;\textsuperscript{26} hence, the rights and duties of the donor of the real estate will be completely transferred to the donee upon registration.

2.1.1.4 Inheritance Transactions

Similar to gift contracts, the inheritance of real estate is a legal transaction that only benefits one side. Based on its nature, there is unlikely to be a contract between the heir and the testator and it is uncommon for heirs to make checks on the property before registration, like real estate sales or mortgages. In inheritance cases, the registrar usually considers if there is an administrator of the estate and if there is not, the inheritor must file a request, together with the required documents, in person to the registrar, but if there is an administrator, the inheritor must present a Letter of Administrator\textsuperscript{27} from the court to the registrar as well.\textsuperscript{28} When the registrar has accepted all the documents, the request must be advertised to the general public before the passage of title can be registered in order to give anyone a chance to oppose the transaction.\textsuperscript{29} This announcement must be

\textsuperscript{26} Thai Civil and Commercial Code §1299 paragraph 2
\textsuperscript{27} A document issued by the court that serves as evidence that the person has been appointed as the administrator of the estate.
\textsuperscript{28}กรมที่ดิน,'การโอนมรดกโดยมีผู้จัดการมรดก'(กรมที่ดิน, 2550) (Department Of Lands,' Real Estates Inheritance with an Administrator' (Department of Lands website, 2007)) retrieved from http://www.dol.go.th/lo/smt/article/article12.htm (accessed 6 Dec) 2017
\textsuperscript{29} Thai Land Code B.E. 2497 §81
made in writing and posted at the regional land office, the Town Municipality, as well as on the property itself for 30 days. In the event that there is no opposition, the registration will continue. The Letter of Administration and the 30-day announcement both act as a kind of check to examine the rights of the person making the request before passing the title to the claimant.

Last, but not least, after the counterparty has acceded to all the requirements, it will set a date and prepare all the necessary documents for registration. Since each kind of transaction requires different documents, claimants can check the documents that are needed for their business on the website of the Department of Land. They should also prepare money for paying revenue tax and duty, a transaction service fee and business taxes that specifically relate to their business. The rate of transaction fees and taxes vary based on the type of the transaction and also the identity of the parties. For example, the registration service fee for real estate conveyancing from ascendants to descendants or between spouses is 0.5 percent, while it is 2 percent for others. This is a fixed rate that is established in Ministerial Regulations 46 and 47. The total amount of the transaction fee, taxes and duties of each transaction will be calculated from the rate specified in the Ministerial Regulation and the appraised price. The law generally states that both sides share the responsibility to pay the service fee, taxes and duties equally, unless otherwise agreed by the counterparty.

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30 Ministerial Regulations No. 47
31 Thai Civil and Commercial Code §457
32 Thai Civil and Commercial Code §151
2.1.2 Registration Stage

Since the law enacts that several real estate transactions, such as sales, mortgages, gift etc., must be registered in the public record, after the agreement has been settled, the counterparty must bring the certificate of ownership to the Department of Lands or at any regional land office to register the concluded agreement with a competent official. At the registration stage, the land official will investigate the right of the conveyer to the property before the registration proceeds. If the ownership information is reliable, the official will hold an inquiry into the real estate transaction in order to make a contract to record the transaction. The details of the inquiry at the registration stage will be discussed in this sub-section.

The most crucial task at the registration stage is to conduct an investigation of the right to the property, whether the sale involves real estate, gifts, etc. At the registration stage, the land official has to ensure that the person who requests the transfer of his right to the real estate property to another person has the right to do so, because if he does

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34 Thai Land Code B.E. 2497 §71-§72


not, it will cause huge damage to the real owner, as well as the buyer or third party. Therefore, the official must check all the documents and take the actions specified below.

2.1.2.1 Investigate on the Rights and Capabilities of the Owner

Firstly, the land official must check the capability and rights of the transferor. It is important to determine if the transferor is able to perform such a transaction because the entire transaction can become void or voidable if he is not. For example, a sale of real estate in which the buyer/seller is a minor under 20 years old is voidable until the legal representative accepts or denies it. Moreover, the official must check the right of the transferor to the property. He will have to verify that the realty has no charge on it because the whole transaction may be withheld or dropped if there is any obligation on the property, like seizure, attachment, litigation or any other obstacle.

In cases where there are many owners, the estate is subject to shared ownership and every owner must agree and give his consent to the transaction to pass the right of the entire property to the transferee. If any of them do not approve, the transaction can only be valid on the transferor/s’ part. In cases where the ownership of the property is shared, the name of all the owners will be shown on the title deed. Therefore, at the registration, the registrar has to check that all the owners have given their approval. The official will have to be careful in the case of marriage because the estate can be either community property or private property. When couples are legally married all their properties are normally shared as community property. Land obtained after the marriage

37 Thai Civil and Commercial Code §21
will be subject to shared ownership automatically without the need for the names of both spouses to be specified on the title deed unless there was an agreement before the marriage.\textsuperscript{38} Thus, real estate transactions must be undertaken based on the consent of both spouses or they can be revoked by the court.\textsuperscript{39} If a couple made a prenuptial agreement to separate or arrange the property between them, they must also present a copy of this agreement to the land registrar. Furthermore, in cases where the transferee is married, the official must check that the spouse is not a foreigner because foreigners are not allowed to own real estate in Thailand under Thai law. If one of the spouses is a foreigner, the official must ask the couple to confirm that the real estate is the private property of the Thai spouse.

Another issue related to the authority of parties that needs to be carefully checked is empowerment. The official should also ensure that the person who gives the power has a right to the property. The parties must also submit the power of attorney\textsuperscript{40} to the registry. In cases where one party is a company, the official needs to ensure that a person who acts on behalf of the company or gives the power to that person has the authority to do so. In these cases, the registrar must substantially ensure that the person who signs the power of authority has the right to act on the company’s behalf by checking the corporate memorandum. For example, for a mortgage with a corporation or financial institution, the official must ensure that the documents have been approved and signed

\begin{footnotes}
\item[38] Thai Civil and Commercial Code §1476/1
\item[39] Thai Civil and Commercial Code §1476
\item[40] A power of attorney is an instrument authorising another to act as one’s agent or attorney: Bryan A. Garner, \textit{Black's Law Dictionary} (8th edn, 2004) p3713
\end{footnotes}
by an authorised person and the name of the authorised person on the mortgage contact must match the memorandum of the institution.

In the case of an inheritance,\textsuperscript{41} the land official must verify the applicant/s’ right from supporting documents, i.e. a death certificate of the \textit{de cujus},\textsuperscript{42} a genealogical chart, a will, or a court order. A genealogical chart is usually created by the land official during the registration. This helps the registrar to view the family line and understand how the estate is separated because the chart will depict all the descendants and relatives of the \textit{de cujus}, both dead and living, in sequential order. Moreover, an administrator of the estate must be appointed by the court in cases where managing the estate is problematic, whether there are conflicts between the heirs or the \textit{de cujus} had many properties, rights and duties. To transfer realty that is one of the \textit{de cujus}’ properties, the land official must also collect a Letter of Administration\textsuperscript{43} from the representative heir to ascertain that the heir who filed the request has the authority to transfer the right to the land. Not only this, but if the \textit{de cujus} made a will before he passed away, the registrar may ask for a copy to be submitted for the registration. This may be an important supporting document because estates are usually divided and transferred based on the \textit{de cujus}’ wish stated in the will.

\textsuperscript{42} The deceased who owned the estate.
\textsuperscript{43} A Letter of Administration is an official document issued by the court to appoint someone as the administrator with the authority to manage the estate.
When the official has received all the relevant documents, if it is an inheritance case in which the law does not require an announcement to be made prior to registration, the process will continue the same as in other circumstances. However, if it is a case in which the law requires an announcement to be made before the transfer of the property, there will be a pause in the process for a 30-day announcement to give people a chance to oppose the transfer.\textsuperscript{44} The land official will issue a notice to post in the regional land office and the town municipality, as well as on the property. In addition, he will also send a letter to all the heirs, or as many as possible, in case they wish to oppose the transaction. If there is no opposition after 30 days, the heir will receive a confirmation letter from the land office to continue the registration process.

2.1.2.2 Verify the Land Directory and Land Title Deed

Secondly, the registrar must check the land directory and title deed to determine that the presented title deed is the original and real one. This can normally be done by observing the number of the title deed, the Garuda,\textsuperscript{45} the quality of the paper, etc. The land official will also compare the details and the listings of the presented version with the duplicate version at the land office. Apart from the title deed, the registrar must also examine the other presented documents to determine that they are correct and true, He should then verify that the property is not restricted in any way. For instance, there should be no attachment to the property and there should be no prohibition or limitation on its

\textsuperscript{44} Thai Land Code B.E. 2479 §81

\textsuperscript{45} A Garuda (ตราครุฑ) is a symbol of a legendary bird in Hindu/Buddhism mythology used as the letterhead on public documents.
transfer. Some types of certificate of ownership do not allow the transfer of ownership or have some conditions of transfer. For example, a Nor-Sor 3 certificate prohibits the transfer of ownership, and a Nor-Sor 2 certificate\textsuperscript{46} only allows the transfer of an inheritance after the owner has held it for more than 10 years. Furthermore, no conditions should ever have been attached to the property before, such as prohibiting the transferee to pass it to another person.\textsuperscript{47}

2.1.2.3 Establish a Contract

The next step of the registration after the investigation of the individual and the property involves creating a contract. Since the law has enacted that the transfer of real estate can only be valid when the transaction is registered with a competent official, a

\textsuperscript{46} Nor-Sor-2 certificates and Nor-Sor-3 certificates are instruments issued by the Authority to show that the proprietor has the right to possess and utilise land without completely owning it. A Nor-Sor-2 certificate is an instrument that gives an individual the right to utilise land for a specific period of time. This individual does not have the ownership right to the land, so he cannot sell it. The right can only be transferred via inheritance. The Nor-Sor-3 is an instrument that shows that the land has been utilised. The instrument certifies the possessory right to the land of the proprietor, but it does not give the proprietor ownership of the land. Nevertheless, this right can be sold to others when the proprietor relinquishes his right to another person. A Nor-Sor-3 certificate can be turned into a title deed when the land office calls for the proprietor of each area to register the land.

\textsuperscript{47} Thai Civil and Commercial Code § 1700, and Department of Land’s order number 4/2502 as of 29 May 2502 (1959)
contract will be formed when the ownership is transferred from one person to another; in other words, the contract is actually created when the transaction is registered with a competent official. Hence, the land office also provides a public service by writing an agreement at the moment of registration. This agreement will be stored in the land registration records and three copies will be printed for each transferee, the transferor, and the revenue department. All the parties must sign the contract before the copies are distributed and the registrar will ask the transferor to add a special condition if there is any. The transferor will usually be asked to add a clause mentioning that the registrar and the land office will not be held responsible for the damage caused by any mistakes made during the transaction.

2.1.2.4 Evaluate Land for the Expenses of the Transaction

Every real estate transaction costs money. The registrar will calculate the service fee, taxes and duties based on the value of the property and the type of transaction. As discussed earlier, the value of the property is considered based on the appraised price of the land plus the value of the house or building minus some depreciation. The regional land office collects this money on behalf of other organisations; for instance, the service fee will be sent to the Municipal Office and the taxes to the revenue department. Therefore, the applicant/s will have to pay the service fee, taxes and duties at the finance department of the provincial land office at the time the paperwork flows to the next stage.
The rates of the service fee, taxes and duties normally vary in each circumstance, depending on the type of the transaction, the relationship of the parties, the status of the parties and some conditions of the transactions; for example, transactions that involve compensation are more expensive than those that do not. Notwithstanding, the registrar has a regulatory guide for calculating these expenses and examples of the calculation of each cost in ordinary circumstances are provided below.

The service fee is the cost of the transaction service provided by the local land office. In most sales, gift and inheritance transactions, the land office charges a service fee of 2% of the appraised value or selling price, depending on which is higher.\textsuperscript{48} In the case of gift or inheritance transactions between spouses or between ascendants and direct descendants, the land office only charges 0.5% of the appraised price or selling price.\textsuperscript{49} The service fee for registering a mortgage transaction or a preferential right is usually 1% of the transaction value, but the total amount will not be more than 200,000 baht per transaction.\textsuperscript{50} If it is a mortgage or servitude transaction with an agricultural cooperative financial institution or a financial institution specified by the government, the service fee will only be 1% of the transaction value and not higher than 100,000 baht.\textsuperscript{51} If the transaction does not involve compensation, the service fee will only be 50 baht.\textsuperscript{52}

\textsuperscript{48} Ministerial Regulation No.47 (BE 2541) Clause 2 (7) (น-า)
\textsuperscript{49} Ministerial Regulation No.47 (BE 2541) Clause 2 (7) (ต-ด)
\textsuperscript{50} Ministerial Regulation No.47 (BE 2541) Clause 2 (7) (ง-ฉ)
\textsuperscript{51} Ministerial Regulation No.47 (BE 2541) Clause 2 (7) (จ-ฉ)
\textsuperscript{52} Ministerial Regulation No.47 (BE 2541) Clause 2 (7) (ฎ-น)
The second cost is taxes, more specifically, personal income tax. According to the revenue code, all kinds of assessable income\textsuperscript{53} are subject to tax, and income from real estate activities, including the value of the real estate obtained, is considered to be income under Section 40(8)\textsuperscript{54}. Hence, the amount earned from selling real estate or earnings from real estate is also subject to tax. The tax is calculated at different rates in proportion to the total net income. The rate for each portion is shown in Table 2-1.

Table 2-1: Personal income tax rate for the tax year 2560 to be filed from 2018 onward.\textsuperscript{55}

<table>
<thead>
<tr>
<th>Net Income</th>
<th>Tax Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net income that does not exceed THB 150,000</td>
<td>0</td>
</tr>
<tr>
<td>Net income between THB 150,001 and 300,000</td>
<td>5</td>
</tr>
<tr>
<td>Net income between THB 300,001 and 500,000</td>
<td>10</td>
</tr>
<tr>
<td>Net income between THB 500,001 and 750,000</td>
<td>15</td>
</tr>
<tr>
<td>Net income between THB 750,001 and 1,00,000</td>
<td>20</td>
</tr>
<tr>
<td>Net income between THB 1,000,001 and 2,000,000</td>
<td>25</td>
</tr>
<tr>
<td>Net income between THB 2,000,001 and 5,000,000</td>
<td>30</td>
</tr>
<tr>
<td>Net income from THB 5,000,001 and above</td>
<td>35</td>
</tr>
</tbody>
</table>

\textsuperscript{53} It is stated in Section 39 of the Thai Revenue Code that “Assessable income” is income that is taxable under Chapter 3 of the Revenue Code. Such income also includes property or any other benefit received that may be computed into a monetary value, any amount of tax paid by the payer of income or by any other person on behalf of a taxpayer and tax credit under Section 47 Bis.

\textsuperscript{54} Thai Revenue Code § 40(8)

\textsuperscript{55} Income tax rate attached to Chapter 3, part 2, of the Thai Revenue Code
It is worth noting that the first 200,000 baht of income earned in a single tax-calendar year from the sale of immovable property or derived from immovable property located outside Bangkok, municipality, sanitation district or Pattaya City and obtained via an inheritance or a gift, are exempted from tax.\(^56\)

The expenses must be deducted from the assessable income to obtain the net income before calculating the tax. The standard expense rate stipulated by the law for each year of possession can be seen in Table 2-2.

Table 2-2: Standard expense rate prescribed by Royal Decree No. 165 B.E. 2529

<table>
<thead>
<tr>
<th>Duration of Possession (years)</th>
<th>Expense Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year</td>
<td>92</td>
</tr>
<tr>
<td>2 years</td>
<td>84</td>
</tr>
<tr>
<td>3 years</td>
<td>77</td>
</tr>
<tr>
<td>4 years</td>
<td>71</td>
</tr>
<tr>
<td>5 years</td>
<td>65</td>
</tr>
<tr>
<td>6 years</td>
<td>60</td>
</tr>
<tr>
<td>7 years</td>
<td>55</td>
</tr>
<tr>
<td>Over 8 years</td>
<td>50</td>
</tr>
</tbody>
</table>

*Expenses for immovable property obtained via an inheritance or gift are 50% of the value of the property for every year of possession.\(^57\)

\(^{56}\) Ministerial Regulation No.47 (B.E. 2541) Clause 2 (17) (ช-g)

\(^{57}\) Thai Revenue Code §48 (4) and§ 50(5) (A-ก)
The assessable income must be multiplied with the expenses of the years of possession to yield the total expenses during the possession, which will be subtracted from the assessable income to obtain the net income of the period of possession. Then, the net income of the period of possession must be divided by the years of possession in order to obtain the net income per year, which will be used to calculate the tax, as shown in Table 2-1.

\[
\begin{align*}
\text{Assessable income} \times \text{Expenses during years of possession} &= \text{Total expenses of the period of possession} \\
\text{Assessable income} - \text{Total expenses of the period of possession} &= \text{Total net income during the period of possession} \\
\text{Total net income of the possession} ÷ \text{Number of possession periods} &= \text{Net income per year (for tax calculation)}
\end{align*}
\]

Example 2-1:

If the selling price of a house in Surat Thani, which has been possessed for five years, is 10 million baht, the calculation of tax would be as follows;

**Step One: Find net income per year**

- First, deduct the standard expenses of 5 years of possession from the assessable income (the selling price) in order to obtain the net income for the tax calculation.
  
  THB 10,000,000 × 0.65 = Total expenses for 5 years of possession is 6,500,000 baht.
  
  THB 10,000,000 – THB 6,500,000 = Total net income for period of possession is 3,500,000 baht.
  
  THB 3,500,000 ÷ 5 Years = Net income per year is 700,000 baht.
Step Two: Find Tax Amount

- Since the property is located outside Bangkok, the first 200,000 baht of the net income is exempted from tax according to Clause 2(17) of Ministerial Regulation No.47 (BE 2541).

- The next THB 100,000 (THB300,000-THB 200,000) is subject to a 5% tax rate, which will yield 5,000 baht as accumulated tax.

- The next THB 200,000 (THB500,000- THB 300,000) is subject to a 10% tax rate, which will yield 20,000 baht as accumulated tax.

- The next THB 200,000 (THB700,000- THB 500,000) is subject to a 15% tax rate, which will yield 30,000 baht as accumulated tax.

When the total tax accumulated at each stage is added together, the total tax accumulated for 1 year is 55,000 baht. Since the period of possession is 5 years, the total tax accumulated, which needs to be paid on registration, is 275,000 baht.

However, the aforementioned illustration is only the calculation of the personal income tax rate. The rate will be different if the receiver of the assessable income is a corporation, since cooperate income is taxed at 1% of the assessable income. Hence, if a company sells a piece of land for two million baht, the corporate tax on the income for this transaction is 200,000 baht.

The third cost is duty or stamp duty. Duty is another kind of tax imposed on certain instruments specified in the Stamp Duty lists attached to Chapter 6 of the Revenue Code. According to these lists, stamp duty must be paid on any transaction that involves a
receipt for the transfer or establishment of any right on to immovable properties, and the rate of this duty is one baht for every 200 baht or 0.5% of the transaction value, i.e. the selling price, the appraised value, the property’s value, the loan amount, etc. Thus, duty is collected for registering every sales transaction, whether gifts, mortgages or referential rights, unless the transaction does not involve compensation. However, the duty rate for renting a house, building or any kind of immovable property, including a raft, for over one million baht for any purpose apart from farming is one baht for every 1,000 baht or 0.1% of the rental fee. If the parties fail to pay the duty, the instrument, whether it is the original version, the duplicate version or the copied version, will not be acceptable as evidence in any commercial court. However, duty is exempted for cases that involve the payment of specific business tax.

Specific business tax is a special tax for certain businesses that are specified in the Revenue Code, including the sale of immovable property for commercial purposes or profit. Therefore, the sale of real estate that has been possessed for more than five years is likely to be exempt from the specific business tax. The tax rate for the specific business tax.

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58 Thai Revenue Code Chapter 6 Stamp Duty No.28
59 ประกาศอธิบดีกรมสรรพากรเกี่ยวกับอากรแสตมป์ (ฉบับที่ 37) เรื่อง กำหนดวิธีการชำระอากรเป็นตัวเงินแทนการปิดแสตมป์ตราสารบางลักษณะ ข้อ2 (1) – ข้อ3 และบัญชีอากรแสตมป์ (Notification of Director-General of Revenue Department about Stamp duty (No. 37) Title: Determining on paying duties in cash instead of stamp duty for some instruments No.2(1)-No3 and Stamp Duty Lists), and The Revenue Code Chapter 6 Stamp Duty List No.1
60 Thai Revenue Code §118
61 Thai Revenue Code § 91/2 (6) §3, and Royal Decree No. 342 B.E. 2541 §4
62 Royal Decree No. 342 B.E. 2541 §4(6), and Revenue Order No. por. 82/2542 Section 7
tax for trading immovable property is 3% of the selling price or apprised price, whichever is higher.\textsuperscript{63} The transaction will also be subject to local tax, which is another 10% on top of the original specific business tax.\textsuperscript{64} For example, if the land is sold for two million baht, the specific business tax is 60,000 baht and the local tax is 6,000.

All the costs listed for each transaction must be paid at the registry office; otherwise, the registration is incomplete and cannot be claimed against the other parties.

\textbf{2.1.2.5 Approve the Transaction and Revise the Records}

After all the payments have been made, the application and all the documents will be sent for approval to the chief of the provincial land office, who will sign and stamp the document when the transaction is found to be reliable and then the paperwork will be sent to another department to update the land registry records. The name of the owner on the title deeds in both versions, the individual version and the land registration version, will also be changed. When the name on the title deed has been adjusted, the registration process is complete and the title deed will be returned to the new owner. The whole registration process usually takes one or two hours.

The land registration work in modern times has developed a great deal from the past. The registration process is much easier and faster than it was in the early days. In

\textsuperscript{63} Thai Revenue Code §91/6 (3)

\textsuperscript{64} กรมสรรพากร, ‘ภาษีธุรกิจเฉพาะจากการขายสิ่งอสังหาริมทรัพย์’ (กรมสรรพากร, 2551) (The Revenue Department, ‘The Specific Business Tax from Real Estates Sale’ (The Revenue Department, 2008)) retrieved from http://rdsrv2.rd.go.th/landwht/landwht06_4.asp (accessed 26 February 2018)
some areas, registration is now done via computer with a special programme designed for the land registry. The registrar can simply enter the information required for each type of transaction and it will be record on the system and kept permanently in the history of the real estate. Therefore, the registrar must check the documentation intently before entering it into the system. All information must be checked thoroughly and confirmed to be true because, although the intention is to improve the disclosure and fairness of real estate registration, a computer system cannot prevent the applicants from submitting false information. Hence, the investigation stage is the most important part of real estate registration. A minor mistake in the investigation during the registration may lead to major disputes over the land in the future.

2.2 Problems Related to the Real Estate Registration Process

Based on the discussion in the last section, real estate registration in Thailand seems to be secure and reliable, since the work is done in a systematic procedure and governed by concrete rules set for different circumstances. However, land management is still extremely problematic and there are a great many arguments over land possession in Thailand, some of which have been problematic for decades, such as forest invasion and land expropriation. Although the State has improved the land administration in various ways and introduced technology to manage the land registry and directory, arguments over land are still one of the top issues in Thailand. There has not only been an increase in the number of land disputes in the modern age, but they have also developed into
diverse forms. However, only three significant types of land disputes will be addressed in this thesis; 1) Problems caused by uncertain real estate information; 2) Problems caused by land transfer without ownership, and; 3) Problems caused by the use of a nominee in real estate transactions.

2.2.1 Problems of Uncertain Real Estate Information

It is unbelievable that, in Thailand, although a person holds a legitimate certificate of ownership, it is still possible that he may lose the right to his property, not because of a mistake during the conveyancing transaction, but because of an error in Thailand’s real estate information. The uncertain real estate information is the consequence of too many public agencies being responsible for managing land, while there is no proper connection between them and the lack of sufficient verification before processing conveyancing transactions. As a result, these diversified organisations overlap in terms of territorial claims. Although this overlap is actually the outcome of the inefficient administration of the State, it can cause an argument between the Public Authorities and private individuals or between private individuals themselves.

The overlap of territorial claims is one of the most problematic issues in Thailand that has been broadcast on the news for more than 30 years. This problem is the result of poor land administration in Thailand because nine Agencies from five Ministries are responsible for different areas of land. For example, the Royal Forest Department is responsible for reserved forest areas and the Agricultural Land Reform department is responsible for allocating land for dwelling and farming to locals. Each agency has its own
map showing the boundaries of its responsibility and interestingly, when there was a survey in 2541, it was reported that the total public land on all the maps of these nine agencies was 450 rai, while the total area of Thailand is only 320 rai.\(^65\) This indicates that some maps are overlapping and there may be two or more agencies governing one area. Since each agency has its own mission and uses different laws, there are many different laws and various missions within one area. These regulations and missions sometimes collide and make it difficult to determine who is entitled to the land. Wang Nam Khieo-Nakornratchasima,\(^66\) Khao Kor-Phetchaboon,\(^67\) and Bang Kanoon Forest in Phuket\(^68\) are examples of areas where more than one Agency has authority over the land and two types of certificates of ownership are issued to the locals. Both certificates are legitimate, but subject to different laws.

Although these certificates are lawful, they still create problems in the long term. The owners have the right based on the certificate they hold, but the exercise of that right under this certificate can be wrongful under another law. This is because, in many cases, the government enacts a policy designed to help the locals to maintain their livelihood by giving them some parts of a preserved forest area under certain conditions. In these


\(^{66}\) Supra note 4

\(^{67}\) Supra note 5

\(^{68}\) Supra note 6
cases, some kinds of documents are issued, such as a Sor-Por-Kor certificate\(^\text{69}\) or a Nor-Sor-2 certificate, to guarantee the locals’ right to the land. However, these documents usually have some limitations and the land cannot be transferred except through succession. Nevertheless, they may change into different kinds of documents or a certificate of ownership over time, and then the possession of the land moves from locals to investors, leading to the destruction of the preserved forest land, which becomes an economic area. Therefore, the government has had to take action against these situations in many areas and this has caused enormous arguments in the media for years. In some cases where the situation is similar, but the government has still not taken any action, there may be some disputes between individuals instead. Both of them may hold a legitimate certificate of ownership of the same piece of land issued by different Authorities. In these cases, it may be necessary to investigate how the certificates were issued to determine which party has the better right to the land.

Since conflicts caused by overlapping territorial claims are the consequence of the inefficient land administration, the government of General Prayuth Chan-O-chla launched

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69 Sor-Por-Kor (หนังสือ ส.ป.ก.) is an instrument that gives the locals or farmers in the area or nearby the right to live or use the land reform for their living. This land reform area is land the government allocates for farmers or homeless people to utilise the land for their living, so the proprietors can only use it for farming or living. They do not have the ownership of the land, and the land cannot be transferred to anyone else, except through inheritance. If the land is not used for agricultural reasons, it must be returned.
a new project called “One Map”\textsuperscript{70} in 2015 in order to solve the problem of the unclear boundaries of responsibility of every organisation. This involved readjusting the territory and boundaries of responsibility of each organisation for the land in Thailand in order to eliminate all duplication, overlapping, or gap of functions. This project is supervised by General Prayuth Chan-O-cha and the new map will be the standard map used by every organisation. The map will display the borderlines of authority for each organisation, but it is not intended to be the only strategy deployed to resolve the problem of unclear real estate boundaries. There are other strategies related to the roadmap, such as revising the law and establishing actual rules and regulations for each public agency, which will also support the use of the One Map. The map is expected to more or less resolve the issue of overlapping territorial claims and, hopefully, it will generate some certainty of Thailand’s real estate information.

2.2.2 Problems of Land Transfer without Ownership

Transfer of land without ownership is the most common argument over land in Thailand. This is a situation in which the transferor is not the owner of the land and has no right to pass the ownership to another person. The transferor seizes or embezzles the

\textsuperscript{70} คณะกรรมการปรับปรุงแผนที่แนวเขตที่ดินของรัฐแบบบูรณาการ มาตราส่วน 1:400 (One Map), ‘การปรับปรุงแผนที่แนวเขตที่ดินของรัฐแบบบูรณาการ มาตราส่วน 1:400 (One Map)’(สำนักงานคณะกรรมการป้องกันและปราบปรามทุจริตในภาครัฐ, 2559) (The Committee of Improvement Of The 1:4000 Scale Map of The State Land Map (One Map), ‘The Improvement of State and Landscape Maps Integrated Scale 1:4000(One Map)’ (Office of Public Sector Anti-Corruption Commission, 2016)) retrieved from http://www.pacc.go.th/ (accessed 2 Jan 2018)
land from the person who has the legitimate right to it and then defrauds the transferee by claiming that he has the right to make a legal transaction on behalf of the true owner. This involves deception at the real estate registration, and if the registrar believes that the transferor has the right to process the transaction, he will complete it and enter it in the public record. Hence, the fraudulent transaction will be valid and be able to claim against a third party. This transaction will not only damage the real owner, but it will also cause a problem for the transferee and a third party as well. These deceptions subsequently lead to many lawsuits over land.

Based on the current crop of lawsuits, there are diverse tricks to transfer the land belonging to another person to oneself or to others. This can be done either by a close person, like a spouse, relative, friend, broker, partner/shared owner, or by any random person. Therefore, land owners must take care of their certificate of ownership/title deed for their own benefit. They should always be careful when someone borrows their real estate documents because it is possible that they can be forged and/or switched when they are returned in order to embezzle the real documents to use in real estate conveyancing. Land owners should also remember never to sign any document without reading it nor sign a blank power of attorney. Every time they empower someone, they should always specify the duties of the assignee. This is because there are so many land cases in which the land is transferred without the owner’s knowledge, since the owner has empowered someone with a blank power of attorney to work on a transaction, but that person has used the power of attorney to transfer the land to someone else and
damaged the owner. There are also numerous cases in which individuals falsely report to the land official that they have lost their certificate of ownership and request the issue of a new document, when, in fact, they are not the real owners who have the right to the land. These are only some examples of many deceptive strategies individuals use to snatch someone’s land and transfer it to someone else, but there are other strategies that are too numerous to mention here.

In addition, the owner is not the only person who will be affected by the transfer of land without ownership. It is possible that a transferee/receiver may also be affected, especially when it is a reciprocal transaction. Since the general principle of law is that no-one gives what he does not have, the transferee/receiver does not have the right to the land he receives from the transferor, who also does not have the legitimate right to it, because the transferee cannot have a better right than the transferor unless the situation falls into one of the exceptions to this rule. One of the most remarkable land scandals and the Nemo Dat rule in Thailand was the Wat Suan Kaew case, in which a local, who

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71 Thai Supreme Court Judgements: 7906/2544, 8929/2542, 4708/2533
72 Thai Supreme Court Judgements: 2071/2532, 2803/2535, 2093/2542, 8018/2544, 7223/2556, 6239/2555
73 Nemo Dat Rule (Nemo dat quod non habet)
74 Thai Civil and Commercial Code: §155, §821, §1299 paragraph 2, §1303, §1329, §1330, §1332
had earned squatters’ rights through adverse possession by virtue of a court order, since she had occupied the land for more than ten years, sold it to the Suan Kaew Foundation. However, the descendants of the real owner, who held the title deed, appeared two years later and claimed the land. Subsequently, the descendants made an agreement with the seller to relinquish her squatters’ rights, so the court repealed the adverse possession order. Since the seller did not have the right to the land, neither did the Foundation, who received the land from the seller. Consequently, the revocation annulled the Foundation’s right to the land because it could not have a better right than the seller. This case did not fall into the exception under Section 1299 paragraph 2 of the CCC because the seller had never registered her right after she received the court order.

The case of the Suan Kaew Foundation is not only a good example of a transferee who suffers from the transfer of land without ownership, but it also illustrates that the land registration in Thailand is ineffective because the Foundation had checked the title deed at the local land office before it bought the land from the seller and had received confirmation from the land official that the title deed had no restriction and could be transferred; therefore, it bought and registered the land, as usual. This case proves that there is insufficient investigation and verification of transactions in the land registration system in Thailand, and no-one who works on registration is held accountable for the mistakes they make when a transaction goes wrong.
2.3.3 Problems of the Use of a Nominee in Real Estate Transactions

Since Thailand has been described as the hub of South East Asia, it has been popular with many foreign investors, who have been interested in establishing a business here for decades. When foreigners establish a business in Thailand, they naturally want to own a company and possess both movable and immovable property. Yet, there are various laws under the Thai jurisdiction that limit foreigners’ capability to own some kinds of immovable property, especially land. For example, the Land Code B.E. 2497 was intended to prohibit foreigners’ capability to acquire land in order to preserve the land for Thai citizens. The promulgation of this Land Code automatically repealed the Act on Land in Connection with Foreigners (B.E. 2486), which allowed foreigners from countries that have a treaty with Thailand, to possess land. Hence, when every treaty ended in 2014, foreigners were not permitted to own land from that time on. Although there are some exceptional rules for foreigners to own a piece of land, it is still difficult to obtain such a privilege. Consequently, many foreigners search for loopholes in the Thai law to acquire land and one of the most popular is to appoint a nominee to hold the land for them.

Since Thai law does not allow foreigners to possess land in Thailand, they find a local to hold the land for them. A local who agrees to do this is usually called a nominee.

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76 Thai Land Code §86- §96 ter
77 Thai Land Code §4 (13)-(14)
78 กรมที่ดิน, ‘สรุปการได้มาซึ่งที่ดินของคนต่างด้าว’ (กรมที่ดิน, 2545) (Department of Lands, Summary of Land Acquisition of Foriengers (Department of Lands, 2002)) retrieved from http://www.dol.go.th/dol/index.php?option=com_content&task=view&id=100 (accessed 17 Dec 2018)
The foreigner and the nominee usually engage in some kind of legal relationship, which allows the foreigner to entrust the nominee to hold his property instead of him. This legal relationship conceals their real intention, which is to make a real estate transaction. The three popular kinds of legal relationships foreigners commonly use are marriage, setting up a company, or hiring a nominee.

a) Marriage:

Marriage is the safest way for an individual foreigner to obtain a piece of land in Thailand. In general, under Thai law, a couple use and share the ownership of all their properties, except land. Since the law does not allow a foreigner to own land, he can only own use the land on behalf of his spouse.

b) Setting up a company:

Since a company can be easily established and earn the full right of citizenship when it is registered in Thailand, setting up a company is another strategy frequently used by foreigners for acquiring real estate. In fact, foreigners are not only able to purchase real estate, but they can do all kinds of legal transaction on behalf of the Thai company. Therefore, the Thai company is a nominee for foreign founders. However, the company will only be considered as a Thai company when more than half of the total shares are held by Thais. Foreigners can establish a small company as long as they do not hold more than 51% of the company’s shares. They can be the biggest shareholders who control the company by holding 49% of the total shares, and separate the remainder in small
portions to many Thai shareholders. Nonetheless, to be safe, they normally make a contract to hold the management power of the company. Not only this, when the proportion of the foreign shares increases and exceeds 50% of the total share, the Thai company becomes a foreign company. All the properties, including real estate obtained before the change of the company’s status, still remain under possession of the same company. This means that all properties will automatically belong to the foreign company.

c) Hiring a nominee:

Foreigners can simply hire a local as their nominee to buy the land for them. This is the most direct and easiest way if they do not want a long-term commitment. The foreigner will make the payment for the property, while the local will process the registration in his name. In this kind of relationship, the foreigner will ask the local to make a loan or mortgage contract as collateral for the agreement, which he can use to sue the local if he breaks his promise.

Since Thailand is such a beautiful country with abundant resources and economic potential, it attracts more and more foreigners to live and do business there. As a result, the number of foreigners who own land is continually increasing. In the conference of the Standing Committee on Commerce, Industry and Labour, the National Legislative Assembly in March 2555, Professor Sriracha Charoenpanich, the Chief Ombudsman of Thailand at that time, mentioned that about 100 million Rai or about one third of all land in Thailand is possessed by foreigners and they have obtained it via a loophole in Thai
Many journalists have published reports about the foreign ownership of real estate property in Thailand. Foreigners own land in many commercial areas and tourist resorts. Many hotels and big holiday homes on the shorelines of Phuket, Samui, and Pattaya belong to foreigners and, similar to the South, many foreigners live and own houses in the northern part of Thailand in Chiangmai, Chiangrai, Udon Thaini, Khonkean and so on.

79 คณะกรรมาธิการเศรษฐกิจ การพาณิชย์และอุตสาหกรรมวุฒิสภา และการแรงงาน สถำนิติบัญญัติแห่งชาติ, ‘สรุปรายงานสัมมนา เรื่อง “นิติกรรม อ้าพราง: ต่างชาติกับการถือครองที่ดิน”’ จัดทำโดย คณะกรรมาธิการเศรษฐกิจ การพาณิชย์และอุตสาหกรรม วุฒิสภา ร่วมกับสำนักงานผู้ตรวจการแผ่นดินกรมที่ดิน ส่งนักงานบริหารกับระบบรักษาการฟอกเงิน สำนักงานปฏิบัติการพื้นเมืองที่ดิน สันนักงานปฏิบัติการพื้นบริหารศาสตร์, 12 มี.ค. 2555’ (สำนักงานเลขานิธิการวุฒิสภา - สถำนิติบัญญัติแห่งชาติ, 2555) (Industry and Labour the Standing Committee on Commerce, the National Legislative Assembly,’ The Summary of The Conference Title: Hidden Transactions: Foreigners and Land Possession by the Industry and Labour the Standing Committee on Commerce, the National Legislative Assembly, the Office of the Ombudsman, the Department of Lands, the Anti-Money Laundering Office, the Agriculture Land Reform Office and the National Institute of Development Administration (NIDA) on 12 March 2012' (The Secretariat of the Senate, 2012)) retrieved from http://www.senate.go.th/w3c/senate/pictures/comm/68/2555/sammana/2555/sam.repor t.nitikamaompangTeedin12.03.55.pdf (accessed 17 Dec2017)

80 เอมเฟงบูญญานุพงศ์,'"นอมีนี” คนสำคัญของธุรกิจจีนในเชียงใหม่’ (ไทยพีบีเอสออนไลน์, 2559) (Amphong Boonyanupong, ' "Nominee"-The Important Person in Chineese Business in Chiangmai' (Thai PBS news, 2016)) retrieved from https://news.thaipbs.or.th/content/252907 (accessed 18 Dec2017)


82 เจนสา, ‘อาเซียน 'ขยายเเร่'รู้ ก็เกิดก็อ ยังถ้ำ-'วางตีปีกยอดขาย 3 จังหวัด 'อุบะฯ-อุตรฯ-ขอนแก่น' (โอเค เนชั่น, 2551) (Jansa, 'The Virtue of Foreign Sons-in-law Increases Real Estates and
Moreover, it has been reported that foreign investors have acquired huge swathes of farmland and forest in the past ten years in different parts of Thailand, especially in the six provinces of Supanburi, Ang-Thong, Singburi, Chai-Nart, Ayutthaya and Uthai Thani, and most of these acquisitions have been facilitated by a nominee.  

In fact, the use of a nominee and fictitious contract is illegal. Although it appears that transactions that involve marriage or the purchase of real estate via a Thai individual or Thai company are legal and valid, the use of a fictitious contract is wrongdoing and void under Thai Jurisdiction, and only the hidden contract is enforceable in the end. Hence, it is unsurprising that this strategy leads to conflict in the future as a consequence of broken relationships. When the true owner and nominee argue, they will claim their hidden intention behind the concealed transaction. While the State uses land registration as a strategy to prevent disagreements, the use of a nominee causes a dispute over real estate transactions instead. Furthermore, the record of possession in the land directory will contain false information. It will only show the name of the nominee, while the name of the real owner, who truly uses the land, will be absent. This means that, if the land is used for any criminal activities, it may be difficult to trace the perpetrator of the crime.


84 Thai Civil and Commercial Code §155
Since the law concisely specifies that this is a wrongful act, the use of a nominee in real estate transactions illustrates a lack of respect for Thai law; hence, the increasing usage of nominees in real estate transactions reflects the ineffectiveness of the law in Thailand.

In summary, Thailand’s land administration has a long history and the current registration and cadastral system has significantly developed since the early days. It has become a systematic procedure whereby all real estate must be recorded and certificated, and all transactions related to real estate must be registered in the public records at the land office. The practice of the registration process is controlled and guided by rules and regulations and certain tasks need to be completed before and/or during the registration process. However, there are still many arguments over the possession of land, most of which are caused by one of three major factors: 1) uncertain real estate information; 2) transfer of land without ownership; and 3) the use of nominees in real estate transactions. These disputes are inevitable, since the land administration in Thailand is still inefficient. There are so many agencies responsible for land management that the boundaries of their responsibility are unclear and overlap. Moreover, the process of registering real estate is easy and insecure. The transactions are too fast, leaving little time to conduct a thorough investigation and verify the realty’s record and the right of the applicant. Additionally, the law does not require applicants to have assistance in real estate transactions, and since many people still do not know or understand much about the practice or the law, applicants may damage themselves because they have insufficient knowledge of the registration process and their rights and duties of the real estate property.
CHAPTER 3

GENERAL CONCEPT OF NOTARIES AND NOTARIES IN THAILAND

3.1 Development and Legal Status of Notaries

A notary is a legal professional whose duty entails authenticating contracts, deeds, and other documents with a special notarial seal to provide them with a certain degree of credibility. Yet, this is only the basic duty of every notary around the world, but in some counties, notaries have more functions than this general duty and they are called civil-law notaries. They can mainly be found in western European counties, whereas notaries with basic functions or common-law notaries are found in both common-law and civil-law countries on different continents. Although these two kinds of notaries have the same root and their general missions are the same, they have developed differently and have distinct details. The functions and social status of these two types of notaries are not equivalent; hence, it is interesting to study them to compare the differences between them. Therefore, the focus of the first part of this chapter is the development and status of civil-law and common-law notaries. Then, the missions and liabilities of both types of notaries are examined in detail in the latter part when civil-law notaries are paid significantly more attention than their common-law counterparts because their functions are more extensive. The differences between these two types of notaries are demonstrated within the context of the narrative.
3.1.1 Notaries in Civil-Law Countries

Civil-law notaries or Latin notaries, who will be mainly discussed in this thesis, are powerful people, who are highly respected in society and have a wider scope of duty than general notaries. Most civil-law notaries can be found in European countries, such as Italy, Spain, France, Germany and the Netherlands, where the law and legal system are influenced by the Roman legal system. Therefore, civil-law notaries have a long history on the European continent, from the ancient Roman period until today.

3.1.1.1 Development of Notaries in Civil-Law Countries

In fact, the origin of notaries can be traced to pre-Roman times, when the sales and gifts of valuable properties were recorded on Papyrus deeds in the Old Kingdom of Egypt. Documents were authenticated with a seal in that era because most people were unable to read and write. Therefore, a clay disk or metal was used as a seal to impress on hot wax to serve as a signature. Documents in which the transfer of property or the last will and testament of Egyptians was recorded during the old and the middle kingdoms of Egypt were found with a seal as if they had been prepared by someone important such as a priest. Later, in the new kingdom of Egypt, scribe-priests were the people who wrote

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85 Pedro A Malavet, ‘Counsel for the Situation: The Latin Notary, A Historical and Comparative Model’ University of Florida Levin College of Law, at 405
86 About three millennia B.C
87 Raymond C. Rothman, Notary Public Practices & Glossary (Third edn, National Notary Association 1978)
88 Malavet, at 405
and witnessed documents, which were subsequently authenticated by a magistrate’s seal to give them a public status.\textsuperscript{89}

Records of scribes or “scribae” are also found in the Hammurabi Code and the Old Testament. It was scribes who generally wrote and witnessed documents in ancient times. Based on the Hammurabi code, they mainly dealt with contracts related to the transfer of real estate property and personal property.\textsuperscript{90} Meanwhile, many different types of scribes worked in different scopes in Old Testament times; for example, the King’s acts were authenticated by royal scribes, legal scribes interpreted the law and religion, and the most popular scribes were general scribes who handled private affairs, such as marriage contracts, deeds of purchase and leases.

However, the origin of notaries has only been traced to the Roman period in many articles because Roman history recorded several professions that had similar functions or duties related to the work of a notary in modern times. The first profession was that of a scribe and the scribes in this period were similar to those in the kingdom of Egypt. They were public officials who prepared and transcribed documents with special skill and knowledge. Scribes often worked in courts and prepared judicial documents. They usually had slaves, who were skilled in short-hand writing, to help them to record the court proceedings and these slaves were called “notary”. They invented a shorthand system called “Sigla” for use when taking notes.\textsuperscript{91} Notarii also sometimes prepared private documents, but these documents would not have public status until the magistrate

\textsuperscript{89} Ibid
\textsuperscript{90} Ibid
\textsuperscript{91} N.P. Ready, \textit{Brooke’s Notary} (13th edn, Thomsom Reuter(Legal) Limited 2009), at 2
sealed them with the official seal of the court. In fact, private documents were usually prepared by a third professional called “tabularii” and “tabelliones”, whose work seemed to be most similar to the work of today’s notary. Both tabularii and tabelliones were professional scribes who mainly dealt with private documents, such as deeds, wills, conveyances, etc. However, the tabularii were public officials, while tabelliones were private professionals, who were regulated by the law. Documents written by the tabelliones would become authenticated deeds and considered as official records (instrumenta publica confecta) when they were subjected to the appropriate formality. This meant that the documents would have the same status as official documents (publica monumenta) when they were written and signed in front of the parties and witnesses and authenticated by a tabellione. Nevertheless, they would still not have probative value until they were registered in the public archive and tabelliones did not have the power to register documents as a public record (instrumenta publica confecta). Each document must have passed a special judicial procedure called allegation apud acta to earn a probative force, which meant that it had to be scrutinised by a magistrate before it could be registered in the public records. Once a document had earned a probative force, it would bind all parties with a high evidentiary weight.

After the fall of Rome, tabelliones survived in the Eastern part of the Empire, in the Byzantine kingdom, and they reached their prime in the Justinian regime when all

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92 Ibid

93 Under the Law of Evidence, evidence with a probative value tends to prove or disprove a point at issue. Bryan A. Garner, Black’s Law Dictionary (8th edn, 2004), at 3085

94 Byzantine emperor (527–565 CE)
documents had to be authenticated. On the other hand, the powerful Western Roman
Empire was divided into several polities. Roman law and administration were fading from
this area because the invaders introduced their own customary law to the conquered
states. Since most intruders were Germanic tribes, the law and administration of Western
Europe became influenced by the Germanic law combined with some of the remaining
Roman law.

In the early medieval period of the Western Roman Empire, the count of each
polity had his own notary called the notary of the count or royal notary. The function of
these notaries was similar to that of the Roman *tabelliones*; hence, they held a high status
in society, similar to a judge. Unlike royal notaries, the status of a papal notary or private
professional notary under Germanic law was not as high and powerful as that of Roman
*tabelliones*. Papal notaries were attached to the church and appointed by the Pope. They
were responsible for the public and private affairs of the church. However, the documents
they prepared did not have the same public status as the *tabelliones’* work in earlier
times. Nevertheless, notaries were upheld again when the Roman law was reinstated in
the tenth century and they had recovered their authentic judicial power by the twelfth
century.

The development of the notary profession was more significant in the thirteenth
century when a special school for notaries called the “*Scuola di Notariat*” was founded
in Bologna in northern Italy. The notary school of Bologna was a very influential university
in Europe in medieval times and its emergence led to a significant development of the
Notaries’ society. This established a foundation for the modern notary, since notarial acts
were set in a systematic practice and notaries learned legal knowledge and technical skills. As a consequence, the school changed the perception of notaries and they were subsequently viewed as qualified jurists. Moreover, one of the professors, Rolandino Passaggeri, wrote a notable notarial handbook entitled *Summa Toutius Artis Notarie*, which was composed of notary theory, practical guidelines, explanations of relevant laws, different contact formats, etc.\(^5\) It was subsequently translated and disseminated widely. It is worth noting that “*tabelliones*” and “*notaries*” were used interchangeably in this book, which shows that these two words were synonyms for each other in this period.

After being systematically formed in medieval Europe, notaries developed another step in the late thirteenth century when notarial acts obtained executory force. Therefore, from this time onward notarial deeds became equivalent to judicial decisions. They are enforceable like court judgements without the need for further action to be brought to the court.\(^6\)

Notaries not only spread throughout Europe, but they continued to expand their presence in other parts of the world in the following centuries, initially via colonisation and trade. Today, they can be found in 87 countries around the world, in both civil law and common law jurisdictions.\(^7\) Notaries have generally developed a great deal over time, but the notaries in each country have developed in their own way. Although their core duties are still the same, their specialised functions, requirements and administration may

\(^5\) Ready, at7  
\(^6\) Ibid  
vary in different countries. However, they can still be grouped into two types, namely, notaries in civil law countries and notaries in common law countries. The ancient Roman notary or Civil law notary still remains in countries where Roman law prevailed. The roles of notaries in the old times have now been shaped into proper functions. Hence, they are now specialists in certain areas and required to be part of certain businesses. The role of a notary in the real estate context, which will be discussed in detail later in this thesis, is one example. Although few books contain a reference to the role of a notary in conveyancing or real estate management in history, notaries have been practicing in this area since ancient times and their work has now been formulated into a very systematic practice/procedure.

3.1.1.2 Status of Notaries in Civil Law Countries

Notaries held a high status in the past because they were categorised as upper class, among the élites and rulers. In the kingdom of Egypt, scribes were members of the ancient Egyptian bureaucracy, while notarii were only slaves and shorthand writers. Most of them were attached to the royal court or ecclesiastical court and were responsible for recording public proceedings and property conveyancing.\textsuperscript{98} The notarii and tabularii who took care of public or state affairs were later regarded as official employees in the Roman kingdom.\textsuperscript{99} Although the status of notaries dropped a little in some regions after the collapse of the Roman Empire, they were still attached to the king, aristocrats or the

\textsuperscript{98} Malavet, at 405
\textsuperscript{99} Ibid, at 408
church in the early middle ages. Kings also had their own notaries under the Germanic Lombard law and notaries were regarded as royal officials in Charlemagne’s regime. They were even perceived to be similar to a judge and entitled to use the \textit{tabellionatus} sign in the regime of Charlemagne’s on, Lothar.\footnote{Malavet, at 115} On the other side of the Germanic Lombard code, the status of medieval notaries, who dealt with private affairs, was not that of public officials, and it was not clear whether they were legal professionals or not. They were private professionals, who were entitled to draw up private documents, and this was considered to be legal work, but it did not have public status.\footnote{Malavet, at 415}

Today, notaries are public officials or professionals who hold public authority to act on behalf of the State. In France, it is clearly stated in Article 1 of the Order dated 2\textsuperscript{nd} November 1945,\footnote{According to Article 1 of the Order dated 2 November 1945, "\textit{Notaires are public officers authorised to record any instrument or contract the parties to which are obliged, or may wish, to invest with the type of authenticity associated with public authority instruments}".} that a notary is a public official. Although this is not so clearly stated in the law of every country, notaries in other countries also perform an official function. In many countries, notaries are appointed and controlled by the state, even though they are not public employees. They are independent from other public official professions; in other words, this is a liberal profession and notaries are free to manage their own work, administration, and finance. All notaries are regulated by their own professional council, and must follow their special professional code of conduct. Nevertheless, the entire profession is still supervised by the Ministry of Justice, which controls the profession in
line with the professionals’ aim and public duty, since notaries are mandatorily involved with important and high-value subject matters.\textsuperscript{103} For example, in some countries, the state stipulates a price chart for notaries to collect money at the same rate and controls the number of notaries in each region in order to avoid high competition or monopoly within the profession.

Unlike the old times, the modern Latin notary is clearly a legal professional. Therefore, legal knowledge is one of the basic qualifications that notaries need in most civil law countries. Some countries require notaries to have a Bachelor of Law degree at least, and some countries even require their notaries to have a Master of Law degree. Although notaries need a background in law and their role seems to be very close to that of an attorney or advocate, they are not the same. It is usually more difficult to become a notary than an attorney or advocate because notaries need to be more highly qualified than attorneys and advocates. The possession of a law degree is insufficient to become a notary. The degree must be accompanied by a special course or examination focused on training the skills and knowledge necessary to practice as a notary. The length and type of course may vary in each country; for instance, potential notaries must attend an academic course for 7 years in France, followed by at least a four-week internship and practical training in the office,\textsuperscript{104} while potential Spanish notaries must complete a law


degree at university, which normally takes about 6 years, and pass the state exam.\textsuperscript{105} Additionally, in some countries, such as Germany, since the qualifications of a notary are as high as those of a judge, applicants will only be qualified after they have passed a two-stage examination consisting of theory and practice.\textsuperscript{106}

Furthermore, notaries have more power than advocates and attorneys. In civil law countries, notaries not only certify the correctness of documents related to the transaction, but they also have the special authority to establish a notarial act. In some articles, the notarial act refers to a document drawn up and sealed by a notary after the two parties have reached an agreement but, according to Black’s Law dictionary,\textsuperscript{107} a notarial act refers to the function of a notary, which usually starts from the time the parties make an agreement in front of the notary and witnesses and ends at the time the document is drawn up and certified by the notary with his seal.

As explained above, the practice of a notary has a particular formality. Notaries must follow the regulations and perform their task attentively. Documents will have a special value when the notarial act has been done with the correct formality based on the law. Documents prepared by a notary are equivalent to the public’s documents and are kept in the public archive. They are very reliable and have high probative value and binding force. Documents made under the specified formality will automatically bind all


\textsuperscript{106} Bundesnotarordnung (BNotO) §6 and §7a

\textsuperscript{107} A notarial act is the official function of a public notary such as placing a seal on an affidavit. Bryan A. Garner, \textit{Black’s Law Dictionary} (8th ed, Thomson West 2004) at 3362
parties, and have greater weight than other evidence; hence, the opposing party must present proof against them. Additionally, since notarial acts or notarial deeds have an executory force with their own power, the parties who hold them may request legal execution without fear of prosecution.

Although notaries, like attorneys, can deal with many businesses, the law reserves certain legal work for notaries. In some businesses, the related documents may require a notary's certification by law, while the participation of a notary is mandatory in some stages of transactions in others. For example, a notary is required to be part of the process of executing a contact in real estate conveyancing in several countries. The notary must sit before all the parties during the time the agreement is made and certify the entire agreement. In some countries, it is also mandatory that they make a preliminary check on the ownership of the land or continue the registration process at the Department of Lands. However, since notaries are specialists, who are required to participate in some part of the transaction, they are often involved at all stages or the entire transaction may be invalid or unenforceable without their intervention.

In short, notaries are public officials in civil law countries, but they are different from other public officials. They have a great deal of freedom to control their profession and a special professional council and code of conduct. Although they are considered to be legal professionals, they are different from advocates and attorneys, since they play an important and mandatory role in some businesses. The consequences of notarial acts are powerful and long-lasting.
3.1.2 Notaries in Common Law Countries

In common law countries, notaries are formally known as public notaries. The origin of notaries in these countries is presumed to be the same as in civil law countries but, according to the chronicles, they appeared several centuries later. Notwithstanding, after notaries were disseminated around Europe, the profession developed in its own way in each country. Therefore, notaries in common law countries function differently from those in civil law jurisdictions. Despite having the same core duty to certify documents, the details of their role, responsibility, status and power, are not the same in each country.

3.1.2.1 Development of Notaries in Common Law Countries

England has been observed to be the first common law country where notaries were found, although their presence was not recorded until around the 13th century, when Roman notaries were flourishing throughout Europe and penetrated England. However, most notaries in England at that time were foreign, mainly Italians, who had been trained by the Bologna school and/or appointed by the pope. Since the customary law dominated England and Northern Europe, notaries did not play as prominent a role in this region as they did in predominantly Roman countries. Although notaries were engaged in some actions related to land conveyancing and contract execution in this period, English law did not specifically require their intervention in these activities.108

108 Christopher Robert Cheney, Notaries Public in England in the thirteenth and fourteenth centuries (Oxford at the Clarendon Press 1972), at 6
Notaries were developed more significantly in England in the late 13th century when Pope Nicholas III delegated John Pichel, the Archbishop of Canterbury, the authority to appoint an English notary in 1279. Subsequently, notaries were supported by proper training and the notarial profession was established. English notaries were also attached to the church or monarch in civil law countries during the middle ages. Church notaries were responsible for ecclesiastical matters, while royal notaries were responsible for civil matters related to the state and the church. Notaries took a part in the private affairs of individuals who hired them. They were often employed to prepare documents, contracts, deeds and wills for both domestic and overseas associations. This commercial work seems to have been the beginning of the characteristics and functions of the modern notary.\(^\text{109}\)

The commercial work of notaries gradually developed over time until it became one of their major duties. Their commercial role was further extended when trading with other European countries grew. Their work started to involve international trade, such as shipping and insurance agreements, bills of exchange, conveyancing agreements, etc. Since this new role overlapped with the work of local scribes in London, the so-called “Scriveners’ Company”, notaries became part of the Scriveners and they monopolised the activities of this profession in London and within a circuit of three miles, for centuries. The monopoly was confirmed in the Notarial Act of 1801, which was the first statutory regulation of notaries. This monopoly ended in 1760 with the prospering of international trade.

\(^\text{109}\) Ready, at 9
trade, when there were insufficient notaries in the Scriveners’ Company to meet the demand for notarial work.

The judicial system was substantially reformed in the nineteenth century. The reformation itself did not have a significant impact on the administration of notaries, but it combined all jurisdictions into a single jurisdiction and all legal professionals, apart from notaries, into a single profession, that of Solicitor, under the same council called the Law Society. Although notaries were legal professionals, they were independent and different from general solicitors and attorneys. As a result, notaries were not part of any profession and they were no longer required to be part of the Scriveners’ Company by virtue of The Court and Legal Service Act 1990. Hence, their work shifted from royal and ecclesiastical business to a commercial role and they became much more involved in international trade. Yet, notaries in England and Wales are not mandatory, nor are they as powerful as their counterparts in Civil Law countries.

Since the United States is one of the most notable common law countries in the world, it is worth studying American notaries, who appeared during the colonial period, brought to the continent by European navigators and traders. Although they were public officials in the early stages and were appointed in the same manner as judges, they did not play a significant role in society. They generally certified documents and drew up simple agreements. They were not much involved in real estate transactions because this kind of agreement was usually made in an open court. The importance of notaries rose

110 Rothman, at 2
111 Ibid
when trade with European countries increased and notaries were needed to witness and draw up sales agreements before goods were shipped.\textsuperscript{112} Although notaries were regarded as persons of high moral character and were required to participate in transactions, their position was never as high as that of notaries in civil law countries. They were simply clerks who certified and kept shipping documents and bills of lading.

Notaries in the United States vary from state to state and there are both civil law and common law notaries. Since the United States was originally colonised by Britain, the US law is developed from the English law; hence, notaries in most states are common law notaries. However, the administration and requirements in each state are different based on the business needs and business practices of the community. If the activities in a particular state do not require the intervention of a notary, there will only be minimum notarial law in that state. In terms of civil law notaries, they are in states that were once colonised by the French or Spanish, such as Florida, Louisiana, Maine, and Puerto Rico. Since the majority of notaries in the United States are common law notaries, the important of civil law notaries has diminished over time.\textsuperscript{113}

Some attempts were made over the years to unify notaries and their administration into the same standard. The first Notary organisation, the National Notary Association (NNA), was established in 1957. The NAA is a non-profit organisation with the aim of providing education and training to promote the standard criteria for notaries throughout

\textsuperscript{112} Ibid, at 3-4
\textsuperscript{113} Malavet, at 427
the United States.114 The NNA published the first notary act called the Uniform Notary Act in 1973. This act was updated to the Model Notary Act in 1984, and the latest version used in the United States today is the Model Notary Act 2010.115 The new Act has the same purpose as the past versions, but it contains more details and up-to-date issues, such as circumstances related to advanced technology. Since the Act covers all aspects of the notary profession from regulations to practices, it serves as a guideline for every state to adopt its own rules. Nevertheless, the Model Notary Act is based on common law notaries. Although notaries in the United States are adopted from England, it seems that they are less important than English notaries. The major role of American notaries seems to be attesting to the identification of documents, signatures and signers. Although the notaries in each state may have some other roles, the scope of their functions is less than that of their English counterparts and much less than that of civil law notaries.

All in all, notaries were spread around the world via colonisation and trade. In the beginning, notaries in each colony followed their governing states. If the governing states had common law notaries, the colonies also had them and if the governing states had civil law notaries, the colonies had civil law notaries too. As international trade and commerce flourished, notaries were needed to be part of transactions, to attest documents or draft sales-purchases agreements, especially for contacts with European countries or countries where notaries existed. As a result, many countries adopted

notaries, starting with simple functions such as certifying documents and drafting agreements, and they were generally known as public notaries, like the American notaries. They developed more and unique functions in different countries as time passed.

3.1.2.2 Status of Notaries in Common Law Countries

Despite the fact that notaries in common law countries have the same root as those in civil law countries, notaries in common law countries are not comparable to their civil law counterparts. England was the first common law country where notaries were found to exist.\footnote{Ready, at21-23} It was in about the thirteenth century when foreign notaries travelled across the sea to England. They were initially attached to the royal and ecclesiastical courts; therefore, they were among the élites and rulers, similar to notaries in civil law countries. They became more involved with commercial matters with the increase in trade and shipping with European countries until these matters became their major duty. Subsequently, notaries worked more with laymen on commercial errands, and their duties with the monarch and the church gradually faded. In terms of their commercial function, most notaries were initially scattered in and around London, being the major international trading port. To be a notary in London or within a three-mile circuit, it was necessary for newcomers to join the Scriveners’ Company, since the scriveners held the monopolistic power of notarial work and the real estate conveyancing. However, they were deprived of this monopolistic power when it was decided that these tasks should be undertaken by legal professionals in the form of solicitors, rather than simple clerks or notaries. As a
result, only notaries who had a legal degree, solicitors and attorneys were allowed to undertake conveyancing work.

As a result, a legal certification is one of the qualifications English notaries must have in this modern time. In order to qualify as a notary, the applicant must hold a law degree from an English university or must have passed a Legal Practice Course (LPC) or Common Professional Examination (CPE), or must be either a solicitor or a barrister; otherwise, they must obtain a Diploma in Notarial Practice and pass all the prescribed subjects. Hence, a notary in England today is recognised as a kind of legal profession. Although notaries are also authorised to undertake general legal work, they are not the same as solicitors and attorneys. They have special authenticating power the others do not have and, conversely, they are not allowed to preside over litigation. Since each legal profession has its own special roles and functions and they work concurrently, none of them is of a higher status than the other. Hence, English notaries do not have a more superior status than those in other legal professions, unlike civil law notaries. However, about half of the notaries in England are solicitors at the same time. Nevertheless, these solicitors still have to pass a special course and training to become a notary.

In England, notaries are public officials, who are appointed by the Archbishop of Canterbury under state supervision. Although the Archbishop of Canterbury uses the

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119 Supra note 34.
authority of the crown to appoint notaries and exercises this duty through the Court of Faculties, where most senior ecclesiastical judges preside.\textsuperscript{120} Notaries are not really hired by the government per se. They are liberal professionals who are free to choose their work as long as they follow the regulations for notaries enacted by Parliament. The state closely oversees notaries’ activities because they use the state’s power to authenticate or certify documents and documents certified by a notary have a certain degree of reliability. Notarial certification or involvement is generally not mandatory in English law, but these documents are often requested by foreign companies when trading overseas; however, they do not have the same full probative force as those certified by a civil law notary. They are only acceptable for use against the other parties, but have no evidence value in common law courts.\textsuperscript{121} This means that the documents are not presumed to be reliable evidence when they are first presented. Therefore, the incomplete power of English notaries shows that they do not enjoy as much privilege as their civil law counterparts.

Notaries in the United States are inferior to English notaries despite their English roots. It is relatively easy to become a notary in the United States compared to England. Based on the Model Notary Act 2010, applicants are only required to have basic personal qualifications and complete the notarial course and a written examination.\textsuperscript{122} They do not need a law degree or any background in law to apply for notary certification, unlike their English counterparts. They only need to pass the three-hour course, either in a classroom

\begin{itemize}
\item \textsuperscript{120} Ibid
\item \textsuperscript{121} Malavet, at 441
\item \textsuperscript{122} Model Notary Act 2010 §3-1 and §4-3
\end{itemize}
or online, to acquire some knowledge about notarial law, procedures and ethics. As a result, notaries in the United States are not always legal professionals. Although anyone can become a notary, those who are also advocates are usually more credible than lay notaries. They have the authority to draft their own instruments and contracts, while lay notaries are not permitted to do so.\textsuperscript{123}

Since notaries in the United States are not required to have legal knowledge, they have an inferior status and a lesser role than English notaries. They cannot be compared to solicitors or advocates, since they are only generally known as people who authenticate documents, signatures and individuals’ identity, which means that they only certify the validity of documents. They usually do not verify whether the content of those documents is correct or not; therefore, the documents with a notarial seal can only be used to claim against the parties. Since they have little credibility, they have no evidence value to be used in the US courts. Nonetheless, notaries in the United States are also public officials; in fact, they are ministerial officials, who are appointed by the state and under the state’s supervision. Since notaries use the state’s power for their acknowledgements and oaths, they are monitored to perform lawful and proper notarial acts. The state enacts a law to define official misconduct and constructs administrative agencies to supervise the notarial system.\textsuperscript{124} Although a notarial seal is not a compulsory part of most transactions in the United States, some business activities require notarisation

\textsuperscript{123} Rothman, at.15
\textsuperscript{124} Michael L. Closen, ‘The Public Official Role of the Notary’ 651 The John Marshall Law Review
to demonstrate a certain degree of reliability, especially when trading internationally with European countries.

Several centuries after the appearance of notaries, economics and commerce have become the major concern of every country; hence, notaries are spread around the world, together with trade. Since England and the United States are the leading countries that drive the global economy, common law notaries appear to have more influence than their civil law counterparts, even in many countries that have never been colonised by civil law countries where the notaries have developed their own way. In some countries, the notarial administration and procedure may still be unstable. They may have both civil and common law notary systems or the notary function is only one part of advocates’ duties, like Thailand. However, the notaries in these countries seem to be similar to those in the United States, where their main duty entails acknowledging documents’ authenticity.

3.2 Missions and Liabilities of Civil Law Notaries

To understand what notaries are and what they do, Pedro A Malavet gives the following brief summary of the functions of a typical notary in his paper;¹²⁵

1) A private legal professional who performs a non-advocacy counselling function.

¹²⁵ Malavet, at 429-430
2) One to whom the state entrusts exclusive power to take a private transaction and give it a proper legal form and authenticate it in a public act by memorialising it in a public document that is publicly enforceable.

3) One who must maintain a permanent record of these transactions and issue certified copies of the public documents he prepares to interested parties upon request.

4) One who is subject to professional and criminal liability for the miscarriage of his offence.

As discussed earlier, civil law notaries developed from public officials to private legal professionals during the late Middle Ages and Pedro’s summary of contemporary notaries is in accordance with history. Today’s notaries are clearly legal professionals. Although notaries are another branch of the legal profession, which is different from advocates or solicitors, notaries are also advocates or solicitors in some countries. However, all applicants must attend special courses and training, and obtain a certificate of appointment to become a notary. The big picture of the main duty of a notary is to give authentication to private documents to give them a public status. In doing so, a notary has the exclusive power to perform a public service by turning private documents into public ones, as a consequence of which the documents are credible and carry evidentiary weight. Therefore, every notarial act must be recorded for the long term or permanently, so that it can be traced for the source of each document in the future. With their high level of credibility and ethics, notaries in civil law countries are mandated to be part of
certain kinds of transactions, such as land conveyancing, business registration, business amalgamation, etc. Since they are often involved with important and valuable issues, notaries must also hold significant liability for their actions.

3.2.1 Missions of Notaries

Although notaries have a long history and are widespread among many countries, some people still misconceive their role. As seen from Pedro Malavet’s summary, the simple version of a notary’s duty is the authentication of documents. Hence, it is not surprising that all notaries are often viewed in the same way as American notaries or Public Notaries, who are mainly authorised to administer oaths, take affidavits and certify documents and signatures when, in reality, civil law notaries, who are the focus of this thesis, are specialists in family affairs and assets. Their duties are much broader than those of common law notaries. Three major situations, with which civil law notaries are usually involved, namely marriage and family matters, corporate affairs and real estate conveyancing, are briefly discussed below.

3.2.1.1 Marriage and Family Matters

Marriage and family matters were one of the duties of papal notaries who worked in the churches in the past and were responsible for civil affairs. Unlike the old days, notaries in the modern age are not responsible for actual marriages, although they may
still practice in some regions; for example, notaries in the Canadian provinces of Quebec\textsuperscript{126} and Newfoundland & Labrador,\textsuperscript{127} are one of the professional who are allowed to perform a civil marriage. However, notaries in this modern age are not mandated to be part of a marriage in most places. Their involvement mainly consists of giving advice to couples and only engaging in certain serious matters of married life. Therefore, notaries may be involved at the beginning of a marriage, during a marriage, or when a marriage is ended, either by divorce or death.

A marriage is a kind of civil contract between two people, who commit to joining their lives and their properties. In normal circumstances, the properties and status of a couple will automatically be joined once they are legally married. However, in many countries today, couples can arrange their duties and properties in the form of a contract before the marriage called a “matrimonial contract” or a “prenuptial agreement”. This kind of agreement will only be valid when it is made before a notary; therefore, notaries are hired to give advice on how to manage their properties and draw up a marriage contract before the wedding. If the spouses decide to make any change to the matrimonial property after the wedding, they must give their consent and sign the contract again at the notary’s office. Notaries are sometimes hired to give advice and assistance on several


matters during the marriage, such as adoption, change of matrimonial contracts, gifts, and so on.

Notaries can deal with divorce settlements in cases of separation. If there was no matrimonial contact before the marriage or if the contract is different from the current situation, the spouses may need to make a notarised divorce agreement, whether the divorce is amicable or not. This agreement concerns issues such as child care and custody, alimony, compensatory allowance, division of property and debts. However, if there is a matrimonial contract, the spouse may have to appoint a notary or a lawyer to draw up a plan for the liquidation of the matrimonial regime.\(^{128}\)

A family member can arrange his property for the period following his death in the form of a will or family agreement. Although it is not necessary for a will to be drawn up in front of a notary, notarised wills are more secure than any other kind. The notary will draft the will and assist with its registration in the public record. On the other hand, notarial authentication is required when making a family agreement. This agreement needs the consent of the child, who will be the successor of his parent’s estate after the parent’s death, to waive all or some parts of his inherited right to the other successors based on some circumstances or agreement among them. All the successors can make an

agreement to dispose of the estate contrary to the testator’s intention, but this agreement must be made in a written document and signed by two notaries.\(^{129}\)

Apart from the above, it is also crucial for notaries to be involved in international marriages and international wills. Foreigners are allowed to marry or make a will in other countries, but they must submit the required certified copies and certified translation documents to the authorised office. The notary needs to check the qualification of the couple, i.e. age and status, and certify all the related documents for marrying abroad.

3.2.1.2 Corporate Affairs

It is not necessary to involve notaries in any particular activity in the corporate context, apart from authenticating business documents and transactions and providing a certificate showing the status of the company or the identity of its directors. This usually occurs when the business needs to contact other businesses or institutions, especially when trading with foreign countries. Although notaries are not required to play a role in any business in the corporate context, they are still often hired to give advice concerning business management, since some decisions may have an impact on the business in the future.

Notaries can serve business owners or directors from when a business starts to when it is transferred or enters bankruptcy. When establishing a new business, directors must choose the best legal form, type and objectives of the business because this will

affect many factors later, such as tax payments or business operations. Examples of important issues that need to be carefully considered are the registration procedure, tax planning, property management, mergers and acquisitions, and it would be best to have a notary, who is specialist in asset management and corporate law, to give advice about the most suitable/beneficial option. Notaries also help in preparing documents and drafting contacts, or checking the information in important documents or contracts drafted by others, because if vital information is missed, it may affect the validity of the entire transaction. Moreover, in cases where the owner of a business sells it, a notary is not only important to draft or revise the agreement, but he sometimes also acts as an escrow agent in the transaction. When the notary is an escrow agent, he has a fiduciary duty toward all the parties. The notary will hold the property and the payment until the transaction is finalised and he will remain neutral and examine the contract to ensure that it satisfies all the parties. Then, he will release the payment and the property when all the parties confirm that they are satisfied with the transaction. As an escrow agent, the notary will ensure that both sides receive the appropriate compensation.

Since notaries facilitate various business transactions and provide security for companies, many businesses hire a notary to give counsel on different matters, even though the use of a notary’s service is voluntary.

**3.2.1.3 Real Estate Conveyancing**

Different from notaries’ role in family and corporate contexts where their use is voluntary, notaries are mandatory in the real estate context. Notaries play a vital role in
several stages of real estate transactions in many European countries, especially in those areas that were once governed by Roman law. In real estate transactions, notaries are mainly involved in the conveyancing process, but their participation varies from country to country. In some counties, notaries are required to be part of several stages during the transaction, whereas their participation is optional in others. Nevertheless, notaries are mandatory for certification of signatures in most of these countries because the validity of transactions is subjected to a notarial deed. This means that contracts related to immovable property must be concluded and signed in the presence of a notary. The notarial authentication will guarantee the correctness of the transaction and allow it to be opposed by third parties.

Another stage that often requires the intervention of a notary is the registration of title at the Land Registry. Since notaries must record their notarial act in the public archive after a contract has been concluded, they may have a legal duty to inform the land registry about the outcome of the transaction in some countries, such as France, where notaries have a duty to register the sale instruments at the Land Registry and pay the fees and all taxes related to it.\(^\text{130}\) Beyond this, notaries in some countries may also have a duty to execute the contract and pay tax after the agreement has been settled. They may act as escrow agents, who hold the property until the contract terms satisfy both parties. Then, they release the property to the buyer and facilitate payment to the seller. Furthermore, notaries play more extensive roles in some countries, such as the

Netherlands\textsuperscript{131} and Portugal\textsuperscript{132} than in others. In these countries, notaries’ role extends to drafting contracts, preliminary checks, giving legal advice or counselling customers. Although some of these activities are mandated functions of notaries in some countries, they may only be their professional duties in most places. This means that notaries are sometimes hired to work at some dispensable stages or all stages of the conveyancing process without being prescribed to do so by law because they are professionals in real estate property law. As such, they are required to be involved in some stages of the transaction already, so it is better to hire only one professional to facilitate and complete the whole transaction.

Notwithstanding, the duties of notaries in the real estate context are not limited to the buying and selling of houses or land but all types of transaction, such as mortgage deeds and the auction of real estate properties, as well as properties like buildings and condominiums.

### 3.2.2 Liabilities of Notaries

Since the role and duties of notaries involve high-value properties and essential issues in people’s daily lives, they must perform their work honestly, rationally and prudently to avoid the possible occurrence of loss and damage to their clients or third parties. If there is any loss or damage caused by their performance, notaries are subjected to liability for the injured party. There are three types of liability that may arise from notary

\textsuperscript{131} Schmid, at 223-224
\textsuperscript{132} Ibid, at 237-238
practice: professional, civil and criminal. Whether intentional, unintentional or negligent, notaries must be responsible for any loss incurred by their performance.

3.2.2.1 Legal Liabilities

Since damage caused by a single notarial act may be the result of violating both criminal and civil law at the same time, notaries are subjected to both criminal and civil liabilities, as explained below.

(1) Criminal Liability

The common criminal offences of notaries are forgery, fraud and perjury. Since the main duties of a notary are drafting, revising or certifying documents, the work of a notary is all about paperwork, which makes it very easy for a dishonest notary to falsify documents. This can be done by creating a new forged document, distorting the contents of a document, altering some parts of a document, certifying false documents or false signatures, etc. These are all criminal offences and subjected to criminal liability. When a document is real and passes formal notarisation, it becomes another official government paper or a public document. Since the status of public documents is superior to other documents, the destruction, forgery, or suppression of these documents is a greater criminal offence. Furthermore, when notaries submit a forged document to the registrar, they are committing perjury because they are presenting a false message to the official. However, if notaries use such documents with government officials or any individual, they are also committing the crime of fraud because they know that the document is untrue.
It can be understood from the above discussion that notaries are subjected to criminal liability for misconduct based on whether they knew the truth or not. Therefore, if they know a document is false and they still use or certify it on any occasion, they are acting against the law and are responsible for wrongful practice. Although the criminal liability for notaries’ misconduct is usually a monetary penalty or imprisonment the same as individuals’ lawful acts, the liability is different from country to country and varies based on the grounds of the wrongdoing. In addition, since notaries in civil law countries are public officials, entrusted by the state to perform a public act, they must complete their mission with the correct procedure and truthfulness. If they perform their function wrongfully, they may not only be subjected to their professional liability, but they may also be liable for the crime of official misconduct.

(2) Civil Liability

Since notaries are entrusted by their clients to arrange their property or personal matters, they must perform their duties with care based on the standard of their profession in each circumstance in order to prevent damage and harm to their clients or third parties. The violation of their duty of care, either by intention or negligence, is considered as tort even though their performance is not regarded as criminal liability. The aggrieved parties are entitled to receive a substitutionary remedy in the form of money to compensate them for losses caused by tort; therefore, every notary usually holds financial responsibility for their action. If a notary fails to compensate the aggrieved parties, he can be sued in the civil court like other civil cases. Hence, notaries cannot escape liability for
their mistakes or professional malpractice, so they must perform their notarial act correctly, reasonably and prudently.

3.2.2.2 Professional Liability and Indemnity

Apart from criminal and civil liability, notaries are subjected to special schemes, namely, professional liability and insurance, arranged by their own professional council to punish notaries who misbehave and indemnify the injured party.

(1) Professional Liability

Like all professions, there is a set of rules that regulates the notarial profession.\textsuperscript{133} These rules relate to formal conduct, disciplinary rules and professional responsibilities, as well as professional ethics. Therefore, notaries must perform their tasks with sufficient care, diligent and integrity. Since they hold professional liability for breach of their duties and malpractice,\textsuperscript{134} all notaries must follow their professional code strictly or they will be reported to the disciplinary court for unprofessional conduct.\textsuperscript{135} The punishment for misconduct may be censure, fine, suspension or dismissal from the profession for either intentional or unintentional mistakes. The rules not only control notaries’ practice and

\begin{itemize}
  \item \textsuperscript{133} Rules for German Notar - Bundesnotarordnung (BNotO); Rules for French Notarie; Loi contenant organisation du notariat (loi 25 ventôse an XI); Rules for Notaries Public in United Kingdom and Wales- Notaries (Conduct and Discipline) Rules 2015; Rules for Notaries in the Netherlands-Wet op het notarisambt; The rules for Spanish Natario- Ley del Notariado de 28 de mayo de 1862
  \item \textsuperscript{134} Germany-Bundesnotarordnung (BnotO) §95
  \item \textsuperscript{135} Germany-Bundesnotarordnung (BnotO) §99
\end{itemize}
behaviour, but also reflect the impartial and righteous manner of notaries. As a result, notaries are seen as professionals with great dignity and honour.

Notaries in each country are regulated by their local professional council, which stipulates the notarial rules and regulations to suit their national situation and tradition. All notaries are members of the association from the very beginning of their profession because the notary councils are also responsible for applications and training so that applicants’ names are kept in the records and added to the list of members when they succeed in becoming a notary. The local notary council establishes the standard criteria for notaries and their practice and keeps an eye on their behaviour to ensure that their practice is in line with the regulations. The professional council has the authority to discipline and punish notaries who misbehave. They have the power to suspend or revoke the notarial license of a notary who intentionally causes serious damage or violates the important notarial rules, which has an extremely severe effect.

(2) Insdernity

Although many laws prescribe liability for notaries’ malpractice and notaries cannot escape their mistakes or misconduct, aggrieved parties may not be compensated for their loss or damage because a single notary does not have the financial capability to cover the loss. This sometimes occurs when the consequence of the notary’s action is very costly because notaries are dealing with valuable assets and important issues in most cases; therefore, the loss or damage may be too great for a notary to reimburse the injured party from his own pocket. Therefore, all notaries must have professional insurance to
protect themselves from financial liability and provide their clients with some security that they will be reimbursed for any mistakes caused by the notary’s practice.

In many countries, it is compulsory for notaries to acquire individual professional insurance to protect themselves from errors or omission, but since the requirements of professional insurance depend on the national policy, the type and the insurable value of the insurance vary in different counties. For example, in Germany, the law requires every notary to have individual insurance with coverage of 1,000,000 euros,\(^\text{136}\) while a notary in the United Kingdom must have indemnity insurance with a minimum coverage of £1,000,000.\(^\text{137}\) In addition, notaries may have further security from their professional group in some countries, where the local notary association organises a collective fund to cover the loss or damage caused by its members. A fixed amount of money may be collected from all members for a certain period of time or collected from each notary’s revenue on a case-by-case basis. For example, the Royal Dutch Association of Civil-law notaries (KBN)\(^\text{138}\) in the Netherlands collects money from each member on a yearly basis to provide fidelity insurance for all members. This KBN insurance will be responsible for all damages caused by notarial action to the injured party up to 24,000,000 euros.\(^\text{139}\)

\(^{136}\) Bundesnotarordnung (BnotO) §19a
\(^{137}\) The Faculty Office, ‘Code of Practice: Chapter16 Insurance’ (The Faculty Office, n.d.) retrieved from http://www.facultyoffice.org.uk/chapter/insurance/ (accessed 1 Nov17)
\(^{139}\) Schmid, at 230
3.3 Notaries in Thailand

After the topic of notary profession had been discussed and studied for years, at the present time, notaries exit in Thailand, yet the current notaries in Thailand are only similar to the notaries public or common-law notaries in the United States. Thus, they do not have board working scopes nor superior status like civil-law notaries in the Roman-prevailed countries. Thai notaries work mainly on translate and/or certify documents, individuals’ identities, and signatures; and prepare and certify oaths as well as affidavits. Apart form these duties, they do not involve in real estate business or any special area.

In Thailand, notaries is a lawyer who pass a special training and obtain a certification which permit them to perform notaries’ works. However, a lawyer, who earn the notarial certification, do not have superior status than ordinary lawyer even though they possess an additional certification. Not only this, similar to the notarial acts of the common-law notaries, notarial authentication of Thai notaries do not have special power which have probative value nor executory value like the notarial authentication of civil-law notaries. Document with notarial acts enclosed by Thai notaries can only be used for proving against the contractual parties.

As Thai notaries are basically lawyer, the Thai lawyer council is the organization which responsible for registration, training and well as discipline notaries. They have set the separated qualifications for becoming notaries, and the two important qualifications
to become Thai notaries is that the applicants must\(^{140}\) 1) be a lawyer; and 2) pass a special course trained for becoming a notary. From the first qualification, it means that the knowledge in law is the important requirements to apply for notaries because in order to become a lawyer, the applicant must 1) hold a law degree or an equivalent degree; 2) complete an internship for at least 6 months in order to take the lawyer examination; then 3) pass the lawyer examination. Apart from the above qualifications, the applicants must hold Thai nationality and have good behaviour without a record misconduct in good moral which show intention of dishonesty.

\(^{140}\) Section 4 of Regulations of the Lawyers Council of Thailand Regarding the Registration of the Notary's Lawyer (ข้อบังคับสภาทนายความ ว่าด้วยการขึ้นทะเบียนนายความผู้ท้าทายการรับรองลายมือชื่อและเอกสาร พ.ศ.2551 ข้อ 4)
To summarize chapter 3, the notarial profession is another legal profession that has a long history and the same origin as civil law, namely, the Roman Empire. However, the role and status of notaries in society have substantially changed from the Roman era until today. Notaries developed from short-hand scribes to their current legal profession in civil law countries along with trade and commerce when shipping flourished and the presence of a notary in commercial tasks became essential. Therefore, notaries began to be involved with commercial work more than in the old days until their main duties included family matters, corporate affairs and real estate. With their high morality and standard practice, the intervention of civil law notaries is considered to be essential in certain transactions, such as real estate conveyancing and prenuptial agreements, which are not considered to be legally valid without the participation of a notary.

Since their initial appearance in Roman times, notaries have spread across the world and can be found on every continent today. However, notaries in most countries are common law notaries, who are not as important as their civil law counterparts, despite being developed from them. With their greater responsibilities, qualifications and liabilities, civil law notaries in continental Europe, especially in France and Germany, have more extensive roles and functions than common law notaries, who can only affirm oaths and certify the validity of documents and signatures. Hence, it is interesting to study the three main functions of civil law notaries, since they are extremely important to society. Therefore, notaries’ duties in one of these functions, namely, real estate, are examined in this thesis to compare this foreign interventional measure with the current real estate
registration system used in Thailand and discuss the possibility of utilising the services of notaries in the Thai registration system.
CHAPTER 4

ROLE OF NOTARIES IN THE REAL ESTATE REGISTRATION PROCESS IN FOREIGN COUNTRIES

Notaries are viewed in the big picture as legal professionals who are authorised to certify documents and signatures, take affidavits and administer oaths. These are the fundamental duties of notaries around the world but they are not limited to these, because notaries in some countries have broader roles and duties. Notaries who only have these basic duties are common law notaries, who were only found in common law counties like England and America in the early days, but today, they are widespread and exist in many countries around the world, both common and civil law counties, including Thailand; therefore, these basic duties are perceived to be the core function of all notaries in every country.

As mentioned in the previous chapter, civil law notaries are superior to common law notaries and they have more duties than their common law counterparts. Their roles and duties have been developed closely to the original Roman notarii, who took care of properties and civil matters for the royal and ecclesiastical courts. The civil law notaries in this modern era are still responsible for properties and civil matters, but they are now also specialists in family, property and corporate law. They deal with many important matters in people’s daily lives, and real estate activities are one of the major duties of the civil law notary. In civil law countries, notaries are used as an intervention mechanism for preventing real estate arguments. Notaries are involved at different stages of various kinds of real estate transactions; yet, their role in the context of real estate may vary from...
country to country. In some countries, the involvement of notaries is mandatory in some stages of a transaction, while their participation may be voluntary in others. Hence, notaries may be present at different points of transactions in different countries.

Although all notaries have the same origin, they have developed differently in each country. They may be divided into two generic types, but each type has distinctive characteristics based on the country in which they developed. Hence, it is interesting to study notaries in different countries and their role in the real estate context. Therefore, the notaries in four countries will be studied in this thesis based on two civil law countries, France and Germany and two common law countries, the United Kingdom, particularly England and Wales and the United States of America. France and Germany are chosen because the notaries in these countries have a long history close to the Roman notarii and the notarial system today is very well organised and effective, while the United Kingdom is chosen because its notaries also have a long history and were developed closely to the civil law notaries. Meanwhile, the United States is chosen because the American notaries are role models for common law notaries across the world. The notaries in these countries be studied in this thesis with a focus on the following three factors;

1) The characteristics of the notaries in each country, including their social status, the qualifications required for becoming a notary and the reasons for disqualification and the regulator, which is the organisation that regulates the profession;

2) Notaries’ role in real estate transactions, including what they do, their significance and the alternative intermediaries in real estate transactions, if any; and
3) The liabilities of notaries, including remedial schemes for any loss and damage caused by the notary’s practice.

4.1 France

In the past, France was part of the Roman Empire; therefore, the French legal system and law were influenced by the legal system of ancient Rome. France adopted the civil law system and civil law notaries from its precedent kingdom, when notaries were introduced into French territory, which was previously called Gaul or Gallia,\(^\text{141}\) around the 3rd Century AD by colonisers.\(^\text{142}\) They disappeared for a time after the fall of the Roman Empire, but reappeared and developed intensely during the 12\(^{th}\) and 13\(^{th}\) Centuries\(^\text{143}\) in the reigns of King Louis IX and King Philippe IV. They continued to develop over time until they become proper professionals called “notaires”. Since the French notaries originated from the Roman Empire, their roles and duties developed close to those of the Roman tabelliones. Since the roles and the duties of the French notaries follow the practice of the Roman notaries, French notaries not only certify signatures and documents, like general or common law notaries, but they specialise in property and family matters and dealing with real estate transactions is their main duty in this modern time. Notwithstanding, the French notaries are now governed with a more systematic system

\(^{141}\) The western part of the Roman Empire  
\(^{143}\) Ibid
and formality than in the ancient era. There are special laws and regulations for notaries and their qualifications and practices are supervised by a professional association. As a result, France is regarded as having the most organised notarial system in the world and its notaries have the oldest history, which is why it is interesting to study French notaries and their role in the real estate context.

4.1.1 Characteristics of French Notaries

Even though notaries have a long history in France, their role was confined to the royal courts and churches in earlier times. Notaries in each county were regulated by their rulers; hence, the regulations and practices of notaries varied in different countries. The conventional practices of notaries in different regions were consolidated into a uniform law in the 19th Century\textsuperscript{144} and the status of French notaries became stable after the French Revolution by the Act dated 25 Ventôse year XI.\textsuperscript{145} The main characteristics of notaries and notarial deeds were established in this Act and there were also some regulations and qualifications that were required to become a notary. More rules and regulations were established in different decrees over time until today, French notaries occupy a strong position in society. They have a certain and respectable status and are involved in many important issues in people’s daily lives. Yet, it is not easy to become a French notary. They must have high academic knowledge and an unimpeachable personality to qualify as a notary. Their work is monitored by professional bodies to ensure

\textsuperscript{144} Ibid
\textsuperscript{145} Ibid
that they follow the professional standard of practice and the core values of the profession. Therefore, the status, qualifications and regulatory bodies of French notaries will be the particular focus of this section.

4.1.1.1 Status

French notaries are specialists in private civil law, especially family and property law. Therefore, all notaries must have a very strong background in legal knowledge. They are required to have a degree in law specialising in notarial law and vocational training in a notary office for a certain period. Although notaries are a kind of legal practitioner, they are not exactly the same as a lawyer because they cannot represent clients in court and cannot be involved in any litigation like an advocate. They can only provide legal advice to clients and their duties cover real estate, family, tax and corporate contexts. Since they are specialists in these areas, they have the monopoly of some tasks, such as the provision of authentication to some activities, like real estate conveyancing, in which transactions would not be complete and enforceable without a notarial deed. Hence, the participation of notaries is essential in some stages of these kinds of transaction and sometimes, they are also hired to work on the whole transaction. As mentioned above, notaries are usually involved with important and/or valuable events in daily life, like the sale of immovable properties and prenuptial agreements; therefore, every notary must be highly competent with a good moral character. Notaries must act with prudence and discretion, otherwise they will be held liable for wrongful actions, whether intentional or improvident. Their high academic qualifications and merit give notaries a prestigious social status.
It is clear that notaries in France are public officers by virtue of Article 1 of Order no. 45-2590, in which it is stipulated that notaries are public officers who are authorised to record any instrument or contract for parties who want or are obliged to have authentic deeds for any activity. French notaries are appointed by the Minister of Justice (le Garde des Sceaux) and empowered to authenticate any document or act on behalf of the State; hence, they must perform their duties deliberately with reference to the relevant rules and regulations. When documents have been authenticated with the proper practice, they are considered to be public documents that will be recorded in the public archives for years. As a result, notarial instruments have a high degree of credibility, which is why notarial deeds are mandatory in several activities, such as real estate conveyancing, marriage contracts or testamentary dispositions. Notaries' practices give documents two special attributes, namely, probative force and execution force. With probative force, notarised documents have a probative value and this means that they are presumed to be true and correct when they are first presented, thereby directly binding the contractual parties to the agreed obligation stated in them until they are disproved. The second special attribute is enforceable power, which means that the notarised documents have the same effect as a court order, which the parties are bound to immediately execute without the need for further legal procedures. Hence, the claimants are not required to file a lawsuit for a court order before executing the contents of the document.

146 Article 1 of the Order no. 45-2590 Relative au statut du notariat dated 2 November 1945
147 Article 23 Decree No. 71-941 of 26 November 1971
Although French notaries have public authority, they are not entirely the same as other public officials. The notarial profession is also considered to be a liberal one because, unlike other public servants, notaries have a high degree of freedom to manage their work. They can operate their own business and receive requests and income directly from customers. They do not receive orders or salary from any public authority and only the Ministry of Justice can appoint and monitor them. There is professional council, which regulates all notaries to ensure that they are working in line with their professional guidelines. However, as public servants, notaries’ mission is to provide a service to the general public. They must remain neutral in all their dealings and work to guarantee the public interest rather than to make a profit.

### 4.1.1.2 Qualifications

To become a notary, a candidate must have general qualifications and educational qualifications as specified by the law.\(^{148}\) In terms of general qualifications, a candidate must be a French national or a national of any Member State of the European Union or of another State that is party to the Agreement on the European Economic Area, be of good behaviour and uphold integrity and impartiality. Therefore, he should have never been bankrupt, sentenced to prison by a final judgment, subjected to any disciplinary action by any State agency or similar kind of sentence.

As for educational qualifications, applicants must hold a Master’s degree in law called “Master 1” (*A maîtrise en droit*) and another diploma specialised in the notary

\(^{148}\) Article 3 of Decree No. 73-609 of 5 July 1973
profession. There are two kinds of notary diplomas that can be obtained in different ways, and applicants are free to choose one of them. The first is an academic path, which is reserved for those who accomplish a Master’s degree in notarial law from a University in cooperation with the Paris Center and the National Notary Training Center (CNEPN) or notaries who have previously worked in a notary office in the geographical area. This entails further study of notarial law called “Master 2” at university. This is a three-year course, in which the first year involves the full-time study of notarial law, while for the next two years, the applicants can choose to take four training modules at the university or intensive training on notarial practices in a notary firm. After completing the course and all the related assessments, students are awarded a higher notary diploma (diplôme supérieur du notariat (DSN)). The second path is a vocational one, for which applicants who do not have a Master 1 degree, but hold an equivalent degree, such as economics, accounting, etc., are also eligible to apply. In the first year, the applicants study notarial duties and notarial law in a course organised by the CNEPN to obtain a Master 2 degree, after which they are selected for an internship in a notary office and follow a sandwich course of five modules for the next 30 months. Having completed this path, they are awarded another type of notarial diploma, a diploma in the notary profession (diplôme d’aptitude aux fonctions de notaire (DAFN)).

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149 The Centre National de l’Enseignement Professionnel Notarial (CNEPN).
151 Articles 2-7 of Order of 28 April 2008
152 Supra note 150
Nevertheless, the law has stipulated a special route to become a notary for those who do not have a law degree or notarial diploma, or neither, but have been working in a notary firm for many years. However, the length of work experience for the exemption also varies by the qualification and position of the candidate. For example, if applicants have held a diploma of first clerk (premier clerc de notaire) or a diploma from the Institute of the Trade of the Notary (IMN) for more than 6 years and have been working in a notary office for more than 9 years, they are eligible to take the notarial examination. Others, whose professional activities are directly related to those of a notary, only need five years’ experience and those who work for a statutory notarian body only need four years and the duration will be reduced by half of each circumstance for those who also hold a Master’s degree in law.\footnote{Article 7 of the Decree No. 73-600 of 5 July 1973} After candidates have submitted their application to the Ministry of Justice, they are required to take a Technical Proficiency test (l’examen de contrôle des connaissances techniques (ECCT)), which takes two years’ compulsory preparation to learn the knowledge of notarial management, ethics and laws, in order to earn the diplôme d’aptitude aux fonctions de notaire (DAFN).

Apart from these routes, if other legal professionals who have more than three years’ legal knowledge and experience, such as judges of ordinary courts, advocates, attorneys or taxes counsellors, want to become a notary, they are not required to follow the aforementioned regular paths to obtain legal knowledge and experience again, but they need to take another examination arranged by the Ministry of Justice.\footnote{Articles 4 and 5 of the Decree No. 73-609 of 5 July 1973}
examination is designed to test their technical knowledge and knowledge about notaries, the contents will vary according to each candidate’s qualification and experience.\textsuperscript{155}

After candidates have obtained the qualifications to become a notary, they can submit their intention to the Conseil Supérieur du Notariat (CSN), which will forward their application to join the profession to the Minister of Justice and they will become assistant notaries.

\textbf{4.1.1.3 Governing Bodies}

Although notaries are public officials supervised by the Ministry of Justice, they are, in fact, regulated by their own professional institutions. The first French notarial institution was established by the ordinance of 2 November 1945\textsuperscript{156} in the 20\textsuperscript{th} Century,\textsuperscript{157} which contained the characteristics and roles of notaries and the notarial institution. Then, the ordinance of 19 December 1945 was issued to regulate notaries and institutions.\textsuperscript{158} These two ordinances are still in use in modern times and they indicate the mission and administration of three kinds of notary institutions, namely the Chamber of Notaries, the Regional Council of Notaries and the Higher Council of Notaries. These three institutions have distinctive functions and different levels of authority.

\textsuperscript{155} Article 5 of the Decree No. 73-609 of 5 July 1973
\textsuperscript{156} Ordinance n ° 45-2590 of November 2nd, 1945 relating to the status of the notariat
\textsuperscript{158} Decree No. 45-0117; Ordinance n ° of 19 December 1945 adopted for the application of the statutes of notaries
The lowest type of notarial organisation is the Chamber of Notaries (le Chambre des notaires). These are types of notarial associations that operate at the district level (French Administrative area); hence, there are 72 Chambers of Notaries in France. Each of them is considered as one department in which all notaries and notarian offices are collected together. A Chamber of Notaries is responsible for all notary affairs within the area, from registration, welcoming them to the profession, training, to regulating their professional practices and ethics. They also settle disputes between notaries, and between notaries and their clients, as well as communicate with the public. Apart from this, the Chamber of Notaries is also responsible for managing a real estate property database since notaries must record the authenticity of every real estate transaction. However, the Paris Chamber of Notaries has a special duty over and above those of the other Chambers of Notaries because it not only manages the real estate property database of Paris and the Parisian Regions (Île-de-France), but this chamber also traditionally organises public auctions for real estate sales.

The Regional Council of Notaries (Conseils Régionaux des Notaires) is the middle level of notary organisations, which gathers all the Chambers of Notaries in one jurisdiction of the Court of Appeal into one Regional Council. France has 33 Regional Councils of

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159 Id
160 Article 4 of Ordinance n° 45-2590 of November 2nd, 1945
161 Article 4 of Ordinance n° 45-2590 of November 2nd, 1945
Notaries, each of which has authority over all the Chambers of Notaries in its region. The Regional Council supervises the disciplinary activities of each Chamber of Notaries by giving an opinion of the regulatory scheme established by each Chamber, as well as disciplining the chamber. The Regional Councils also collaborate with the Chambers of Notaries and the Higher Council of Notaries to discipline notaries, and promote and foster the education and activities of notaries in the region. They also handle any conflicts between the departments.

The highest level of notary institution is the Higher Council of Notaries (the Conseil Supérieur du Notariat), which has the authority over and represents the whole profession in France. The Higher Council implements policies and legislation for notaries at the national level. It establishes missions and directions to serve the interests of all notaries, so that all Regional Councils and all notaries must follow the instructions of the Higher Council. The Higher Council of Notaries mediates arguments between Regional Councils or notaries from different regional councils, furthermore, it collects funds and distributes them to the regional councils. These funds are used to promote professional activities and provide professional insurance and social security for notaries.

The Higher Council of Notaries, the Regional Council of Notaries and the Chamber of Notaries are the main governing bodies that strictly manage and develop the profession.

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163 Supra note 158
164 Article 5-1 of Ordinance n° 45-2590 of November 2nd, 1945
165 Article 5 of Ordinance n° 45-2590 of November 2nd, 1945
166 Article 5 of Ordinance n° 45-2590 of November 2nd, 1945
167 Article 6 of Ordinance n° 45-2590 of November 2nd, 1945
168 Article 6 of Ordinance n° 45-2590 of November 2nd, 1945
in France. The governing power is decentralised in a hierarchical system in which each level of organisations has its own missions and responsibilities. The decentralised system facilitates an oversight of the profession and has the ability to closely control the practices of notaries within a small area; yet, all organisations connect and cooperate at the uppermost level, where they are supported and monitored by the principal organisation to ensure that the entire profession works in line with the same integrity, ethics and neutrality.

4.1.2 Roles and Responsibilities of French Notary in Real Estate Transactions

French notaries play a significant role in real estate transactions. In fact, they have the monopoly over real estate conveyancing because the notarial act is an important legal condition for registration. As a result, about half of the work of French notaries in 2017 involved real estate properties. Nevertheless, their role is not limited to registering real estate; they also participate in various stages of real estate transactions in which their professional knowledge and skill are essential. Therefore, the three notable functions of French notaries in real estate transactions will be described in this section.

4.1.2.1 Verification of the title, the contractual parties, and the property

A real estate transaction in France starts when the buyer sends an offer to buy the property to the seller. Then, when the parties have agreed on a price, they sign a contract called a preliminary contract. This is an agreement in which one party, usually the seller, invites the other party to purchase the property within a stated period of time. It is usually
created prior to a sales contract and it binds the party to the offer he made. This offer can be made by either party or both. The person who makes the offer will determine the type of preliminary contract, which will have different effects. Nevertheless, he is committed to the agreement and cannot withdraw his offer until the contract is retracted or expires. On the other hand, if it is not a bilateral promise, the party, who does not make the offer, has the option to exercise his right according to the contract or retract it. He is free to reject the agreement during the preliminary period. If he confirms the contract, the buyer and the seller can establish an actual sales contract.

The buyer should do a preliminary check before confirming the agreement in the time between the formation of the preliminary contract and signing the sales contract. It

There are three types of preliminary contract in France.

1) A Promise-to-Sell contract (Promesse de Vente) is a contract of a unilateral promise to sell made by the seller. In this contract, the seller makes an exclusive offer to a potential buyer to buy the property at the specified price in a limited period of time. The seller will be bound to his promise until he retracts the offer or the offer expires. This type of preliminary contract will only be valid when it is registered with the tax authorities. (Article 1589-2 of French Civil Code)

2) An Agreement of Sale (Compromis de Vente) is a bilateral promise to sell. This kind of contract is like a preliminary sales agreement formed by the intention of both parties after the price has been agreed. Both parties will be committed to the contract at this stage so that, if one party retracts the agreement, the other one can take legal action to claim for damages. (Article 1589 of French Civil Code)

3) A Purchase Offer (Promesse d’achat) is a unilateral promise to purchase made by the buyer. In this kind of contract, the buyer commits himself to the offer and the seller must accept or retract it.

is not mandatory for notaries to be part of the transaction at this stage, since a preliminary contract can be drafted either by notaries, real estate agents or the parties themselves. Hence, the contractual parties may verify the contract themselves instead of hiring a notary. The buyer can make a decision by considering the information provided by the seller because, before two parties enter a sales contract, the seller normally has a duty to inform the buyer of all the important information related to the property that may affect the buyer’s decision,\textsuperscript{170} such as a description of the property and its ownership, and any liabilities connected to it; otherwise, the seller will be held responsible for any hidden defects.\textsuperscript{171} Notwithstanding, since the preliminary contract is considered as the first formal contract that has a binding effect on the party/s, it is important to draft it wisely and check all crucial information thoroughly. Therefore, notaries are hired to participate in drafting preliminary contracts and in most real estate transactions from the preliminary stage based on their expertise in real estate properties.

Notaries can do the preliminary checks better than individuals, since their status as public officials and real estate specialists grants them the special authority to undertake a title search of the land registry. Notaries use the title deed to search for information of the land. They can verify the true owner of the property, since the names of all owners, from the first to the last, are shown in the title history. If a property is jointly owned, the notary will be aware of the seller’s rights. He will also see the status of the land in the land directory so that, if there is any restriction or charge on the property like a mortgage

\textsuperscript{170} Article 1602 of the French Civil Code
\textsuperscript{171} Article 1641 of the French Civil Code
or attachment, he will also see this when he performs the title search. Beyond these two points, notaries can use the information of the title, i.e. the location and area of the land, to appraise its value by comparing it to a similar piece of land in the same area.

As professional intermediaries of the real estate transactions, notaries must also verify the information that may affect the validity of the transaction. For example, it is important for notaries to ensure the marital status of the contractual parties and their ability to complete the transaction. Although notaries may also visit the property to see its characteristics, such as its location and condition, it is not necessary for them to do so; instead, they may arrange for a technician to check the property for defects and provide a certificate. All the information obtained from the verification of titles, contractual parties, and properties will be used by the notary to draft a preliminary contract or advise the contractual parties whether to accept the agreement or not. Since this information is vital for contractual parties to make a decision, notaries must perform their task very carefully and give truthful and impartial information to both sides; otherwise, they will be liable for any mistake or misconduct.

4.1.2.2 Certification of Transactions

Notaries’ main task in this context is the certification of the real estate transaction. They have a duty to attest that it is valid and correct. Notaries will certify the transaction with an authentic act/deed at the place where the contract is drawn up.\(^{172}\) All the parties,

\(^{172}\) Article 1369 of the French Civil Code
including the notary and the witnesses, if there are any, must be present in the notary’s office at the moment the contract is executed. The two parties must read and understand the agreement and accept it by signing it in the presence of the notary and the witnesses. Then, the notary will sign and enclose the acknowledgement with a notarial seal. Thus, notarial acts are normally conducted at the moment the contract is executed to confirm that the transaction is correct. Today, notarial acts can also be executed in an electronic format. Electronic documents must be produced using a reliable process that guarantees the relationship between the act and the attached signature; hence, notaries must use a special programme approved by the Superior Council of Notaries. They will attach their electronic signature and the image of their seal to the deeds and the parties and witnesses can add their signatures on the electronic screen. If the deed is done with the correct formalities, it is acceptable as an authenticated document/deed.

173 Witnesses may only be required in some circumstances, such as the revocation of a will, drawing up a matrimonial agreement, changing a matrimonial agreement, etc. (Article 10 of law 25 Ventôse year XI)
174 Article 10 Decree No. 71-941 of 26 November 1971 on the Acts Issued by Notaries
Witnesses may only be required in some circumstances, such as the revocation of a will, drawing up a matrimonial agreement, changing a matrimonial agreement, etc. (Article 10 of law 25 Ventôse year XI)
175 Article 15 Decree No. 71-941 of 26 November 1971 on the Acts Issued by Notaries
176 Article 16 Decree No. 71-941 of 26 November 1971 on the Acts Issued by Notaries
177 Article 16 Decree No. 71-941 of 26 November 1971 on the Acts Issued by Notaries
An authentic deed or a notarial deed is a special deed which is drawn up with the special formality of an authorised public officer like a notary. An authenticated deed drawn up by a notary has a special value above that of other private authenticated deeds. An authenticated deed or a notarial can be used against third parties and is enforceable throughout the Republic, while a private authenticated deed is only enforceable between the contractual parties. Another speciality of notarial deeds is that they give full proof of the agreement. They not only guarantee that the transaction is true, but also the facts and information contained in the document or related to the transaction. Hence, in practice, they must verify that all the important information is real and correct before they certify the transaction.

4.1.2.3 Intermediaries in Transactions

French notaries are often hired to mediate real estate transactions, which involves giving assistance during the arrangements and providing professional knowledge of a particular business, although they are not required to do so by law. They provide the two parties, the buyers and the sellers, with professional services at different stages and act on behalf of both sides.

178 Article 1369 of the French Civil Code
179 Article 19 Ventôse and Article 1372 of the French Civil Code
180 Article 1371 of the French Civil Code
In the early stage of real estate transactions, notaries use their professional knowledge of the real property to give advice to both parties in the negotiation. As a professional intermediary in this business, notaries possess various tools and real estate information, which are useful for making good recommendations to clients. With their professional moral duty of impartiality, notaries will provide neutral advice which does not only benefit one side. If they are also hired to draft the agreement or revise it, they ensure that it contains terms and conditions that are fair to both parties.

In addition, notaries also offer an escrow service in real estate transactions. When the preliminary contact has been established, the buyer will place a deposit in the escrow account, which is managed by the notary, to secure the agreement until the buyer accepts the seller’s terms, after which the sales contract is established. Then, the buyer has an obligation to transfer the remainder of the payment to the escrow account. After the notary has facilitated the execution of the contract, he will register the real estate with the land registry and pay the tax and registration fee with the money in the escrow account before transferring the balance to the seller.

Lastly, the notary will keep a record of the real estate transaction and transmit it to the higher council of notaries, which has a duty to keep these records for 75 years and then store them in the national archive.

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183 Article 6 of the law 25 Ventôse year XI
184 Supra note 182
4.1.3 Professional Liabilities and Indemnity

Notaries normally work on people’s personal matters. Since they are entrusted by their clients to deal with important information and valuable property, notaries must take good care to perform their duties to their professional standard; otherwise they may cause their clients to suffer a loss. Therefore, they are held liable for their actions and if they breach their clients’ trust, they are subjected to liability and indemnity. Notaries are not only subjected to civil and criminal liabilities like everyone else but, as public officers, they are subjected to higher criminal sanctions than ordinary men and the liability of their profession. Since notaries’ work involves extremely valuable objects, a single notary may not be able to cover the loss alone. Thus, the professional organisation operates an indemnity scheme for all notaries to share the responsibility with the whole profession. Notaries’ liability and indemnity schemes are crucial elements of the French notarial system, since they provide security to the clients, and the French policy for these two elements is a magnificent tool that makes the French notarial system extremely reliable.

4.1.3.1 Liabilities

As public officers who are granted authority by the State to work on several tasks, notaries’ professional liability is based on the Deontology (ethics) and disciplinary code. Notaries are subjected to several special obligations under these two professional regulations, the most significant of which are as follows;
1) The duty of impartially: French notaries are neutral in all transactions. Since they do not represent any party, they must provide benefits and information fairly to all parties. If there are two notaries in one transaction, they must both work in the same way and ensure that the transaction is fair for every party.

2) Professional secrecy: Notaries are subject to professional confidentiality. Since their clients trust them to carry out tasks related to their personal issues, notaries must not reveal any information about their work to third parties unless it will be useful and beneficial to their clients.

3) The duty to give advice: French notaries cannot refuse to give advice and their advice must reach a professional standard.

4) Prohibited from undertaking commercial activities: Notaries are prohibited from undertaking commercial activities, especially related to their work, such as real estate business, in order to promote fairness and avoid them pursuing their own interest.

Individual notaries will not only be penalised for breaching their obligations under the Deontology and their disciplinary code, but such breaches will also destroy the general public’s trust in the entire profession.

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185 Article 12 of the Deontology
186 Article 13 of the Deontology
187 Articles 3 and 11 of the Deontology
188 Article 9 of the Deontology
4.1.3.2 Indemnity

Notaries have criminal and civil liability for their actions like any other French citizen. Since their work often involves personal property and documents, any criminal offences under the French Penal Code mainly relate to the falsification of documents or signatures, counterfeit of State seal, embezzlement of clients’ property, or perjury to public officials. However, they are subjected to a high penalty based on their high public official status. If their professional misconduct or mistake causes any damage or loss to their clients, notaries have the civil responsibility to compensate them. The proximate cause of the loss or damage for which their clients are entitled to be compensated must be a notarial act. In addition, as notaries are dealing with important and high-value subjects, it is necessary for the French law to set some indemnity schemes for this profession to protect the clients from loss or damage caused by notaries when performing their tasks. There are three categories of indemnity schemes for notaries, as detailed below.\(^{189}\)

1) Professional Insurance (Assurance Responsabilité Civil (RC insurance))

Several professionals in France are legally required to insure themselves against their actions, such as accountants, real estate agents, health professionals and legal professionals, including notaries. Thus, all notaries must arrange professional insurance

with an insurance company at the beginning of their career.\textsuperscript{190} Although insurers will cover 90% of the loss or damage to their clients as a result of notaries’ mistakes, notaries themselves also responsible for the other 10%.\textsuperscript{191} However, the law has set the limit for their responsibility to be within 15,000 euros for each notary per case and/or 15,000 euros for the Regional Guarantee Fund per case.\textsuperscript{192} However, insurers will refuse to cover loss caused by intentional misconduct or an act that is prohibited by the professional rules/regulations or contrary to the professional morality.

2) Regional Guarantee Fund (Caisses régionales de garantie)

The Regional Guarantee Fund is arranged by the Conseils Régionaux des Notaires and is contributed to by all the notaries in the region.\textsuperscript{193} This fund is collected in the form of an annual subscription fee calculated from the average income per single notary in the past two years.\textsuperscript{194} It is a mutual fund that is prepared to compensate for notaries’ mistakes. It is intended to cover the loss and damage not covered by the professional insurance, whether it is an excessive amount or the insurance company refuses to pay it. Therefore, this fund covers any loss and damage caused by notaries’ intentional misconduct in order to provide their clients with a higher standard of security.

\textsuperscript{190} Article 13 of Decree n° 55-604 of May 20th, 1955 and Article 8 of Order of 28 May 1956
\textsuperscript{191} Article 13 paragraph 2 of Decree n° 55-604 of May 20th, 1955
\textsuperscript{192} Article 10 of Decree n° 55-604 of May 20th, 1955
\textsuperscript{193} Article 14 of Decree n° 55-604 of May 20th, 1955
\textsuperscript{194} Article 7 of Decree No. 56-220 of 29 February 1956
3) Central Guarantee Fund (Caisse Central de garantie)

Since the Central Guarantee Fund is arranged by the Conseil Supérieur du Notariat (CSN), it is based in Paris, although it actually financed by French notaries from across the country. The CSN collects 0.25% of the average of each notary’s income in the past two years. This rate applies to all notaries in France, apart from those who have a low income; for instance, those with an average income of less than €176,231 pay 25% less than the usual rate, and those whose average total income is less than €137,204 are exempted from this contribution. The Central Guarantee Fund is the second level of collective funds as an optimum guarantee for clients that they will be reimbursed for notaries’ misconduct.

Nevertheless, to claim indemnity from the collective funds, the claim must be the consequence of notaries’ misconduct during their regular duties and not the result of any action prohibited by law.

4.2 Germany

After the fall of the Holy Roman Empire, the Roman kingdom was divided into small counties ruled by various dynasties. The Roman influence was no longer powerful in the western part of the former Roman kingdom, since these areas were swallowed up.
by Germanic tribes. Although Germanic law dominated these regions, some parts of the
Roman law and legal system remained in some areas. Notaries and the authentication of
documents were implemented in different regions. At that time, notaries were attached
to different monarchies and churches so that the notaries in each county had a diverse
status and authority, and followed the rules of their own kingdoms.

An important event that had a huge influence on the German notarian system that
has lasted until today was the French Revolution in 1794. After Austria was defeated in
the Napoleonic War, the Rhineland,\textsuperscript{199} which had once been part of the Roman Empire,
was transferred to France by the Treaty of Lunéville.\textsuperscript{200} Hence, Bonaparte secured the
control of this region and introduced French law and French notaries to the left bank of
the Rhine.\textsuperscript{201} As a consequence of following the law 25 Ventôse year XI, notaries in this
area were made public officials and only allowed to have a single profession, separate
from lawyers.\textsuperscript{202} On the other hand, the notarial system followed the Germanic law in the
Prussian province in western Germany. Notaries in this territory could be both notaries and
lawyers at the same time. However, when the monarchical regime ended after the First

\textsuperscript{199} Rheinische Notariat, ‘Verein für das Rheinische Notariat e.V.’ (RHNOTV, 2017)
\textsuperscript{200} retrieved from http://www.rhnotv.de/geschichte.html (accessed 11 September 2017)
\textsuperscript{201} Id
\textsuperscript{202} Id
World War, many states adopted the Reichsnotariatsordnung\textsuperscript{203} and the single-profession notarian system was introduced in many areas.\textsuperscript{204}

Notwithstanding, the separation of notaries in France remains in modern times, but there are three kind of notaries in Germany; 1) Nurnotars; 2) Anwalnotars; and 3) Amtsnottars or Bezirknotars. Since these three kinds of notaries have somewhat different authorities and statuses, their qualification to enter the profession are different. However, they still work within the same scope in their role as a notary and play a crucial part in real estate transactions. With their long history of development, German notaries are some of the most significant civil law notaries in the world. Although they have the same ancient history as French notaries and have adopted some formalities from the French law, the German notarial system later developed into a unique system. Therefore, it is interesting to study German notaries and their role in the real estate context.

4.2.1 Characteristics of German Notaries

In Germany, notaries are commonly known as Notars or Notarins.\textsuperscript{205} Their service is usually in the real estate field, the successions field or the corporate field, and their responsibilities normally involve property, juristic acts and/or documents.\textsuperscript{206} In fact, there

\textsuperscript{203} The first formal uniform code for notary established by in 1512
\textsuperscript{205} Der Notar is a singular form of notary, die Notare is plural form of notary, and die Notarin is description of a female notary.
\textsuperscript{206} BNotO §20-21
are three types of notaries in this country; 1) Nurnotares; 2) Anwaltsnotares; and 3) Amtsnotares, and they have distinctive characteristics.

1) Nurnotares are single-profession notaries, who are forbidden to practice any other profession; hence, they work as notaries on a full-time basis.\textsuperscript{207} They are the majority or about two-thirds of German notaries.\textsuperscript{208} As mentioned earlier, nurnotares were introduced by the French and they can still be found in the West and East of Germany, in regions that were controlled by French based on the Treaty of Lunéville, or nearby.

2) Anwaltsnotares are advocate-notaries, who have two separate professions as notaries and advocates at the same time.\textsuperscript{209} They mainly exist in the regions that used to be part of Prussia, in the North-West of Germany and Berlin.

3) Amtsnotares or Bezirksnotares are notaries who fully and officially work as public servants employed by the State.\textsuperscript{210} These kinds of notaries only exist in the Baden-Württemberg district.

\textsuperscript{207} BNotO \S3(1)
\textsuperscript{209} BNotO \S3(2)
\textsuperscript{210} BNotO \S3 paragraph 2 and\S 114
Although these three types of notaries have their own specifications and practice in different regions, they have the same core responsibilities and formalities, since they are governed by the same Federal Notarial law.\textsuperscript{212} As well as their dissimilar characteristics,\textsuperscript{211}

\textsuperscript{211} Supra note 208

\textsuperscript{212} There are three federal laws related to the notarial profession.

1) Bundesnotarordnung (BNotO)- the main uniform laws containing notaries’ practices,
each type of notary also has a distinctive status, authority and qualifications. Hence, it is interesting to study their different statuses and qualifications and how they are organised under the same law and the same governing entities.

4.2.1.1 Status

Since each type of notary has distinctive characteristics, their statuses are not the same.

Nurkotares and Anwaltsnotaires are subjected to the Federal Notarial Code; hence, they are independent public officials, who are appointed by the State to record legal acts and perform legal interventions. Therefore, the status of their profession is close to liberal, but they especially have the power to perform certain public services on behalf of the State. They are public officials as they are appointed and supervised by the regional Ministries of Justice, but as a liberal profession, they are independent and can manage their own work and finances, unlike other public officials. These two types of notaries do not receive direct orders or salary from the State. They earn their income directly from their clients. However, notaries are not free to decide the cost of their service, since the aim of the profession is to provide a service for the public; hence, they are not allowed

administration and disciplinary rules.

2) Beurkundungsgesetz (BeurkG) contains the provision related to notarial deeds.
3) Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (GNotKG) contains regulations for the cost of notaries and courts.


213 BNotO §1
to profit from their function.\textsuperscript{214} They can only claim remuneration based on a fixed rate set by the Ministry of Justice.

The main difference between Nurnotares and Anwaltsnotares is that Nurnotares are prohibited from having another profession, while Anwaltsnotares are both notaries and advocates at the same time, although they both have a legal background. Although Anwaltsnotares are also advocates, in reality, the two roles must be separated, since the professional responsibility of the two professions toward their clients’ conflict. Since German notaries must be impartial based on their professional ethics, they must remain neutral in transactions.\textsuperscript{215} They must reveal and inform all important information to both sides. On the other hand, Anwaltsnotars have a duty of secrecy in their advocate role. They must not disclose their clients’ information to anyone.\textsuperscript{216} Since they are hired to represent one party, they cannot share their clients’ secrets with the other side. As a result, Answalsnotares cannot practice as notaries and advocates in one business; in short, notaries are not the same as advocates for both kinds of notaries.

Amtsnotares are full-time notaries like Nurnotares, but they are employed by the State so that they have a clear status as a public servant and, since they work full-time as notaries, they are not advocates as well. The speciality of Amtsnotares is that their status is close to that of a judge. They also perform some court functions in non-contentious cases, such as requisitions for land registration, probate cases, requisitions for guardianship,
etc. Since Amtsnotares are complete public officials under the State administration, they are not subject to the Federal Notarial law; instead, they are subject to their regional law. However, Amtsnotares and their system have just been abolished in 2018. They no longer existed from the 1st day of the year, when all Amtsnotares were transformed into Numnotares instead.

### 4.2.1.2 Qualifications

Since there are several types of notaries, to become a German notary, an applicant must obtain the basic qualifications, as well as the specific qualification required by each type of notary.

Every kind of notary must have four basic qualifications. Firstly, they must be German citizens below 60 years old. Secondly, they must qualify as a legal practitioner, hence, they must have passed the first examination, the University Examination, for a legal degree, and completed the second State examination with two years of practical training. Thirdly, they must pass the notarial subject examination and prove that they have sufficient knowledge of the profession by being trained for at least 160 hours by a professional notary, who has been appointed by the Chamber of Notaries. However, to

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217 The Dutch and German Notarial Systems Compared
218 Baden-Württemberg Law- Landesgesetz über die freiwillige Gerichtsbarkeit (LFGG)
220 BNotO §5 and DRiG (Deutsches Richtergesetz) §5, §5b
221 BNotO §7
attend the notarial examination, the applicant must have three years of experience in the legal profession.\textsuperscript{222} Fourthly, the most important condition is that there must be a demand for notaries in the region. There are numerus clauses in German law, which limit the number of notaries in each area\textsuperscript{223} in order to ensure that the number of notaries is in proportion with the total population. Hence, if there is no position available in the district, the applicant must stay on a waiting list until there is a vacancy. Consequently, notaries who register in one district are not allowed practice their profession in others.\textsuperscript{224}

Apart from the above-mentioned basic qualifications, each type of notary requires a specific qualification. To become Nurnotares, applicants must be among the top five percent to have passed the Second State Examination and then they will have to work as a Notarassessor (trainee) in a notary office for three years before they can earn the title of notary.\textsuperscript{225} Anwaltsnotare applicants must have attained a mark of over 40\% in the aptitude part of the notarial examination and over 60\% in the same part of the State examination.\textsuperscript{226} Then, they are required to participate in the notarial training organised by the professional organisation for at least 15 hours within a year after passing these examinations.\textsuperscript{227} They must also work as an advocate for at least 5 years.\textsuperscript{228}

\textsuperscript{222} BNotO §7a(1)
\textsuperscript{223} BNotO §4
\textsuperscript{224} BNotO §10a(2)
\textsuperscript{225} BNotO §7
\textsuperscript{226} BNotO §6 paragraph 3
\textsuperscript{227} BNotO §6 paragraph 2(3)
\textsuperscript{228} BNotO §6 paragraph 2(1)
Qualified applicants can apply for a position when a vacancy is advertised by the governor, who will co-organise the selection process with the regional Chamber of Notaries. The chosen applicant will be appointed in a formal ceremony at the regional Chamber\textsuperscript{229} and he will then have earned the title of notary.

### 4.2.1.3 Governing Bodies

As a respectable profession, which is empowered to act on behalf of the State, it is necessary for the notarian profession to maintain its merit and reputation. Therefore, professional organisations have been established to both control notaries’ activities and support their well-being. The two most important notarial institutions in Germany are the Chambers of Notaries and the Federal Association of Notaries. There are also some other institutions that oversee the integrity and transparency of the profession.

The Chambers of Notaries\textsuperscript{230} are public corporations that encompass all the notaries within the region. They collect all notaries’ profiles and certify their notarial positions. They also arrange professional welfare, as well giving administrative support to members. Since Chambers of Notaries represent all notaries in the region, they monitor and discipline them by establishing rules and provisions to regulate and promote notaries’ practice. However, they can only issue a warning in cases of misconduct,\textsuperscript{231} but they are not authorised to enact disciplinary proceedings. They must submit all allegations to the Higher Regional Court for a judgement. Chambers of Notaries also arrange professional

\textsuperscript{229} \textit{BNotO} §65
\textsuperscript{230} \textit{BNotO} §66-67
\textsuperscript{231} \textit{BNotO} 75
insurance to cover the damage caused by the breach of notaries’ duties. In addition, they organise training and examinations for notaries in conjunction with the State Justice Administration (Landesjustizverwaltung).\textsuperscript{232}

The Federal Association of Notaries (Bundesnotarkammer)\textsuperscript{233} is a higher notarial organisation than the Chambers of Notaries. This is a public organisation that consists of an aggregation of 22 Chambers of Notaries and its authority spans the whole of Germany. The Federal Association provides administrative support and supervision to all Chambers of Notaries.\textsuperscript{234} It records notaries’ registration and maintains notaries’ profiles. Moreover, it recommends the guidelines established by each Chamber of Notaries and also draws up guidelines and regulations, as well as training plans, for them.

Apart from the two above-mentioned types of notarial organisations, there are a few more, which supervise the profession to maintain transparency, independence, and neutrality. The District Court, Higher Regional Court, and State Justice Administration are Supervisory Authorities (Regelmäßige Prüfung) that regularly review and randomly check notaries’ activities.\textsuperscript{235} They also assess notaries’ behaviour in cases of minor misconduct and breaches of duty,\textsuperscript{236} and each supervisory authority also has a special role in this profession; the Higher Regional Court is the disciplinary court of notaries and the State Justice Administration is responsible for the notarial examination.

\textsuperscript{232} BNotO §93(2)  
\textsuperscript{233} BNotO §76  
\textsuperscript{234} BNotO §78  
\textsuperscript{235} BNotO §92-§93  
\textsuperscript{236} BNotO §93(1)
4.2.2 Roles and Responsibilities of German Notaries in Real Estate Transactions

According to German law, the transfer of the ownership of immovable property or an encumbrance or any right to the property must be based on an agreement between the contractual parties;\(^{237}\) furthermore, the acquisition of real estate property must be recorded with a notarial act and registered at the Land Registration Office.\(^{238}\) This implies that real estate transactions can be completed under two conditions: 1) they must be written in the form of a contract and certified by a notary, and 2) they must be registered afterwards. Hence, notaries' intervention is mandatory in real estate conveyancing in Germany, and although they are not required to participate in the entire transaction, they are often found to be involved in various stages. The significant role of notaries, which is to provide security and convenience in real estate transactions, can be divided into three functions: 1) verification of titles, 2) certification of the transaction, and 3) intermediary in the transaction.

4.2.2.1 Verification of titles, and rights and capabilities of contractual parties

The law only prescribes that the contract has to be certified with a notarial act, but it does not specify that it has to be drawn up by a notary; hence, the drafting of contracts is not a legal duty of notaries. Some contracts may be written by an advocate or a real estate agent, in which case, they must be reviewed and certified by a notary,

\(^{237}\) BGB §873
\(^{238}\) BGB §311b
otherwise they are not registrable. The notary must verify that all the legal requirements have been met before he certifies the document because he is liable for the information contained in the document once he has certified it. If the information is incorrect and causes damage to the client or third parties, he is liable for the loss. As a result, notaries are obliged to verify all the documents related to the transaction.

Although the law does not specify that a preliminary check is a mandatory duty of notaries, as mentioned above, it is important for them to check the background of the land and the contractual parties in order to protect their professionalism and prevent loss and damage.\(^ {239}\) Furthermore, it is necessary for them to make these checks because they have a duty to inform their clients of any potential risks that may be involved in the transaction.\(^ {240}\) Hence, notaries must verify all the related information as well as clarify every ambiguous detail and advise their clients accordingly. The information obtained from the preliminary checks will also be useful for them to draft the contract if they are asked to do so. Nevertheless, notaries’ duty is limited to providing legal advice about the charge on immovable property, the abilities of the parties, etc. They are not required to inspect the property and search for defects or give advice about the price or terms and conditions in the contract. They must only ensure that the parties acknowledge the terms and conditions of the agreement and the subject matter.

In order to examine the status of the property, notaries may need to investigate beyond the information provided by the contractual parties. As public officials who have

\(^{239}\) BeurkG §21

\(^{240}\) BeurkG §17(1)
permission to view the records of the land in the registration system, notaries can conduct a title search and provide a report that contains the background of the land with the land-registry imprint for their clients. This report will contain details of any charges over the land, the registry record, the names of all previous owners and the current owner. Since the information in this report is guaranteed, the buyer can feel secure about the status of the land.

4.2.2.2 Certification of Transactions

As mentioned earlier, the law requires the transfer of immovable property to be recorded by a notary; hence, notaries have a duty to certify the correctness of a real estate transaction. This does not mean that German notaries have to be present at the exact moment the contract is executed but, since it is mandatory for transactions to be certified as correct according to the intention of the parties by a notary, the parties must declare their intention to transfer the ownership or right to the immovable property to the notary and the notary has to record this declaration. Hence, it does not matter whether the contract is drafted and/or executed with other agents or made by the parties themselves because, in the end, they must present the agreement and declare their intention before a notary. Before the notary attests this agreement and declaration, he must investigate and verify the background of the property and the contractual parties, as discussed in the previous section. After the verification, the notary will read the statement

\[241\] Grundbuchordnung (GBO)§133a
\[242\] BGB §925
to the parties so that they can confirm their intention by signing it. Subsequently, the
notary will add his signature and stamp his seal on the document.\textsuperscript{243}

This notarial practice represents an authentic act or a notarial deed, which is a
crucial element that is required to register real estate.\textsuperscript{244} Notwithstanding, in German law,
a notarial deed has more special properties than just being required to register real estate.
The notarial deed has two special enforcement features. Firstly, it grants a binding force
to all kinds of public documents with full evidentiary value, which binds the contractual
parties to the information contained in the document.\textsuperscript{245} Hence, in real estate transactions,
the parties are bound to the agreement and its obligations from the moment the notary
affirms the contract, despite the fact that it has not been registered with the land registry.
The correctness of the information in the notarised document cannot be disputed unless
there is proof that it is incorrect.\textsuperscript{246} Secondly, the notarial deed in Germany has the same
enforceable value as court decisions; hence, the contractual parties do not have to file a
lawsuit against the opposing parties. For example, the notarial deed allows them to
request foreclosure without a court order.\textsuperscript{247}

\textsuperscript{243} BeurkG §13
\textsuperscript{244} BGB§311b
\textsuperscript{245} German Civil Procedure Code (ZPO)§415
\textsuperscript{246} ZPO§415 paragraph2
\textsuperscript{247} ZPO§794 (1)(5)
4.2.2.3 Intermediaries of the Transaction

Notaries act as intermediaries between the two parties in a real estate transaction. They are usually hired to be the counsellors in these transactions but, unlike real estate agents or brokers, they do not represent any side because, according to their professional ethic, impartiality, notaries must be neutral. They have the duty to give legal advice and assistance for the benefit of both parties; hence, when they verify the contents of the contract, they must inform the parties if there is any deficiency in legal requirements, whether due to the contractual parties, the property, or the agreement.

German notaries also play the role of escrow agent, since they are responsible for transferring the property from one party to another and, on the other hand, they are also responsible for transferring the money from the counterparty to the property owner. After the contract is signed, notaries have the duty to inform the tax authorities about the real estate transaction for a tax assessment, and also contact the land registration to determine the pre-emptive rights before the payment is made. Afterwards, they will contact the creditor/s to release every encumbrance from the property. Having completed this task, they will ask the buyer to transfer the money to the escrow account. Before the transaction can be registered, the parties must pay taxes and then the Tax Authority will issue a certificate to be used in the real estate registration. Therefore, notaries act as a third party, who secures the obligation during the time the property remains unregistered.

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248 BNotO §14 paragraph1  
249 BNotO §23  
250 Grunderwerbsteuergesetz (GrEStG) §18  
251 § BeurkG 19 and GrEStG §22
In some cases, notaries also perform this duty by deducting the money from the escrow account. Lastly, notaries will submit a request to the registry office to register the transfer of the title deed. When the registration process is completed, they will safely release the payment from the escrow account to the seller.

However, the law only actually requires German notaries to perform the notarial deed. Acting as an intermediary, whether as a counsellor or an escrow agent, is only a professional service notaries offer to clients in order to enhance the security of the real estate transaction. For this reason, it has become a common service of notaries that many people use in the real estate businesses.

4.2.3 Liabilities and Indemnity

In Germany, notaries are well respected and reliable. German people trust them to work on their personal affairs and their work involves highly valuable and important subjects; hence, they must perform their work prudently and faithfully or they will be held liable for any damage caused by their action. The law impose both legal liabilities and professional ones on notaries in order to protect the public. However, since the cost of the damage may be too high for a single notary to hold the responsibility alone, the law provides an indemnity scheme in order to give clients security and assure them that they will be reimbursed for loss that is the result of notaries’ performance.
4.2.3.1 Liabilities

Their high social status does not exempt German notaries from legal liability. In fact, they are subject to both criminal and civil liability and, as special officials, they are also subject to their professional liability.

Since notaries’ duties are mainly involved with documents and property, their criminal liability under the German Penal Code\textsuperscript{252} is often related to the falsification of documents or signatures,\textsuperscript{253} counterfeit of the State seal,\textsuperscript{254} or embezzlement of clients’ properties.\textsuperscript{255} However, like French notaries, German notaries are also public officials, who are accountable to the public when performing their official duties so that their offences may be more serious than those of others;\textsuperscript{256} for example, misrepresenting public documents, authenticating false documents,\textsuperscript{257} or charging prices over and above the fixed rate.\textsuperscript{258} If notaries’ criminal offences cause damage to others, either by intention or negligence, they are liable for a civil offence and must compensate the injured person for the damage.\textsuperscript{259} They have professional insurance, which guarantees the remediation of the damage caused by their performance, but they are held personally liable for their actions as well in some cases.

\begin{itemize}
\item \textsuperscript{252} Strafgesetzbuch (StGB)
\item \textsuperscript{253} StGB §267
\item \textsuperscript{254} StGB §148
\item \textsuperscript{255} StGB §266
\item \textsuperscript{256} BNotO §95
\item \textsuperscript{257} StGB §348
\item \textsuperscript{258} StGB §352
\item \textsuperscript{259} BGB §249, §280 and §839
\end{itemize}
Notaries are special professionals who States rely on to perform some activities on their behalf. Since those activities involve the personal affairs and properties of others, notaries must strictly adhere to their professional code of conduct; otherwise, they will be held liable. In terms of German notaries, several important professional obligations are contained in the Federal Notarial Code. Since German notaries’ duties are similar to those of French Notaries, they also have the duty to remain impartial, the duty of professional secrecy, and the duty to perform a service; however, German notaries have a few more obligations. The notarial profession is not a commercial one and, since notaries provide a public service on behalf of the State, their service fee is controlled by the State. Thus, German notaries are obliged to charge a fixed fee. Every notary in Germany can only charge the fixed rate according to the Court and notary fees law. Moreover, notaries are forbidden to participate in any commercial activities, particularly advertising. Since they are providing a public service to the German people, they should perform their work correctly and quickly. Since some of their functions are already reserved only for their profession, they should not engage in any promotion to compete for clients from other notaries. The whole profession should work collectively to provide a good service to clients.

Notaries’ practices are supervised by the president of the intermediate court; hence, they are monitored once in a while and if they fail in their professional duty, their misconduct is subject to the notarial disciplinary court, which is part of the District Court.

260 BNotO §17
261 Kostenordnung (KostO)
262 BNotO §29
4.2.3.2 Indemnity

Notaries are entrusted to work on various important missions and, since they have to guarantee their professionalism, the profession has implemented an indemnity scheme to provide security for the public and maintain the honour of the notarian profession. This professional indemnity scheme consists of two types of professional liability insurance, which are provided by each notary and the Chamber of Notaries.

The first type of insurance is fidelity insurance with which all notaries must insure their professional practice with a reliable insurance company to cover possible loss and damage as a result of their practice. Notaries must present evidence to prove that they have met this requirement before being entitled to work as notaries. The minimum insurance policy the law requires is €500,000 for each insured event and the minimum insurance coverage per year may be limited to twice the insured amount. However, the professional insurance obtained by individual notaries only covers the general operation of a proper professional practice and not the loss and damage caused by negligence or malfeasance. Notaries are personally liable for an intentional breach or the negligent violation of their notarial duties.

The second type of professional insurance is fidelity insurance, which is provided by the Chamber of Notaries in each region. This insurance is contributed to by all the notaries in the region. The Chamber of Notaries arranges this as additional insurance for their members in order to cover the amount the insurance company refuses to pay. Thus,

263 §19a BNotO
264 §6a BNotO
265 §19 BNotO
the insurance provided by the Chamber of Notaries will cover the cost of damage incurred as a result of the breach of notarial duties or the amount that exceeds the individual’s insurance cover.\textsuperscript{266} The coverage for intentional breaches of duties is at least €250,000 per insured event and at least €500,000 for each insured event in the case of the negligent violation of duty.

4.3 The United Kingdom (England and Wales)

Records show that notaries have existed in the United Kingdom since the 13\textsuperscript{th} Century at which time, the first notaries were foreign notaries who crossed the Channel from the European continent. Most of them were Italian notaries from Bologna. Later, England adopted this profession but, since it used customary law, the European law was not implemented into the region. Notarial activities were not official or widespread until trading with European countries increased.

Despite civil law notaries being the origin of English notaries, this profession has developed uniquely in the United Kingdom. The notaries in this region are common law notaries and are called “Public Notaries”. They are lawyers who specialise in commercial activities and their major tasks are the attestation and authentication of documents and transactions, and the completion of the administration of oaths. Although they are also deemed to be public officials, their status cannot be compared to that of the civil law notaries in France, Germany, Italy, the Netherlands, etc. While they are appointed and

\textsuperscript{266} BNotO §67 paragraph 3(3)
monitored by the State, they have no power to perform public functions or draw up public documents.\textsuperscript{267}

English notaries do not play a role in the real estate business. The intermediaries in real estate transactions in England and Wales are solicitors and licensed conveyancers. Although their presence is not mandatory in these transactions, these professionals are likely to participate in them in order to provide assistance and security to their clients. They normally provide a professional service in terms of giving legal advice, drafting contracts, and performing an escrow function for clients. Therefore, the characteristics and roles of these two intermediaries, solicitors and licensed conveyancers, particularly in the real estate transactions, will be discussed below, together with their liabilities and indemnities. Notwithstanding, since there are three distinctive courts and legal systems in the United Kingdom,\textsuperscript{268} Scotland and Northern Ireland will be excluded from the discussion and the two professions will only be discussed in terms of England and Wales.

4.3.1 Characteristics of Solicitors and Licensed Conveyancers

Although these two professionals play the same role in real estate transactions, they apparently have different statuses, qualifications, and governing bodies.


\textsuperscript{268} 1) England and Wales 2) Scotland 3) Northern Ireland
4.3.1.1 Solicitors

Solicitors are legal practitioners, who have wide range of legal knowledge. Since they specialise in many different areas, such as property law, family law, intellectual properties and IT law, employment law, etc., they are commonly hired to give legal advice and assistance by various kinds of organisations, as well individuals. Solicitors in England and Wales have a stable status with the appropriate qualifications and a formal professional institution.

a) Status

A solicitor is a kind of lawyer, who primarily gives legal advice and assistance to clients on several subjects. Since they are specialists in certain specific laws, solicitors are hired as counsellors in cases in which they are expert; hence, they can be found in various kinds of cases, including criminal, civil and commercial. However, they only provide their services in an office, whether in an individual’s office or a firm. They do not represent their clients in court or work on any litigation cases. They only arrange and/or support a barrister in the litigation. Solicitors generally give advice and deal with tasks such as undertaking negotiations, property conveyancing, the drawing up of legal documents, and so on. These documents are private documents that can only act as proof against the contractual parties. They do not have a probative force or executory force like civil law notaries’ deeds.
b) Qualifications

In terms of educational qualifications, although there are several routes to become a solicitor in England and Wales, there are two that are commonly-used.\(^{269}\) The first is an academic path, for graduates. Applicants can either possess a law degree or a degree from another field from a UK university, but if they are non-law graduates, they must take the Common Professional Examination (CPE) to obtain a Graduate Diploma in law (GDL) first. Then, both kinds of graduates must complete a full-time legal practice course (LPC), which is the post-graduate programme to learn practical skills in a real working environment.\(^{270}\) Exemption from the LPC course is only allowed for those who graduate with a Law Degree (ELD) from a combined course with the LPC in the same degree. After the LPC, applicants must be apprenticed for two years before they are fully-fledged solicitors.\(^{271}\)

The second path is the CILEx route, which is a route for those who do not have a university degree to apply through the Chartered Institute of Legal Executives (CILEx). This is a path that involves studying and working at the same time. Applicants must first complete the CILEX examination while they are working under the supervision of a solicitor or any CILEx fellow and then study for a CPE to obtain a Graduate Diploma in law (GDL) and complete an LPC and professional training like university graduates. It usually takes about 3 years for law graduates to become qualified as solicitors, 4 years for non-law graduates and 6 years for those who have not attended a university. There is no restriction

\(^{269}\) SRA Training Regulations 2014 Regulation2

\(^{270}\) Solicitors Regulation Authority, ‘Legal Practice Course (LPC)’ (SRA, 2017) retrieved from https://www.sra.org.uk/students/lpc.page (accessed 19 November 2017)

\(^{271}\) SRA Training Regulations 2014 Regulation2 and 5
on nationality, but applicants must prove that they are proficient in English and have graduated from a UK educational institution. Nonetheless, if they are overseas lawyers/barristers, they may apply for the Qualified Lawyers Transfer Scheme (QLTS) to be certified as a qualified solicitor in England and Wales from the SRA.\textsuperscript{272}

Apart from the educational qualification, all applicants, including those from the QLTS, must pass the SRA Suitability Test to check that they have never been involved in such activities as criminal offences, bankruptcy, previous deceitful transactions, etc. to ensure that they have sufficient honesty, integrity and professionalism not to harm the profession.\textsuperscript{273}

c) Governing Bodies

There are two professional institutions for solicitors, namely, the Solicitors Regulation Authority (SRA) and the Law Society.

The Solicitors Regulation Authority is the regulatory body that sets disciplinary rules and standards of practice for solicitors. Since the role of the SRA is to ensure that clients are provided with fairness and protection, it also handle client’s complaints and imposes

\textsuperscript{272} SRA Qualified Lawyers Transfer Scheme Regulations 2011
\textsuperscript{273} SRA Training Regulations 2014 Regulation2(c) and Regulation 6
penalties on solicitors. The SRA was once part of the Law Society, but it was separated by the Legal Service Act and became an independent body in 2007.\textsuperscript{274}

The Law Society is now the representative body of solicitors, providing them with support, advice and guidance, as well as maintaining and promoting the value of the profession to society.\textsuperscript{275}

\textbf{4.3.1.2 Licensed Conveyancers}

Licensed Conveyancing is another branch of the legal profession and licensed conveyors specialise in real estate law. They are not equivalent to solicitors or any other kind of lawyer. They obtain a distinctive professional license and are supervised by an independent professional institution.

\textbf{a) Status}

Licensed conveyancers are qualified lawyers, who are specifically licensed to provide conveyancing services.\textsuperscript{276} They are specialists in real estate law and their professional functions involve the buying and selling of real estate properties, such as giving legal advice regarding the property, conducting a title search, drafting contracts,

\textsuperscript{274} Solicitors Regulation Authority, ‘Who we are and what we do’ (SRA, 2017) retrieved from https://www.sra.org.uk/consumers/what-sra-about.page (accessed 24 September 2017)


\textsuperscript{276} Administration of Justice Act 1985 part 2, Section 11(1)
settling the payment and transferring the property on behalf of their clients. They have the same role and authority in real estate transactions as solicitors, but their licenses are limited to working on simple real estate conveyancing cases; therefore, unlike solicitors, licensed conveyancers cannot practice litigation or give advice on the case outside their professional scope, namely, property law. Hence, licensed conveyancers are not usually hired to work on cases that involve litigation during the conveyancing, e.g. where there is an argument over the boundary. Besides this duty, they can also administer and witness official documents, which is not limited to documents related to real estate transactions.

b) Qualifications

The basic qualifications for those wishing to enter this profession are proof of identity and residential address, no criminal record, an employment certificate and proof that they are fit and sane to practice as an CLC lawyer. Apart from this, applicants are required to have professional knowledge, which means that they must pass the Council for Licensed Conveyancers (CLC) exams organised by the professional institution.

Applicants do not need fundamental knowledge in any particular area to begin studying for the CLC exam. High-school graduates can immediately apply for the course after their high-school education. These applicants are required to take a two-stage course

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277 Administration of Justice Act 1985 part 2, Section 11(3)  
279 Administration of Justice Act 1985 Section 15
to obtain two diplomas: 1) diploma 4, which is a course to qualify as a conveyancing technician and 2) diploma 6, which is a course to qualify as a licensed conveyancing lawyer, which take a total of about 27-36 months. These courses can be studied in a classroom or by distance learning. Before obtaining a CLC license, applicants must also have 1200 hours of practical experience in a conveyancing role. They must submit a statement of Practical Experience certified by an authorised licensed conveyancer, solicitor or licensed FCILEX and this statement should not have been certified for more than two years before the submission. However, applicants may be exempted from studying some subjects if they have a legal background, depending on their previous experience.

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280 A Conveyancing technician is a real estate conveyancer who can only be responsible for small and non-complicated cases. They are often attached to and give support to licensed conveyancers or solicitors.


283 Id
c) Governing Bodies

The independent professional council, which represents the whole profession, is called the “Council for Licensed Conveyancers (CLC)”. This Council was established by the Administration of Justice Act 1985 and its objectives are to maintain the profession’s standard of practice, provide support to members, and protect consumers. The Council is responsible for establishing and enforcing rules of conduct and discipline, setting standards of education and training to enter the profession, issuing licenses and maintaining licensed conveyancers’ profiles, providing support, guidance and indemnity insurance to licensed conveyancers, and collaborating with stakeholders.

4.3.2 Roles and Responsibilities of Solicitors and Licensed Conveyancers in Real Estate Transactions

Although solicitors or licensed conveyancers are significant intermediaries in real estate transactions in England and Wales, the law does not require them to be part of real estate transaction, nor are they an important condition for registration, like the notaries in civil law countries. While people can conduct the conveyancing process themselves, they normally hire solicitors or licensed conveyancers to work on their real estate transactions because they can feel confident when professionals are undertaking the conveyancing for them. Since both solicitors and licensed conveyancers have the same legal authority and functions in real estate transactions, their roles and duties are

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the same. Therefore, the roles of these two conveyancers in real estate transactions gathered from various webpages of conveyancers will be discussed in this section.\footnote{1}{Gov.uk, ‘Buying or selling your home’ (Gov.uk, 2018) https://www.gov.uk/buy-sell-your-home/transferring-ownership-conveyancing (accessed 10 May 2018)
4.3.2.1 Verification of titles, contractual parties and properties

In contrast to civil-law notaries, UK conveyancers are lawyers hired to represent one party; hence, conveyancers will only conduct the conveyancing process in real estate transactions on behalf of their clients. After the negotiation stage that usually involves real estate agents/brokers, the parties will hire their own conveyancers, who must first verify the identity of their clients. Then, the buyer’s conveyancer will contact the seller or the seller’s conveyancer, if any, to obtain the title and the Home Information Pack (HIP) to use for drawing up a contract.

The buyer’s conveyancer must verify several things before drawing up a contract. Firstly, he will have to undertake a title search to verify the status of the property, the ownership of the property and the regulatory restrictions on the title. He will also have to verify crucial information about the property, such as local information, environmental information, etc. in the surrounding area to ensure that there will be no subsequent problems. The conveyancer must report the results of the searches to the buyers, whether there is a problem or not. However, he does not have the duty to check the condition of the property, but he may contact a surveyor to do so. In cases that involve mortgages, the conveyancer will assist in checking the details of the mortgage. He will then use the information from the searches to draft the contract.

Sellers are required to prepare a home information pack (HIP) which contains important information of the property, such as the state of title, local regulations, defects of the property and other information that is likely to be interest to the buyer.
4.3.2.2 Certification of Transactions

Conveyancers in England and Wales do not have the power to draw up a special deed to certify the whole transaction, like civil law notaries. Hence, there is no need for them to read the contract to the two parties and ask them to sign it in their presence, like the notaries in some civil law countries.

4.3.2.3 Intermediaries of the Transaction

The conveyancer in these countries have a significant role as intermediaries in the real estate transaction, especially at the stage where the contracts are exchange and at the payment stage. When the contract is ready, it will be sent to the buyer along with all the relevant documents for the buyer to check the details. However, in some cases, the conveyancer may read and explain the contract over the phone to the buyer. If the buyer accepts the contract, he will sign it and send it back to the conveyancer, who will then send it to the seller and/or the seller’s conveyancer to revise and sign it. Once the two parties have signed the contract, they are legally bound to their obligation to buy and sell the property until the completion day, which is the fixed date for moving stated in the contract.

In terms of payment for the property, since the buyer’s conveyancer acts on behalf of the buyer, as mentioned earlier, he usually collects the payment when he is first hired. He then keeps it in an escrow account to use when he has to make payments during the conveyancing process. For example, he will use it pay a deposit of 10% of the purchase price to secure the transaction after the contracts have been exchanged. Then, he will...
transfer the remaining funds to the seller on completion day and when the seller receives them, he will give the buyer the key to the property.

After completion day, the buyer’s conveyancer still has the duty to pay the Stamp Duty Land Tax to the Revenue Authorities in order to obtain a certificate of registration, and then he will complete the registration on the buyer’s behalf. In cases where the real estate property is being purchased with a mortgage, the title deed will be sent to the mortgage lender instead of the buyer until the loan is settled.

4.3.3 Liabilities and Indemnity of Solicitors and Licensed Conveyancers

Despite the numerous regulatory requirements and high standards of practice set by the governing bodies of both professions to prevent loss and reduce risk for clients, there are still loopholes for mistakes and malfeasance, like every other profession. Hence, solicitors and licensed conveyancers are held liable, both legally and professionally, for their actions. Their professional bodies organise indemnity schemes in order to remedy their clients from loss caused by the misconduct of their members.

4.3.3.1 Liabilities

Since solicitors and licensed conveyancers play the same interchangeable role in real estate transactions, they have similar professional duties. Since conveyancers are entrusted to manage their clients’ property, they must strictly adhere to their professional
duties. The important professional duties of these two professions are found in both the Legal Service Act and their professional Code of Conduct.  

“The “professional principles” are as follows;

(a) that authorised persons should act with independence and integrity,
(b) that authorised persons should maintain proper standards of work,
(c) that authorised persons should act in the best interests of their clients,
(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
(e) that the affairs of clients should be kept confidential.”

Breaches of these professional duties lead to professional liability and may also lead to legal liability. It is possible that solicitors or conveyancers who fail to fulfil their professional duties may commit a crime at the same time; for example, breaching their clients’ trust and performing their duties dishonestly by engaging in misappropriation, fraud, misrepresentation, etc., which are criminal offences. Consequently, they are held criminally liable for their wrongdoing and, if their misconduct causes loss or damage to their clients or third parties, they are also subject to civil liability. Whether their failure to fulfil their professional duty is based on negligence or is intentional, they must restore the injured parties back to their original condition. As a result, the conveyancers must carry

288 Legal Service Act 2007 Section 1
out their duties with honesty and fairness and suit the best interests of their clients up to
the standard of their profession’s practices.

4.3.3.2 Indemnity

Although solicitors and licensed conveyancers have the same role and duties in
real estate transactions, their professional bodies establish unique compensation policies
so that the indemnity schemes of these two professions are quite different.

a) Solicitors

To maintain a good reputation, the SRA requires individual solicitors and firms of
solicitors to procure Professional Indemnity insurance (PII) from an SRA-participating insurer
to protect them against claims made in respect of civil liability based on a breach of
professional conduct. This insurance will cover losses, which are a legal liability. The
minimum level of indemnity insurance the SRA requires recognised bodies to have is

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289 Solicitor Act 1974 Section 37
£3 million\textsuperscript{290} and recognised solicitors £2 million.\textsuperscript{291} Solicitors or firms of solicitors may buy top-up insurance to cover the excess amount; otherwise, they have to hold the liability for this themselves. The SRA has also established a Compensation Fund based on the contributions of members.\textsuperscript{292} This fund will cover losses that cannot be claimed from other sources; therefore, it will pay for losses the Professional Indemnity Insurance refuses to cover, like misappropriation or fraudulent transactions.\textsuperscript{293} Therefore, this Fund is the last resort for injured parties to obtain compensation. Although the Fund has set the maximum amount for redress per claim at £2 million, this is subject to the discretion of the SRA.\textsuperscript{294} Hence, injured parties must prove their eligibility based on the rules of the SRA Compensation Fund and certify that they have suffered loss and hardship caused by the dishonesty or failure to account of a solicitor.\textsuperscript{295}

\begin{footnotesize}
\begin{enumerate}
\item Section 9 (1) (b) Administration Justice Act
\begin{enumerate}
\item The Society may make rules—
\begin{enumerate}
\item prescribing the circumstances in which—
\begin{enumerate}
\item legal services bodies may be recognised by the Society as being suitable bodies to undertake the provision of any solicitor services or other relevant legal services; and
\item sole solicitors’ practices may be recognised by the Society as being suitable to undertake the provision of any such services
\end{enumerate}
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\end{enumerate}
\end{enumerate}
\item The SRA Indemnity Insurance Rules 2013 Rule 2.1 in Appendix 1
\item The Solicitor Act 1974 Section 36A and the Compensation Fund Rules Rule 2.1 and 2.3
\item The SRA Compensation Fund Rules Rule 2.8, 3.1 and 3.4
\item The SRA Compensation Fund Rules Rule 3.3 and 17
\item The SRA Compensation Fund Rules Rule 3.4
\end{enumerate}
\end{footnotesize}
b) **Licensed Conveyancers**

As for Licensed Conveyancers, since professional Indemnity Insurance (PII) is one of the requirements to enter the profession, every Licensed Conveyancer must have professional Indemnity Insurance under the CLC’s Master Policy\(^\text{296}\) or with an authorised insurer to cover the loss or damage arising from their performance.\(^\text{297}\) This insurance will indemnify the injured party for mistakes that resulted from a breach of professional duty by a Licensed Conveyancer, including the loss or damage of documents.\(^\text{298}\) Therefore, this insurance will not compensate for illegal acts, i.e. fraudulent acts or omissions of Licensed Conveyancers’ duty, but only non-disclosure or misrepresentation without dishonest intention.\(^\text{299}\) The limitation of the insurance coverage is £2million for each claim and it will cover a case for up to a six-year extension after the closing date.\(^\text{300}\)

### 4.4 The United States of American

As the United States of America was formerly colonized by England. Notaries and the American law are based on English common law. However, after the American enacted their own law later on, notaries has developed distinctively from the British notaries over

\(^{296}\) The SRA Indemnity Rules Rule 5  
\(^{298}\) CLC PII Policy Wording Rules Rule 2  
\(^{299}\) CLC PII policy Wording Rules Rule 5.12  
\(^{300}\) CLC PII policy Wording Rules Rule 8.11
time. Notaries in this region are called a ‘notary public’. They have lessen authority, functions as well as qualification than the British notaries. American notaries are people who merely hold a licenses to authenticated documents and signatures and witness affidavits or oath.\(^{301}\) They only certify whether the document is real or not; they do not determine the correctness of the document’s content. In contrast to civil-law notaries, American notaries are not lawyers nor specialist in any field. They do not have any other specialized duties other than certifying documents and witnessing affidavits. As notaries public in American are not lawyers, there are not many requirements to become an American notary as British notaries or civil-law notaries.\(^{302}\) The applicants do not need any background in law. They only have to take the 4-hour notarial course about notarial law, procedure and ethic and pass the examination within 3 months after submit the application.\(^{303}\) Consequently, many organizations are likely to send their employee who have other professions, like accountants, bankers, real estate agents and so on, to obtain the notarial license.

\(^{301}\) Model Notary Act 2010 §5

\(^{302}\) Model Notary Act 2010 §3-1

(b) A person qualified for a notary commission shall:

(1) be at least 18 years of age;
(2) reside or have a regular place of work or business in this State;
(3) reside legally in the United States;
(4) read and write in English;
(5) pass a course of instruction requiring a written examination under Section 4-3;
(6) submit fingerprints to allow a allow criminal background check.

\(^{303}\) Model Notary Act 2010 §4-3
Although civil-law notaries exit in some States namely Florida, California, Louisiana, Alabama etc., the civil-law notaries in these States are not equivalent to the civil-law notaries in European countries. They only have some functions and responsibilities of the notaries in European countries. For Example, notary in Maine, South Carolina can also officiate the rites at wedding ceremonies.

Nevertheless, as mentioned earlier that American notaries are not legal specialist in any particular business, they do not have any roles in real estate transactions like civil-law notaries, but in the United States of America, there are other kinds of real estate professionals which have significant roles in real estate transactions instead of the civil-law notaries, and the two professions which offer important services to the real estate transactions are real estate salespersons and title insurance agents. Real estate salespersons and title insurance agents have entirely different characteristics and roles in the real estate transactions. Real estate salespersons are the facilitator in the real estate transactions. They provide service to process the real estate conveyancing transaction on behalf of their clients with their professional knowledge. On the other side, title insurance agents are insurance-sales representatives authorized to sell a specific kind of insurance which protect clients against financial loss resulting from defects in real estate titles. Both real estate professions presents and works in different stages of real estate conveyancing transactions. They have their own duties which are both play an important part in the transaction although they are not mandatory. Therefore, this part will study on these two notable professions in American real estate business- real estate salespersons and title
insurance agents- by focusing on: 1) their unique characteristics; 2) their roles in the real estate transactions: and their indemnity scheme.

4.4.1 The Characteristics of Real Estate Salespersons and Title Insurance Agents

As mentioned, real estate salespersons and title insurance agents have unique roles and missions in real estate transactions. These two kinds of real estate professionals do not only hold different responsibilities in the real estate transactions, but the nature of their profession are also distinct; real estate salespersons are the intermediary or the facilitator in the sales transaction while the title insurance agents are insurance representatives who sell insurance policies. They have different statuses, qualification and governing bodies and since both of them have quite significant roles in the real estate transactions, it is interesting to understand the unique characteristics of each profession.
4.4.1.1 Real Estate Salespersons

In America, there are three kinds of real estate salespersons who facilitate the real estate conveyancing process, namely, real estate agents, realtors, and brokers. These three professionals are specialists in real estate businesses. They do not have any other function which does not relate to real properties. Their main work are processing of buying-selling real properties. In contrast to the civil-law notaries in France and Germany or solicitors and licensed conveyancers in the United Kingdom, real estate professionals are not public officials.

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servants and are not intermediary of the transaction. Real estate professionals in the United States are commercial service providers. They represent and only work for their clients. Although the three professionals have the same roles and duties in the real estate transactions, they are not exactly the same. They have different status and authority, so they have dissimilar qualifications, and also be under supervision of different regulators with different regulations.

a) Real Estate Agents

Real estate agents are professionals who obtain a license from their State to become a real estate salesperson. Real estate agents in America may work as freelances or employees in companies, but it is illegal to be a complete independent real estate agents. Freelance real estate agents must attach to real estate brokers and give them commissions. Whether they are freelances or employees, both of them are acting as private agents who receive remuneration for their service in a form of commission. The qualifications to apply for becoming real estate agents are not much, but they are varied from States to States. The basic requirements mostly are: 1) ages -over 18 or 19 years old, 2) be a U.S. citizen or lawful permanent resident and 3) fundamental education- a high-school diploma or Graduate Equivalency Development (GED). Then, they must complete the real estate course with a certified institution to obtain the professional knowledge, and pass the State real-estate-agent examination. In America, each State has their own real estate commission/bureau that organize the real estate examination and regulate real
estate agents within their State, so real estate agents of different State are subject to their own regulations and ethic code.

b) Brokers

Real estate brokers are real estate agents who obtain a license to set up a real estate business. Brokers can run a business on their own or they can hire real estate agents to work for them. They can either hire real estate agents to work in the business as employees or only collect commissions from their transactions. Thus, real estate brokers have higher status than real estate agents. Brokers have more responsibilities than real estate agents. They do not only work as an intermediary in the real estate conveyancing transactions like every real estate agent, but they also hold managerial roles such as resolving conflicts, providing training, keeping transaction record, marketing the brokerage, and so on, in the real estate office. Additionally, the broker licenses also allow them to perform extra functions like property management and escrow service. As real estate brokers have more responsibilities than real estate agents, real estate agents, who want to wish to be a broker, must study the real estate brokers course and pass the State brokers examination to apply for real estate broker licenses. However, they can only apply for the licenses when they have working experience as real estate agents for at least for two years in most States, but some States may require the applicant to have longer experience than this. The real estate commission of each State also oversee real estate brokers in the region, so the qualifications and disciplinary rules and regulations for real estate brokers in each state are not the same.
c) Realtors

Realtors are real estate professionals who are members of the National Association of Realtors (NAR), so realtors can be any kind of real estate experts such as real estate agents, brokers, property managers, appraisers or any kind of real estate agents. However, it is not mandatory for every real estate professional to be the member of this organization, but only those who join the National Association of Realtors can use the title as “realtors”. The National Association of Realtors is the largest organization of real estate professionals which represents the profession as well as provide supportive resources to their members. The organization provides greater opportunities and advantages to their members. There are various benefits, such as access to real estate market data, educational opportunities, business opportunities and connection etc., from being realtors. Yet, they will have more responsibility than general real estate agents or brokers. Realtors are subject to special ethic codes and standard of practice set by the organization on top of the ordinary regulations for general real estate agents or brokers. Although being realtors do not raise the status of the realtors to be higher than ordinary real estate agents or brokers, real estate agents or brokers who are allowed to use realtors title as the trademark, usually are more trustworthy than general real estate agents and brokers.

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4.4.1.2 Title Insurance Agents

Title insurance agents or title agents are the third party who hold the license to sell insurance policies against hazard of title to the interest parties. They may be in the form of an individuals or a company which normally called title companies or title insurance companies. They sell insurance policies called title insurances which are the special insurance for real conveyancing transactions. The title insurance are not required by law, but they are an important element in the real estate transactions. This is because title insurances guarantee that the titles do not have any encumbrance at the purchasing moment, so it is the protection against the loss arising from defects in the title which may be found in the future after the insured property changes hand. Before title agents issue the title insurance, they have the duty to conduct the title search to verify the status of the property and make sure that the property is free from lien or levies. As a result, having the title insurance will allow the insured parties to be certain that there will be no dispute over the ownership of real estate arising from defective title later on, or in the case that there is a dispute, they do not have to deal with the complication and will be compensated for the damage.

Notwithstanding, title insurance agents are not insurance agencies. They are only the agents who are appointed by the insurers to issue and counter sign binder or title insurances policies on behalf of the insurers. They only sell title-insurance policies on behalf of the insurance companies in order to receive commissions while the insurance

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premium actually goes to the insurance companies. Hence, the insurance companies are the parties that bear the risk of any loss under the policy.

To be qualified as a title insurance agent, an individual or a company must obtain a license from the State to this business, and the requirements to apply for this license are vary in different states, but the common requirements in various states are, such as:

1) the applicants should be at least 18 years old;
2) they must be the resident of the State as well as be a US citizen or legal alien;
3) the applicants must hold a high school diploma;
4) professional education focusing on insurance and title insurance subjects;
5) pass the state examination;
6) experience as a real estate title officer or any related position in the field;
7) background check; and/or
8) present fidelity or surety bond.

All of these qualifications may not be required in every States. Some state may require the applicant to have some qualifications whereas some other states may not require the same qualifications. For example, Florida requires the applicant to complete professional course and pass the state examination while there is no special examination required in Texas, but in order to obtain a title insurance license, the applicants have to pass background check and post a fidelity bond to be the professional liability insurance against

308 Code of Virginia § 38.2-1814.1
their misconduct and dishonesty.\textsuperscript{309} Tough law education is not the qualification of title insurance agent, many title insurance agents are also attorneys.

There several professional associations of title insurance agents, but the two most notable professional organisations are the American land Title Associations (ALTA)\textsuperscript{310} and the National Association of independent Land Agents (NAILTA).\textsuperscript{311} These two organization are trade associations which represent the interests of title insurance agents from all over America. They set some standard policies and protocols as well as provide supports and education for title agents. Yet, the two professional associations do not discipline title agents. Title agents are regulated by the State commission. They are usually under the supervision of insurance department and/or finance division. Hence, title insurance agents are also subject to the National Association of Insurance Commissioners (NAIC). The core regulations for title insurance agents are the Title Insurers Model Act and the Title Insurance Agent Model Act. Furthermore, title insurance agents may also subject to the other rules depending on their roles. For example, their roles in real estate transactions are also regulated by the federal consumer protection statue called the Real Estate Settlement Procedures Act (RESPA).

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{309} Texas Department of Insurance (TDI), ‘Title Insurance’ (\textit{Texas Department of Insurance}, 2018) http://www.tdi.texas.gov/agent/title-apply.html#exam (accessed 20 May 2018)
\item\textsuperscript{310} American Land Title Association (ALTA), ‘American Land Title Association (ALTA)’ (\textit{American Land Title Association (ALTA)}, 2018) https://www.alta.org/ (accessed 25 May 2018)
\item\textsuperscript{311} National Association of Independent Land Title Agents (NAILTA), ‘National Association of Independent Land Title Agents’ (\textit{National Association of Independent Land Title Agents}) http://nailta.org/ (accessed 25 May 2018)
\end{enumerate}
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4.4.2 Roles and Responsibilities of Real Estate Salespersons and Title Insurance Agents in Real Estate Transactions

In America, real estate salespersons and the title insurance agents are not mandatory to be involved in any part of real estate transactions by laws, but since their functions provide convenience and security to the transactions, they are hired voluntarily by the clients who want to avoid the complication in conveyancing process and/or need a security against disputes which may arise from the defects in real estate transactions. Nonetheless, these two kinds of real estate professionals perform entirely different functions as well as involve in different stage of the transactions, so this thesis will study on the roles and responsibilities of American real estate salespersons and American title insurance agents.

4.4.2.1 Real Estate Salespersons

In America, when the buyer decides to find a new home, it is important for the buyer to have the best real estate for him because the right real estate salespersons will be a remarkable assistant to the buyer in real estate transactions. They usually stay aside the buyer from the beginning to the end of the transaction.

The first roles of the real estate salespersons in the real estate conveyancing is assisting in searching and selecting the right properties. The buyer may do some preliminary research about the house and the area first, but after the lender approve the credit line for housing loan, the buyer will consult his real estate salespersons to find the
house that he likes. The real estate salespersons access to the regional database of properties in the area called the local Multiple Listing Service (MLS), so they can prepare a list of houses for the buyer to choose based on the buyer’s budget and preferences—the area, the features, the style etc. The real estate salespersons usually have the better knowledge about the properties, particularly on, neighborhood, geographic factors, and the value of the properties, than the buyer especially if the buyers are from other districts.

In the case that the buyer does not have any mortgage lender, the real estate salespersons may suggests a few good institutions that he has the contact to the buyer. They can also suggest mortgage plans for the buyers, but they will not interfere on the financial procedure. Then, after the buyer selects the property that he likes, the buyer will send an offer to the seller.

The real estate salespersons have a significant role during the negotiation stage. It is not only because they are professionals, who have high bargaining power, in the real estate business, but with their professional knowledge and skills, they also know when and how to make an offer or a counteroffer that will fit with everyone’s desire. They can give advices on the price, the property’s condition and its surrounding area. They can assist in drawing up a purchase agreement with appropriated terms and contingencies. As they are professional intermediary, they know what kind of terms and contingencies are essential and are beneficial conditions for the buyer. The contingency clauses are important conditions of future events which will affect the binding force of the contract. If the buyers or the sellers fail to perform their obligation stating in any contingency clause, the agreement will be null. For example, the crucial contingencies are normally included
in the contracts are the home appraisal, the payment, the mortgage, the house inspection, the sale of current home, and so on. Nevertheless, the real estate salespersons do not usually draw up a sales contract like lawyers. They can only provide the standard purchase agreement and adapt it to suit with each buyer’s circumstances.

After the contract is concluded and the deposit is placed, the buyer will have to do the home inspection in order to find defect and request the buyer to fix all defects before the closing date. The lender may also request the buyer to do the title search with a title insurance company and do home appraisal to see that the property value is worth for the purchasing price. As there normally are other specific professionals who carry on those duties during these stages, real estate salespersons do not have any specific role. They only act as the mediator, who provide assistant and convenient to the buyer, in the real estate transaction until the deal is closed.

4.2.2.2 Title Insurance Agents

The most major duty of title insurance agents is doing a title search. Title insurance agents have property title searchers who will investigate on the status and the condition of title subject to the property. This searcher officers will verify on the public records to see the chain of the title- the historical record of ownership- in order to find out that how the title pass over and make sure that there is no liens or any kind of encumbrances, such as leases, mortgages, outstanding taxes, court judgements etc., created anytime in the past which may impact the buyer’s ownership one day. Title insurance agents may also survey the property to examine the boundary of the property that it is correct according
to the title. Then, property title searchers will summarize the result of the search in a report called the "abstract of title". This report will help the buyer to make the decision whether to buy the property or not and determine about the price once again. In the case that there is any kind of encumbrance over the realty but the buyer insist to purchase the property, some title agents may service to clear them as well.

Title insurance agents have specialty in issuing a title insurance to the interested parties/customers. After title verification, the title insurance agents can issue a title insurance to guarantee that the title is free from encumbrances or any defect in the title. The insurance companies will responsible for losses or damages occurring from the title failure, so having a title insurance will protect the buyer or the lender against claims or law suits for the past events. Hence, title insurances are likely to be an essential component of the real conveyancing in America despite they are not required by law. Once purchased a title insurance, it will be valid forever, yet insurance companies will only responsible losses or damages which resulted from the insured perils. Thus, the insurance coverage for the loss depends on the insurance policy.

In the market, there are various insurance policies, but the two most popular types of title policies are: 1) lender’s policy and 2) owner’s policy. Mostly, in the case which the properties are bought with a mortgage loan, the lender requests the buyer to get a title insurance with a lender’s policy to insure the lender against events which would affect the property or in the other word- the lender’s collateral. The owner’s policy are normally provided by the seller to insure the buyer or the owners against claims which would affect the buyer’s ownership. This is not a legal obligation of the seller. It is a common practice
of the seller in most States because without a title insurance, it is difficult for the seller to sell the property at the market price since there are no security for the buyers against the defect which may occur in the future. Nonetheless, the details of each kind of policies are varied in different companies, and the practices of title insurance agents are varied from State to State.

Apart from doing the title search, title insurance agents also have another roles as an escrow agent or a closing agent in some cases. As escrow officers, they are entrusted by the buyer to hold the payment and are entrusted by the seller to hold the signed deed until the closing stage, and at the same time they are also acting as a closing agent to close the sale. They will coordinate with the paper work. This includes all kind of documents associated with the transaction, such as deed of trust, promissory note, insurance paper, and so on. The closing agents will have to check the completeness and correctness of the documents. All parties including the real estate professionals, loan officer and closing agents must present on the closing date. The seller will sign the deed and closing affidavit and the buyer will sign the new note and mortgage. After everything has been signed, the closing agent will submit all document to the Court House for recording, and afterwards, the disbursement will take place. The closing agent will forward the payment in the escrow account to the buyer, transfer the premium to the insurance company and pay taxes.

Nonetheless, being the escrow agents and/or the closing agents in the real estate conveyancing transaction are not preserved functions for title companies’ employees even though these duties are likely to be the work of title companies’ employees. In
some cases, these roles may be performed by mortgage companies’ employees, closing agent from real estate brokers or attorneys. No matter who holds the escrow duty and/or the closing duty, the person must hold a neutral position in the transaction. They must provide true and impartial information to all parties.

4.4.3 Liabilities and Indemnities of Real Estate Salespersons and Title Insurance Agents in Real Estate Transactions

Since the clients rely on the work of both real estate salespersons and title insurance agents, failure in performing their functions or breaches of the contracts or professional duties will cause huge losses or damages to the clients. Therefore, real estate salespersons and title insurance agents owe some liabilities toward their performance. If they fail to perform their work correctly as stated in the contract, they will be liable for the consequences resulted from their misconducts or mistakes. In the cases that the clients face losses and damages caused by their practices, real estate salespersons and title insurance agents must compensate for such losses and damages. Notwithstanding, these two kinds of real estate professionals can obtain professional insurances in order to mitigate or shift this indemnity duties to the insurers.

4.4.3.1 Real Estate Salespersons

As the three real estate salespersons are hired to be the representative/facilitator in the real estate transactions, they are entrusted from the clients to perform their work on behalf of the clients. Thus, they owe fiduciary duties to their clients. If the breach of
their fiduciary duties caused any loss or damages to the clients, they hold the responsibility to compensate the clients for the loss and damage.

a) Liabilities

Similar to every professionals, real estate salespersons hold both legal liabilities and professional liabilities toward their actions. Their professional liabilities are the consequences of the breach of their fiduciary duties. The breach of their fiduciary relationship may be found in various forms, but the most misconducts of real estate salespersons are misrepresentation. Misrepresentation is when the real estate salespersons fail to disclose true information, which may affect the clients’ decisions in buying or selling the property, to the clients. Whether it is done by innocent, negligent or fraudulent; the failure to provide such important information may lead the clients to make a wrong decision which consequent create losses or damages for the clients. Therefore, every real estate salespersons must provide truthful information and perform their duty with care-up to their professional standard of care and according to the agreement. Breaches of their professional duties under the association’s ethics standards will cause them professional liabilities. They will allow the clients to file a complaints to the broker or the real estate associations which the agents belongs to i.e. the local Association of Realtors, or to the Local Real Estate board or the Real Estate Commission of the State in the case that the agent does not belong to any broker or any association. Apart from this, like every lay person, the real estate salespersons are also subject to civil and criminal liabilities if their conduct cause damages to their clients or other party, so the injured
parties, whether they are clients or not, are also entitled to claim for civil losses and damages resulted from the real estate agents’ criminal actions. They can file a claim for this to the local real estate board.

b) Indemnity

In the cases that breaches of the professional duties create losses or damages to the clients or any person, real estate professionals must hold the liabilities to compensate the losses or damages arising from their practices whether they are the results of willful misconducts or negligence. They may face lawsuits and indemnity for their mistakes on their own because the professional organisations of real estate professionals do not organise any indemnity funds for their members like the organisations of civil-law notaries. Nevertheless, they can buy the professional insurance against their error and omission. The professional insurance is designed to provide protection against financial losses arising from their practices whether intentional or not. The insurance coverage- amount and limitation -depends on insurance policy. In most States, the law does not require real estate professionals to purchase the professional insurance, so real estate professional are free to choose the most suitable and affordable policy.

4.4.3.2 Title Insurance Agents

Since title insurance agents play the key roles in the real estate conveyancing transactions, their conducts, whether as the title searcher or escrow agent, have great influence on the real estate transactions, and the failure to perform their task will cause
damage to the clients. Therefore, title insurance agent are subject to liabilities over their acts and they must compensate for loss caused by their performance.

a) Liability

The conducts of title insurance agents are the vital parts of the real estate transactions. Whether conducting the title search, escrow service or closing service, the acts of title insurance agents have significant influence on acquiring real properties, so their misconducts or mistakes will lead to losses or damages to the clients later on. Although title insurance agents are affiliated to the title insurance company and they are actually the agents who sell the title insurance on behalf of the insurance companies, they must be personally liable for their own actions, and similar to the other real estate professionals, title insurance agents are subject to legal liabilities as well as professional liabilities.

Title insurance agents are holding legal liabilities like every lay person. They are subject to the criminal liabilities for their intentional wrongful acts or negligence that violate the panel code, and if there are financial losses or damages caused by their misconducts or mistakes, title insurance agents hold civil liabilities over the losses or damages which are the consequences of their criminal actions or violation of their professional duties, such as breach of contract, breach duty of care, breach of the fiduciary duty etc., in order to ease or restore the clients’ conditions.

100 Investment LP v. Columbia Town Title, decided January 29, 2013, the Court of Appeals of Maryland

Ref. code: 25605801040030UOG
For professional liabilities, title insurance agents do have any specific rules for their profession because the professional association of title insurance agents does not have the duty to discipline title insurance agents nor set any disciplinary rule for their members. Therefore, for this reason, title insurance agents are subject to the same disciplinary board and adhere to the same disciplinary rules as insurance professionals since they are considered as one kind of insurance agents. Beyond this, there are also special duties and liabilities for title insurance agents appearing in several laws, such as the Truth-in-Lending Act (TILA)\textsuperscript{313}, the Home Ownership and Equity Protection Act of 1994 (HOEPA)\textsuperscript{314}, the Real Estate and Settlement Procedures Act (RESPA)\textsuperscript{315}, and so on. These special regulations are mostly set more liabilities for the title insurance agents when they perform as escrow agents or closing agents. This is because they are dealing directly with payments and real estate properties, so the law place more liabilities to the title insurance agents in order to provide higher protection for the buyers.

\textsuperscript{313} TILA is one of the consumer protection law requiring lenders to disclose the important information such as credit terms and cost to associating with borrowing in order to ensure that the borrowers/consumers will get a fair terms and rates when borrow the money or take mortgage loan.

\textsuperscript{314} HOEPA is a kind of consumer protection law which is the amendment of TILA to address abusive practices in refinances and home equity loans by setting more requirements for disclosures and restrict on specific practices in order to protect the homebuyers from abusive and unfair practices in refinancing or mortgage lending. HOEPA Pre-purchase Counseling, ‘HOEPA Lender Compliance Guide’ (HOEPA Pre-purchase Counseling) http://hoepa.org/hoepa-lender-compliance-guide/ (accessed 5 June 2018)

\textsuperscript{315} RESPA [12 U.S.C. §§ 1261-2617] is codified as Title 12 Chapter 27 of United States Code. It is t by requiring all parties to inform the borrower about the expenses in the transaction.
b) Indemnity

Although the professional organizations do not arrange any indemnity funds for the members, title insurance agents have financial aids to cover the losses and damages resulted from their actions in the form of surety bonds or fidelity bonds. Both surety bonds and fidelity bonds are professional insurances which guarantee that the requested work will be completed properly as agreed, so they provide protection for the obligee or the clients, who hire title insurance agents, to be certain that title insurance agents will not misconducts or create mistakes. However, the two kind of bonds are not exactly the same. The surety bonds are the insurances which insure the legal operations performed by the title insurance agents. Title insurance agents should hold a surety bond to guarantee that they will finish their tasks correctly in order to provide confidence to the clients. If the principal defaults on the contract, the insurance company, which issues the bond, will reimburse the clients for their financial loss. For the fidelity bonds, they are professional insurances which insure against the damages caused by title insurance agents’ criminal acts, so the insurance will cover the loss arising from title insurance agents’ intentional misconducts or frauds. This kind of insurance will give security to the clients to ensure that the clients will be reimbursed for their losses if title insurance agents commit crime.

In many States, fidelity bonds and/or surety bonds are one of the requirements which the State requests title insurance agents to have when applying for a title insurance agent license or when renewing their licenses. Yet, the requirements for the professional insurances vary from state to state. Some states may request tile insurance agent to submit both a surety and fidelity bond, while some states may request title insurance
agents to submit only one of them. Not only this, the limits of insurance coverage also vary in each state. For example, the insurance administration of Maryland requests title insurance agent to have either surety bond or fidelity bond with minimum insurance coverage of $150,000 whereas the Insurance Commissioner of Virginia requires title insurance agent who act as the real estate settlement agents to have fidelity bond with a minimum of $100,000 and surety bond with a minimum coverage of $200,000.  

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In conclusion, chapter 4 examines the intermediary in real estate transactions of four countries and there are independent real estate professionals that provide convenient and security in the real estate transactions. In the Roman prevailed countries, civil-law notaries and their authentic acts are mandatory for real estate registration. Since their performances are empowered by the States, it is not easy to become a notary in this region, so once they are entitled as a notary, they must uphold their professional code of conducts strictly. Otherwise, they are subject to number of liabilities. As a result, notarial acts and the real estate transactions are very reliable. With their authentic act, the public can feel secure that there will be no dispute afterwards. Unlike the civil-law notaries, the other real estate professionals in the United Kingdom and America are voluntary option because their participations are not a required condition for the registration. Therefore, they may also provide security to the transactions like the civil-law notaries, but the history of the title may not be very reliable since they are not necessary to be part of every real estate transaction. Not only this, the acts of real estate professionals in the United Kingdom and in America are merely the acts of commercial agents, so their credibility cannot be compared to the conducts of civil-law notaries.
CHAPTER 5
COMPARATIVE ANALYSIS

5.1 The Flaws in Real Estate Registration System in Thailand

From the study of real estate registration in Thailand and the study of intermediaries of four other countries (France, Germany, the UK and the USA), it can be understood that the real estate problems in Thailand are the result of the absence of an intermediary. The intermediary would normally assist and control the registration stage, in order to ascertain and ensure that the contractual parties have the rights and capabilities over a property and that the property is free for transaction. The flaws caused by the absence of an intermediary in Thailand’s real estate businesses can summarized in the following five points:

5.1.1 The Lack of Verification on Parties’ Identity

As the validity and enforceability of real estate transactions are dependent on the rights and capabilities of the person who enters into the agreement, verification of the parties’ identities is one of the most important steps in any real estate transaction. This means that before concluding any kind of real estate agreement, it is necessary to check that the contractual parties are entitled to create an agreement over any such property. If the contractual parties do not have the right or the capability to create the transaction, the transaction could be void or unenforceable, leading to disputes later on. Therefore,
it is crucial to check on the parties’ identities thoroughly, so that there are no problems or complications in the future, and for this reason, the person who does the verification should know all of the important matters which need to be examined. Missing one vital piece of information about the parties’ rights or capabilities may affect the whole transaction.

In Thailand, there are no independent real estate professionals who assist the contractual parties in any kind of real estate transactions, as their are in the four foreign countries discussed in this thesis, so the owner of a property, or the buyer, must verify the status or the identity of the opposite party themselves. Thus, when the contractual parties do not have any, or have very little, experience in real estate transactions, their verification may not be effective enough to prevent disputes, since it is possible that they may miss some vital information which may cause problems afterwards. In some cases, the contractual parties may hire a lawyer to take care of the legal aspects of a sale, and have them do the verification of the other party’s identity, since lawyers have legal knowledge and which details to check, which may have an effect on the validity and/or enforceability of the real estate transactions. The lawyer is then entrusted to verify the opposite party’s identity on behalf of their clients. However, Thai lawyers are not real estate specialists. They do not have specialist knowledge or training in real estate transactions, so they are not comparable to real estate professional, such as civil law notaries. When lawyers do not have a lot of experience in real estate transactions, it is possible that their verification may not be efficient enough, which could cause disputes over the land in the future, similar to when the contractual parties do it themselves.
However, lawyers are not always hired to be part of real estate transactions because they are costly and may be considered an unnecessary expense for a real estate transaction, since their involvement is not mandatory by law.

Notwithstanding this, the land registrar may also verify the parties’ identities before they process a registration, but their verification may also not be thorough enough. This can lead to a lot of real estate disputes in Thailand, which arise from incorrect identity of buyers or sellers. Cases such as transfers of real estate without ownership, or uses of nominees in real estate conveyancing, are examples of cases where efficient verification of identity did not occur. If the registrar checked these carefully, there should not be any incidents arising from incorrect identity checks. However, as already discussed about real estate registration in Thailand, the registrar usually examines the names of the contractual parties and the name of the person who owns the land on the title deed, and asks a few questions to see that the parties have the capability to create the transactions within a few hours - usually 1-2 hours. As a result, they do not carry out deep or thorough verification to ascertain the parties’ rights and capabilities, as civil law notaries would do. This might be because the land registrar has quite a lot of work, so it would be difficult for them to verify all of the details in every real estate transaction in a short period of time.

Hence, it seems like in Thailand that there is not enough verification done on the identity of parties, and this incorrect identification process is one of the main reasons that causes land disputes in Thailand.
5.1.2 The Lack of Verification and Certification of Titles

In the other four countries considered, there are independent real estate professionals - notaries in France and Germany, solicitors and real estate agents in the United Kingdom, and title insurance agents in America - who can conduct a title search on the public record in order to verify and certify the correctness of the title and the status of the property. These professionals have special authority to search the official system in order to examine the current status and the history of the title. The results of title search can ensure that the information on the title is correct and represents true information about the property. Additionally, the credibility of the title is increased further when certified by real estate professionals because their certification is considered to be a guarantee of the results of the title search. Therefore, when there is a problem arising from any incorrect information yielded from the title search, the injured parties can claim for compensation from the notary who gave the certification, whether relating to parties, titles, transactions and so on. In America, however, the parties/clients cannot claim for compensation for any losses arising from errors in title search, which has the guarantee of a title insurance agent, unless the parties/clients buy a title insurance that guarantees the correctness of the title information.

In Thailand there is no independent profession that has the authority to verify and certify title deeds, unlike these other four countries. Only land officials have the authority to conduct title searches of the public record, so when parties want to verify the status and the ownership of some land, they must go to the local land office and file a requisition to get information about the real estate. The land registrar can verify the
correctness and authenticity of the title, and can also provide other information about the particular real estate, such as its size and area, ownership history, servitude and any kind of obligation over the realty. They may not provide extra information about the real estate or about the surrounding area, such as any restrictions in the region/district, future policies, or projects which may affect the price or use of the property. This is because the registrars do not have a duty to protect the benefit of the two parties or the requisitioners, as civil law notaries do, although they do hold a neutral position in every transaction. Notwithstanding this, in reality some people omit to check the title deed at the land office because they do not want to spend a long time there. Without the involvement of real estate professionals, whether it be the land registrar or other kind of real estate professional, the verification by an individual or a lawyer who does not have a lot of experience in this area may not be efficient enough. This is why failure in title verification is one of the more common reasons behind real estate disputes and litigations in Thailand.

Nonetheless, land registrars merely verify information about the land, then provide information about the requested real estate and indicate whether the title is real or fake. They do not certify the title, nor do they provide any guarantee for the title and the result of the title search like civil law notaries would do. The situation is even worse when current real estate information and title deeds in Thailand are uncertain and unreliable. The Wat Suan Keaw case\textsuperscript{317} is a good example of the lack of verification and certification of title. The purchaser had already verified the title and the status of the land at the land registration office, but afterwards the verification failed and the purchaser could not claim

\textsuperscript{317} Supra note 4
for the failure in title search from the land office, since the registrar is not responsible for any problems because neither they nor the land office certify or guarantee the title and the title search. Hence, if there was an intermediary who held the duty to conduct a title search with liability over the results, the intermediary would conduct a careful verification on the history of the title and the status of the property, avoiding any problems that might emerge after the certification.

5.1.3 The Lack or Certification of Transactions

In the countries where civil law notaries exist, like France and Germany, the notarial act is an important element required for registering a real estate transaction. They are the proof showing that parties made an agreement with willful consent, because after the notaries have verified the parties’ identities, the title’s status, and the ownership of the property, the parties must present and sign an agreement before a notary in order to gain a valid notarial act. Consequently, the agreement with a notarial seal does not only provide a very reliable document, but the agreement also has probative value, which can be used as evidence in court, and have enforceability value that allows such a document to be used like a court order. Therefore, having a notary’s participation in the transaction enhances the reliability of any real estate transactions. Such agreements make people feel more secure in their real estate transactions and more secure in their ownership over real properties, than in circumstances that do not have any notary’s intervention.

Nevertheless, no notarial act or any kind of authentication exists in real estate transactions in Thailand. Real estate agreements are complete and can be enforceable
between the contractual parties simply when the consent of the two parties is reached, and then the transactions can be claimed against a third party when they are registered in the public record by a competent officer. A notarial act is not a requirement for real estate registration. This suggests that Thai law does not see that certification of real estate transactions as crucial, compared with other countries which give importance to civil law notary’s acts. The only similar practice to notarial certifications is when the registrar examines the consent of parties by asking them to confirm their consent and signing their names before the registrar records the transactions. The registrars normally ask this question to see that the parties agree to the transfer and receive the rights and obligations over the property. The registrar will not examine deeply to see whether such agreement is made with true consent of the parties or made under fair terms or not. In Thailand, there are quite a lot of cases where one party takes advantage over another with unfair terms, misleading facts, coercion etc. These kinds of circumstances do not happen in countries where there are civil law notaries, because they hold a neutral position in the transaction, and make sure that all parties know and understand all the terms and situations, and that the parties accept such agreement unanimously. Therefore, in Thailand, the certification by a registrar is not as credible nor equivalent to the acts of a civil law notary. Merely answering the questions of the registrar is not enough to prevent real estate disputes. Having an intermediary like civil law notaries would protect the contractual parties from unfair, fraudulent or subrogated agreements, as well as improving the reliability and stability of the real estate businesses.
5.1.4 The Absence of a Central Information Center

In Thailand, there is no central information center that gathers information about all of the real estate properties in the country. As mentioned in Chapter 2, land in Thailand is under the control of various organizations, and each organization has their own record of land which is under their authority. Sometimes the areas that each organization holds overlap, so when two organizations issue different policies which are not compatible or collide over the same piece of land, it can cause problems. The situations in Wang Nam Khiao\textsuperscript{319}, Khao Koh\textsuperscript{320}, and many other forestry/mountain areas are good examples of this. Consequences then arise due to the incompatible policies of different organizations, for example where one organization preserves a forest area, but another organization lent the land to local people with the intention to let them use the land to make a living, but then the local people sold the land to capitalists who built commercial businesses instead. These problems demonstrate that the current land management style is inefficient because the boundaries for each authority are unclear and overlapping, and there is no central information center where information about land ownership can be checked. This means each organization believes they have the records for the land and that they have authority over it. The absence of a central information center shows that real estate information in Thailand, and Thai real estate registration, is uncertain and unreliable. This is because even though people may acquire the realty for value, obtain possession in good faith, register their acquisition, and obtain a title deed, they may still

\textsuperscript{319} Supra note 4
\textsuperscript{320} Supra note 5
lose their ownership over the property if the title deeds were issued wrongfully, leading to them being revoked. If there was a central information centre that could check the status of land easily for every authority, these kinds of problems would not happen.

As a matter of fact, there is the Bureau of Property Valuation under the Treasury Department\textsuperscript{321}, which manages property valuation in Thailand. This organization conducts a survey to evaluate the value of each piece of Ratchaphatsadu land\textsuperscript{322} in every area once every four years.\textsuperscript{323} However, the organization does not have the authority to gather other kinds of information about land, such as its history, status, ownership, etc., so it is still not enough. Nonetheless, the information that the Bureau of Property Valuation collects is useful information that should be stored in a Central Information Centre. Therefore, once a Central Information Centre is set up, the Bureau of Property Valuation should be

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\textsuperscript{321} สำนักประเมินทรัพย์สิน กรมธนารักษ์

\textsuperscript{322} “Ratchaphatsadu land (ที่ราชพัสดุ) means every kind of immovable property which is State property except the following domain public of State:

(1) waste land and land surrendered, abandoned or otherwise reverted to the State according to the land law;

(2) immovable property which is in use for the people or reserved for the common use of the people such as foreshores, water-ways, highways, lakes.

An Immovable property of local government organization shall not be deemed as Ratchaphatsadu land.” section 4 Ratchaphatsadu Land Act B.E. 2518 (1975)

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transferred from the Treasury Department to be part of the Central Information Centre under the Land Department instead.

As well as this, the Thai government announced the “One Map” project in 2016. This project aims to gather information about land in Thailand into a single map, in order to make boundaries clear and solve the overlapping area problems, particularly for areas which are under public organizations’ authority. This year, the government planned the next steps for this project, which is the enactment of a new law to use with this map. This map and the new law would help to solve the problems of unclear boundaries between different organizations. In fact, there should be a single map for all land in Thailand, including private land, allowing people to obtain the information at a more regional level, because in some areas, both private land and public land are mixed together. Some owners of private land in such areas may want to sell or transfer their rights to others, so having a map that contains both private and public information would help buyers as well as registrars to check this more easily than having separate maps for public land and many local maps for each local land office. It would give more benefits, if all this information was in one joint system or centre, that various organizations could easily access to retrieve information about land in another province. It would help people to save time by not having to travel to a local land office where the land is located. Therefore, there should be a single centre or system which contains all information relating to all land in Thailand.
5.1.5 The Inefficiency of the Present Notaries in Real Estate Transactions in Thailand

As discussed in Chapter 3, notaries in Thailand are similar to the notary public system in common law countries, particularly American notaries. Thai notaries work mainly on: 1) certifying documents - the correctness or the existence of the documents, whether they are original documents, copied documents, or translated documents; 2) certifying signatures; and 3) certifying the parties’ identities. They do not have a broad working scope like civil law notaries do, so they do not play any significant role in particular transactions like marriage or other family transactions, business transactions, or real estate transactions, apart from certifying associated documents in cases in which such documents are required.

The qualifications of the present notaries in Thailand are unsuitable for working in real estate transactions. This is because when comparing the required qualifications for becoming a notary in Thailand to the required qualifications of civil law notaries, the current notaries in Thailand do not have enough education and training. To become a Thai notary, the applicant must hold a lawyer license, in order to apply for a notarial course to get notarial certification. This means that every Thai notary must have at least a Bachelor’s degree in law, plus another year of study, and at least a six-month internship in a law firm to become a lawyer. Then, when they are lawyers, they must attend a notarial course - a two-day seminar - in order to obtain the notarial certification. The present notaries in Thailand are not required to have particular knowledge in any area, nor have many years of working experience in a legal field like civil law notaries do, so
they may not have sufficient skills and credibility for people to entrust Thai notaries with working on their personal matters and property, especially when there is no compensation scheme to support for any losses or damage incurred by Thai notaries.

Another weakness of present Thai notaries is that there is no compensation scheme to protect against any misconduct or mistakes arising from their performance. In Thailand, notaries are currently part of the lawyer profession, so they fall under the Thai Lawyer Council. The Lawyer Council does not organize a collective guarantee fund, whether for lawyers or for notaries, to share any liabilities for losses or damage caused by negligence or malpractice by their members. Therefore, each notary holds the responsibility for their actions themselves, and since the losses or damage in real estate transactions are usually high, a single notary may not be able to take responsibility for any damages on their own. This means the clients must accept the risk for any losses if the notary causes a problem, and they may not have the ability to compensate for their loss. Nonetheless, notaries can get professional liability insurance to share the liabilities for any mistakes they make. This professional liability insurance will only compensate for losses arising from the mistakes of notaries. The insurance will not compensate for losses caused by a notary’s misconduct, so clients must bear the risk for any such losses on their own. Yet, since this is not a requirement for being a notary, notaries may not always purchase professional insurance because they believe that they will not make any mistakes.

In addition, the consequences of the notarial deeds of Thai notaries is in contrast and inferior to the authentication of civil law notaries. The evidence value of the authentic
acts of Thai notaries are not equivalent to the evidence value of the authentic acts of civil law notaries. This is because the notarial acts of Thai notaries do not turn a document into a public document, so although such a document may be enclosed with a notarial acts, they do not have probative value nor executory force. Therefore, if one party requests another party to get a notarial certification on every document before continuing a transaction, the document can only be used against the contractual parties. As they do not have probative value, the court will not presume that the document has credibility, and since such documents do not have any executory force, the parties cannot use to the document to enforce anything against the contractual parties. They will still need to get a court order. As a result, not only are the functions of Thai notaries not fit to take part in the real estate business, but their qualifications, the power of notaries, as well as the absence of a compensation scheme, show that Thai notaries are not suitable to play a part in real estate transactions.

5.2 The Solution to Solve Real Estate Problems in Thailand

After discussing the reasons that cause real estate problems in Thailand, this thesis proposes two solutions in this section: 1) the establishment of a Central Information Centre; and 2) the development of a civil law notary profession for real estate registration in Thailand.
5.2.1 The Establishment of Central Information Centre

In Thailand, information about real estate properties is scattered around in various organizations. This is because there is no central information centre which gathers information about real estate properties. The absence of a connecting or central point to obtain real estate information causes confusion and conflict in the real estate business, so it is necessary to develop a central information centre, which stores information about all kinds of real estate properties in Thailand. It would have information about all organizations in one place, so that everyone can obtain real estate information easily and accurately. Thus, this section will discuss the importance of central information and the development of a central information centre for real estate properties in Thailand.

5.2.1.1 The Need for Central Information Centre

As discussed earlier, the absence of a central information centre for real estate properties is one of the significant causes of real estate problems in Thailand, so there are various reasons why Thailand should have such a central information centre for real estate properties. First and foremost, Thailand needs to have a central information centre where it stores unified real estate information about the country, whether it is owned by public authorities or private individuals. This is because information about real estate properties is currently scattered around and varied among different organizations, which have different authorities and responsibilities over each area. This administration style makes real estate information in Thailand unreliable, because the information that each
organization has sometimes overlaps, which can lead to land disputes later on. An example is when one organization grants some land to local people, while another organization preserves the same piece of land for public benefit, so a person who holds the title of possession may not trust this sheet of paper. Secondly, Thailand needs to have a central information centre where every organization or user can access land information easily from one place. This is because real estate information is scattered among various organizations located in different places around the country, and this real estate information is not linked, so when someone wants to obtain information about a provincial land, they must travel to get such information from the land office where the land is located. Therefore, having a central information centre with an online system would provide easily accessible information and a convenient service for all.

5.2.1.2 The Central Information Centre

To establish the central information centre in Thailand, it is important to concern on: 1) the information stored in the central information centre; 2) the access to the central information centre; and 3) the regulator of the central information centre.

a) The Information Stored in the Central Information Centre

The first purpose for setting up a central information center in Thailand is to gather information about every kind of real estate property in Thailand into a single place, no matter whether they are public or private properties. There should be general information about the real estate, such as its location, size, boundaries, the nature of the land and so
on. Furthermore, real estate information should be classified into different types, so that it can be easily found when searching for the property. The classification should not only be separated into public or private properties, but should also be classified as to what particular type of public or private property it is, such as forestry land, national park land, land distributed for agricultural purposes, military land etc. There should also be information about the organization which has responsibility for the land. This will allow the boundaries of the land to be clarified as well. There should also be information relating to present policies and restrictions issued over the land, as well as within the local area, which would help anyone who wished to acquire the land to make a decision. For public land where the authorities have distributed the land to local people according to certain policies, the records at the central information center should also mention who received the rights to possess the land. Not only what has already been mentioned above, but the history of the land possession is also important, as this information will help the acquirer to see who is the true owner or possessor of the land, and make sure that there is no breach in the title chain which may cause problems after they acquire the land. For private real estate properties, the status of the properties such as mortgage, tax duty, or any kind liens or encumbrances, are very important pieces of information, because they may have an influence on the price of the land, and this is the main reason which behind most land disputes.
b) **The Access to the Central Information Centre**

Since real estate information will be collected and stored in one place, the central information center should organise an online information system where people can access it from anywhere in Thailand. However, there should be some limitation to this access, since some information should be kept for public security reasons and privacy reasons. The public should be able to access the online system, but with limited access to see only general real estate information, such as the size or the boundary of the land, which would not disclose the identities or rights of anyone. They should also be limited to information about public property. Private individuals should not have the authority to register their real estate transactions on their own, nor conduct title searches, as these two functions should be reserved for real estate professionals, namely the land registrar or notaries, in order to avoid fraudulent activities or mistakes. In fact, the access to the registration function in order to record an update or change in the rights over an immovable property should be limited to the land registrar, who would do this work after a notary submits a real estate transaction with a notarial deed; notaries should only be allowed to check the results of a registration. This would allow the two professions to counterbalance each other. Conducting a title search should be a reserved task for these two types of real estate professionals, because they uphold their professional duties to protect the personal information of others. Thus, if anyone would like to get information about land, they should make a request to a notary, and the notary should record details about the request, such as who made the request, the date of the request, and the reason for the request.
Apart from this, some public officers who are granted the power from their organization, which has authority over land or real estate, should also be permitted to access the central information center in order to check, change or update the information about the properties for which they are responsible.

c) The Regulator of the Central Information Centre

Since the central information centre will be collecting information about real estate properties in Thailand, it should be a division of the Department of Land, which focuses on all aspects of real estate registration. This would be similar to the work of local land offices, but instead of spreading real estate information throughout many offices, the central information centre will store information in one place. Thus, the nature of the central information centre would be very similar to that of local land offices, and so this organization should still be kept as part of the Department of Land. The employees of the central information centre will still be considered as public agents, so if there was to be a breach of their duties, the Department of Land could discipline these employees. The Department of Land will also set the mission and vision for the Central Information centre.

5.2.2 An independent Intermediary in the real estate transactions

In Thailand, the only two profession who have notable roles in real estate transactions are the land officials and laywers. However, the performance of professionals
from these two professions are still not effective enough, so there still many real estate disputes in the country. Thus, this thesis want to suggest the establishment of a new independent profession to work in real estate transactions, so this section will discuss on the necessity for the new profession and the development of this profession in Thailand.

5.2.2.1 The Need for Having Independent Intermediary in the Real Estate Transaction

In every real estate transaction, there should be a professional intermediary who can process or give advice to the parties in order to prevent mistakes or fraud. This is because lay people usually do not have much knowledge or experience in real estate transactions, so they cannot conduct an efficient verification like professionals since each real estate transaction has many stages and many important details, and missing some information or having mistakes in a transaction may result in an incomplete transaction or a transactions being revoked. Therefore, it is necessary to have a special intermediary in real estate transactions, who can make sure that all related information is true and correct. Then, the intermediary can certify such information in order to reassure all parties that there will be no real estate disputes. Although the land registrar holds the responsibility for examining the associated information, they only conduct the verification at the registration desk. Since each day there is usually quite a lot of work, they only check on the most important information in order to quickly complete their tasks, so there is a high chance of mistakes happening. In some cases, a lawyer may be hired by one party to be the intermediary in real estate transactions. The lawyers are not the same
as notaries, because lawyers will only represent one party, so they will only work for the benefit of their client. This is dissimilar to notaries, who hold a neutral position, and are concerned about the benefit for both sides before they certify a transaction. Additionally, lawyers are not required to study about real estate, so they are not real estate specialists. They may not be able to give a lot of advice like notaries, and their conduct may not be much better than the parties, especially if they have little or low experience in the real estate area.

Moreover, the current real estate system in Thailand creates an opportunity for corruption, so it is necessary to have an intermediary to check and counterbalance the powers of public authorities. This is because real estate registration and titling in Thailand are under the responsibility of the public sector - the agencies under the Department of Land. The real estate administration is decentralized from the central land office - the Department of Land - to each local land office, so local offices have freedom to work. No other organization checks on their work, so if public officials at a local offices use their authority in the wrong way, the Department of Land may never know or only find out several years later. Therefore, there should be an involvement of professionals in real estate transactions, with such professionals acting to counterbalance and check the public sector’s work. Developing the civil law notary profession to work in real estate transactions like some European countries would be a solution to help solve failures in the Thai real estate system, because a civil law notary is an independent profession designed to be family and property specialists. They are required to have a good understanding of the law as well as real estate transactions, and since they are not a part of public sector or
attached to any profession, they are able to work in the real estate business without interference or pressure from other authorities.

Furthermore, the civil notary profession organizes indemnity schemes to protect an injured party from any loss caused by a notaries performance. In the current real estate registration system in Thailand, there is no protection or remedy against losses resulting from mistakes or malpractice of the land registrar or the lawyer for the injured parties. It is even worse to say that, at the registration stage, the registrar asks the parties to write down their consent for the Department of Land or the local land office to discard liability for their mistakes. Thus, the injured parties would have to sue over the error of a lawyer’s or registrar’s misconduct themselves. Therefore, having an intermediary like notaries, who prepare a compensation scheme for losses arising from a notaries’ misconduct or mistake, will enhance the land ownership situation in Thailand.

It is, however, also necessary to consider two drawbacks of having notaries in real estate transactions, which are the additional cost and time they will incur for the contractual parties. For the current registration system, the registrar finishes the registration process, which includes the verification of both parties and properties, within 1-2 hours, whereas notaries would need a period of time to do the verification of related information, and this period would vary, case by case, depending on the specific details, such as the number of parties, the amount or the complexity of the information, or how difficult it is to obtain the information. Thus, the authority or government must explain to and educate people with regard to understanding the benefits of a notary’s involvement. Apart from the additional time, requiring notarial authentication for real estate registration
will increase the burden to the contractual parties, with them having to pay additional expenses for the notarial service, since the notaries’ participation will be an extra service for the real estate transaction. Therefore, since the notaries will be the main person to do the verification, they should receive a service fee, which the contractual parties would usually pay to their local land office. Notaries should receive the same percentage that the land office usually collects for each transaction. Yet, as notaries will have to be responsible for the registration, they should hold the responsibility to pay the registration fee at a fixed rate for each kind of transaction to the local land office, by deducting such costs from the service fee received from the contractual parties. In this way expenses will not increase for the contractual parties. Though these two disadvantages are major concerns for establishing a notary system in Thailand, if the profession is planned and designed carefully, it will bring more advantages than disadvantages to real estate administration.

5.2.2.2 Development of Notary Profession in Thailand for Real Estate

Purpose

Civil-law notaries are a new concept for Thailand, so before establishing this new profession in our country, it is necessary to consider about the characteristics, the missions, the remedy for Thai notaries.
a) Characteristics of Thai Notaries

Current Thai notaries are inefficient for working in the real estate business because their characteristics are unclear and inferior to civil law notaries, so it is necessary to develop new characteristics for notaries, with the three major concerns being their qualifications, status, and governing body.

As current notaries in Thai are deficient in qualifications to work in the real estate business, the qualification to become a notary should be enhanced to take these new roles in the real estate businesses into account. These requirements can be separated into two kinds of qualification - general qualifications and educational qualifications. The general qualifications that notaries should have are such as Thai citizenship, minimum age etc., and more importantly, they should not have personalities that show dishonesty or irresponsibility, because when they work in the real estate business, they will be involved with personal and valuable properties of others, so they must prove that they are reliable and able to manage the properties of the others. Thus, they should not have a record of bankruptcy, or have been sentenced to imprisonment by a final judgment. For educational qualifications, the applicants are required to have legal knowledge since only qualified lawyers can apply for a notarial license. This means that applicants must hold a Bachelor’s degree in law and have at least six months’ experience in a law firm before they can take the national examination to become a lawyer.

When comparing the qualifications of Thai notaries with civil law notaries, Thai notaries have very low working experience and do not have any knowledge of the real estate field. Hence, notaries should not only have fundamental knowledge of the law but
they should also have some specialized knowledge about real estate transactions and
the market, because they will be the people giving advice about the obligations and the
consequences of real estate transactions to their clients. Moreover, they should also have
some work experience in the real estate field in order to increase their capability and
confidence in dealing with complications in real estate transactions. This will lower the
chance for unskilled notaries to cause mistakes in real estate transactions, which could
result in costly problems.

The status of Thai notaries must be reformed because the status of present
notaries in Thailand is not appropriate to a real estate function. As already
mentioned, to
become a Thai notary the applicant must be a qualified lawyer, so notaries in this country
are actually lawyers who hold an extra certification to practice their notarial function.
Even though in real estate transactions notaries will deal with negotiations, agreements
and procedures which have legal effect, legal knowledge is one of the important
qualification of notaries, although notaries should be distinguished from lawyers because
the nature of their work is completely different. Lawyers work and represent only their
clients, whereas notaries must hold a neutral position in any transactions and ensure that
both sides get a fair deal, so the roles of the two professions are contrary. In practice, it
would be difficult for anyone to hold two professions, which have opposite roles, fairly,
so notaries should be separate from lawyers. Moreover, notaries should not be land
officials or public officials either, as they are intended to be used for eliminating corruption
in the real estate business. Thus, the notary profession should be another branch of legal
practitioners that is an independent profession. They should have the freedom to perform

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and manage their own work, so that they can avoid influence from other organizations in order to maintain their impartiality.

Since notaries should be a new independent profession, which has unique characteristics, there should be a special governing body for Thai notaries. This professional body will govern and supervise the activities of all notaries in Thailand, so that every notary can perform their task with to the same standard of practice. This professional body shall set the rules and discipline for notaries, as well as provide professional training and support to all notaries. However, as Thailand is a big country, the professional body should also appear at a regional level in order to provide convenience for notaries in other regions, as well as allowing them to be monitored more closely. The governing power should be decentralized to the regional offices because each regional body should have some independent control to manage themselves to suit their own local situation, yet the regional offices should still be supervised and regulated by the central professional body located in Bangkok. This means that each regional body would have freedom to discipline their members and issue policy, but they must follow the core regulations and standards of practice issued by the central regional body.

b) Missions of Thai Notaries

As discussed in Chapter 3, the present notaries in Thailand only work on the general functions of notaries, following the concept of common law notaries or notaries public in the United States. Therefore, Thai notaries do not have a special role in the real estate business nor in any other fields, unlike civil-law notaries. Thai notaries are only
involved with tasks such as translation and/or certification of documents, individuals’
identities, and signatures; or preparing and certifying oaths and affidavits. However, their
duty to verify documents must be improved. Notaries must not only verify and certify
that documents are real, but they must ascertain that the content of documents is correct
and true before they certify each document as well. This duty will enhance the reliability
of documents as well as enhance the certainty for transactions which have documents
with a notarial seal. Furthermore, the consequences of notarial practice in Thailand are
not powerful like the practices of civil law notaries. Documents with a notarial
authentication do not have probative value nor enforceable force. They are only
customary practices to fulfill the requirements of the contractual parties, so they can only
be used against the contractual parties, unlike civil law notaries. Therefore, it is necessary
to give some power to the outcome of their general duties in order to raise the standards
of Thai notaries to be equivalent or similar to civil law notaries. Since notaries must work
very carefully in order to avoid liabilities arising from their mistakes or misconduct,
documents with a notarial seal should be very reliable, so they should have probative
value in courts. With their high reliability, they should also have enforceable value like
court orders, which will help contractual issues to save time and money from filing
litigation, as well as reducing the workload for the courts. Another reason for suggesting
this is because the current mission of Thai notaries will be general or fundamental
missions of notaries, which will be parts of their specialized mission, so in order to produce
reliable outcomes, the supporting documents and performance should also have high
reliability as well.
The specialized mission that this thesis would like to propose for Thai notaries is a function in real estate transactions similar to what civil law notaries do in some European countries. Here a notary’s intervention will enhance the reliability of any transactions, so they would be a good factor in preventing real estate disputes. Therefore, the main duties that Thai notaries should perform in real estate transactions are: 1) verifying all related documents, contractual parities, and properties. Notaries will examine documents, contractual parties or signatures in order to make sure that all information is correct and true. This duty will be very useful to solve real estate problems in Thailand because when notaries have time do the examination, they can make sure that the contractual parties have the rights and capability to carry out the transaction. Notaries cannot allow nominees or any person who does not have the right over a property to register the transaction because after the verification, notaries must 2) certify all related documents as well as certify the transactions. When notaries give out their certification, they give a guarantee that there will not be any disputes later on. In the case that there is any loss arising after certification and such losses are related to the failure in verification, they will have to be responsible for any losses and damages. Hence, notarial certification should be an important condition for registration in order to avoid low-quality verification and provide certainty to the contractual parties as well as the real estate administration.

At present, these duties actually exist and are under the responsibilities of the local land office, but due to various reasons such as the land registration officer having a lot of work, or corruption within the organisation, there are still many real estate disputes going on. Therefore, it would be better to have another profession – notaries - to take
this burden away from the land office. This will allow the local land office to focus on their other work, and since notaries will also have to present the verification results and their certification to the local land office for registration, this will allow the two professions to counterbalance their real estate activities. In addition, since notaries will do the main part of the real estate transaction, they may also work on the other functions such as giving advice on real estates, draft contracts, negotiate, and/or act as the escrow agent, etc. This would facilitate and provide security to the parties, yet the law should not be a required service because it should be a free option for the parties to choose on their own, whether they would like to have an assistant or not.

c) Professional Liability and Indemnity

Professional liability and indemnity are special features of civil law notaries that provide security and confidence for the contractual parties/clients in order to guarantee that notaries will not breach their duties or, if they do, the contractual parties/clients will be compensated for their losses or damages.

Whether there is another professional body for notaries or not, it is necessary to set a professional code of conduct for Thai notaries. As notaries work based on the trust of their clients, notaries should hold extra responsibilities on top of civil liabilities and criminal liabilities for those circumstances which are not covered in civil code or criminal code, similar to legal etiquette for lawyers. Yet, since the nature of their work is quite different from lawyers or any other profession, there should be unique etiquette and
liabilities for notaries in order to maintain their important traits - their impartiality and independence.

An indemnity scheme is also a crucial feature of notaries because it will provide financial aid guaranteeing that losses and damages arising out from notaries’ faults will be compensated. There should be an indemnity fund because notaries will be working on important subjects and valuable property of others, so any results of their errors may be too expensive for a single notary to compensate the loss on their own, and it may lead to litigation afterwards. The indemnity fund will be used to compensate clients or any other parties which are injured due a notary’s conduct, as well as protecting notaries who make a mistake inadvertently. However, this indemnity fund should not be extended to cover intentional malpractice or gross negligence. In such situations, the professional body should reimburse the injured parties first to compensate them, then claim reimbursement from the notary. Since every notary holds the same risk towards their tasks, they can share the risk in the form of collective insurance. This means that the profession should organize a collective fund to use for guaranteeing any losses caused by their members. This collective fund should be contributed to by all notaries, and the professional body should be responsible for collecting this money from all members on a yearly basis, allowing easy collection when notaries renew their license.
CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

To summarize this research, there are a lot of disputes over land possession. If the land registration and certificate of land ownership i.e. title deeds, Chanote (NS-4), Nor Sor Sam (NS-3) etc. of Thailand were reliable and stable, there would not be any arguments about land. However, in reality, even though a land owner holds a title deed, which gives complete rights over land and is regarded as the most reliable certificate of ownership, it is still possible that he might lose possession over his property because of a duplicate registration. This kind of situation happens quite often in Thailand, and it shows that the Thai land registration system is failing. The consequences of the weaknesses of the Thai land registration system can be summarized as three major problems: 1) uncertain real estate information; 2) transfer of land without ownership; and 3) use of a nominee in the real estate transaction. This study has found that these three problems occur because verification during real estate registrations is inefficient, or in other words, there is a lack of verification on the parties’ identities and the real estate information, lack of certification on titles, as well as the transactions themselves. This is because in Thailand there is no intermediary in real estate transactions who checks all information before registration, plus there is no central information center, so it is difficult to check information about land.
because the information needed is scattered around and sometimes the information that each organization holds does not match.

Therefore, this research has studied on the system that four countries, namely France, Germany, the United Kingdom - particularly England and Wales - and the United States of America use in real estate transactions for protecting against, and dealing with, real estate problems. The results are:

In France and Germany, civil law notaries and their notarial authentications are a requirement for real estate registration. Before certifying a transaction, notaries will verify all related information to make sure that the information of the parties and the properties, including the titles, are correct and can undergo transactions. If all information is present, notaries will conduct the notarial act to make sure that the transaction is correct and according to both parties’ intentions, in order to certify the transaction. The importance of the notarial certification is that it will guarantee that the whole transaction is correct and that there should not be any disputes over the property afterwards. Thus, if there is an argument over the certified transaction, the notary who performed the transaction will have responsibility for any losses and damages. The professional body shares the responsibilities for notaries’ mistakes, as well as notaries’ misconduct. Thus, the notarial professionalism and their indemnity scheme provide confidence for contracts as well as the society.

In the United Kingdom, there are solicitors and licensed conveyancers who act in a similar way to civil law notaries, but their participation is not mandatory, as in France and Germany.
In the United States of America, a real estate salesperson facilitates real estate transactions, but the title insurance agent is the person who conducts the title search to verify the status of properties. After a sale, a title insurance guarantees that there will not be an argument caused by the title, and in the case that there is a problem, the title insurance company will compensate for the loss. Neither real estate professionals are mandatory for the transaction.

From this study, this thesis would like to propose to develop civil law notaries for real estate registration in Thailand, as well as set up a central information center for solving real estate problems in Thailand.

6.2 Recommendations

After all of the discussion in this research, this thesis would recommend the establishment of civil law notaries and a central information center for real estate properties in Thailand, to fix the failures in Thai real estate registration and in order to solve real estate problems in Thailand. Since it will take time to set up a new profession and a central information center, the development of civil law notaries and a central information center can be done in two time frames: a long-term plan and a short-term plan, with and the details of each plan to be discussed in the following sections.
6.2.1 Long-term plans

The long-term plan is the plan to develop civil law notaries and a central information center in Thailand, so within this plan there are concerns about: 1) establishing civil law notaries, 2) establishing a specific regulation for civil law notaries, and 3) establishing a central information center for real estate properties.

6.2.1.1 Suggest to Establish Civil Law Notaries in Thailand

To establish civil law notaries in Thailand, it is necessary to think of how to develop the current notaries in Thailand in that same direction as civil law notaries, and there are several issues that need to be covered, as follows:

The qualifications of notaries need to be set in a more specific way for notaries, since civil law notaries in France and Germany are actually legal practitioners who specialized in family and property laws and procedures. Therefore, to develop Thai notaries for the real estate business, the qualifications that notaries should focus on are legal knowledge and knowledge about the real estate business.

The mission of notaries has to be clear and have a specific direction, and the mission of notaries should be enlarged from their roles and responsibilities that each notary will have to do in the real estate business.

As the notaries will be a new profession which has a distinctive nature, a governing body should be established to regulate and support every notary in the country. The governing body shall also be responsible for disciplining notaries, as well as setting up standards of professional practice and also professional ethics and education for notaries.
Thai notaries should also have a liabilities and indemnity scheme. Since notaries are entrusted by the contractual parties to deal with their real estate properties, notaries shall be subject to a special liabilities fund for their conduct. The professional body should organize a collective fund to compensate for losses and damages arising from notaries’ mistakes and malpractice; however, notaries should be liable for this misconduct and compensate to their professional body.

6.2.1.2 Suggest to Establish Regulations for the Civil-Law Notaries

There should be specific regulations for civil law notaries, as it is a new profession which has a distinctive nature and distinct activities. The new regulations for notaries should stipulate rules on: 1) The definition of a notary 2) The qualifications of notaries and the prohibited characteristics of notaries 3) Notarial registration 4) A liabilities and indemnity fund. The Land Act should also be amended to insert the requirements of notarial activities for land registration, as well as the mission and responsibilities of notaries in real estate activities.

6.2.2 Short-Term Plans

Since it will take a period of time to establish a civil law notaries system in Thailand, due to the reason that the notarial system needs to be planned and set up, and people need to be trained, alternative plans shall be used during the time that the long-term plan is still in progress, so the short-term plan will initially be intended to be used for just 5 years but may be extended if necessary. The plans for the short-term period are:
6.2.2.1 Suggest to Establishing a Central Information Center for Real Estate Properties in Thailand

There should be a central information center which compiles and stores information on every kind of real estate property in one place, where everyone can easily obtain details of all real estate. The information should not only contain the primary details of land, whether who owns it / is responsible for it, the policies over the land, the size and boundary, but all details associated with each real estate property should be included in its profile, so that when a person who is authorized to search for the information about one piece of land, that person should be able to get all information about that piece of land. However, the access to the information center should be limited for different users, with each authorized user only able to see the information that is related to them. Therefore, the information at the central information center should be sorted into different categories, such as public and private land, and sub-categorised again for different users.

6.2.2.2 Suggest to Organise Special Training for Legal Practitioners

The qualifications to become a notary in civil law countries require applicants to obtain legal knowledge and pass several training courses. In Thailand the only group of people who can perform notarial functions while notaries still do not exist in Thailand are lawyers and/or legal practitioners. This is because legal knowledge is an important qualification of notaries, so the fastest way to produce notaries for Thailand would be to
train current legal practitioners or lawyers to become notaries. However, just having background knowledge in law is not enough because notaries who work for real estate businesses are like real estate specialists. Therefore, there should be special training for those who want to become a notary. This training should be the corroboration between a) the Department of Land as the department responsible for land and land activities in Thailand, b) the Lawyers Council, as they are the organization of the profession which has the closest nature to notaries. They are also currently responsible for the registration and training for the present notaries, and c) the Ministry of Justice - as the organization which is responsible for the justice process and governing justice activities.
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