

## THE DEVELOPMENT OF NOTARIES IN REAL ESTATE REGISTRATION IN THAILAND<sup>\*</sup>

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### Abstract

Real estate disputes are one of the most common types of disputes in Thailand for decades and this is because the real estate administration of Thailand 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 looks into the causes and the consequences of the current real estate registration process in Thailand. Then, the thesis examines 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 - the civil law notaries - in civil-law countries and other kind of real estate professionals in common-law countries in order to suggest the best solutions for solving the real estate situation in Thailand.

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## 1. Introduction

Real estate properties, all over the world, are always seen as valuable assets that everyone would like to possess, so people often compete for land. Thus, real properties in most countries are usually managed by the State. Each State has its own rules and procedure on how to allocate and keep track on the immovable properties in order to prevent arguments about the ownership, and similar to other countries, real estate properties in Thailand are also managed by the State. There are several Codes and Acts that stipulate particular practices for the certain kinds of real estate activities in order prevent real estate arguments. Importantly, in short, anyone who own land must register and earn the title in order to prove his right to it.<sup>1</sup> Furthermore, every transaction involving immovable properties must be made in writing and registered with a competent official otherwise it will be void.<sup>2</sup> Some kind of transactions, like a mortgage transaction or hire of real estate property, are only required to be in writing for it to be enforceable.<sup>3</sup> Nevertheless, despite such formalities, real estate litigation is one of the common arguments in Thailand. There are still numerous news reporting incidents of land grabbing and land invasion in various places in Thailand, and this is because the Thai real estate administration is inefficient. The certificate of land and land registration are unreliable and unstable. Even though an owner of land 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. There are various tricks to seize the land of the others in these modern times. These tricks are used based

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<sup>1</sup> Thai Land Act B.E. 2497 s 5 – s 7

<sup>2</sup> Thai Civil and Commercial Code s 456

<sup>3</sup> Thai Civil and Commercial Code s 538 and s 714

on loopholes in the legal system or the shortcoming of land management. Some trick may be screened out by a scrupulous investigation during the registration. Yet, the investigation during the registration may be insufficiently effective, since there are still many dispute over real estate properties.

In some foreign countries, there are professionals that act as the intermediaries in the real estate transactions who conduct the title search to make certain of the correctness of the title and the status of the property prior the registration. However, the intermediaries in different countries may be different profession and have distinct roles and characteristics. In some European countries, namely France and Germany, civil-law notaries are important intermediaries in real estate transactions. They are very trustworthiness professionals. In real estate transaction, notaries will verify and certify the title, the status of the realty, and the contractual parties. With their statuses and formal practices, notarial authentication or notarial acts are very credible, so their authentications are the requirement for the registration. On the other hand, in common-law countries, notaries are not powerful as civil-law notaries, so there are other kind of professionals who function in the real estate transactions i.e. solicitors and licenses conveyancers in the United Kingdom and real estate agents, brokers and realtors in the United States. Though these professions are not the requirement in the real estate transactions in these two countries, they do the verification and work similarly to notaries. Therefore, the study examines the intermediaries in different four countries of two different law systems in order to provide recommendations to solve the unstable and unreliable real estate registration and titling system in Thailand. This article will discuss the following issues: 1) the problems in Thai real estate registration; 2) the intermediaries used in four foreign

countries; 3) the flaw in Thai real estate registration; and 4) the recommendations to solve the real estate registration situation in Thailand.

## **2. The Problem of Real Estate Registration in Thailand**

Even though in this modern time the real estate registration in Thailand seems to work in a systematic procedure and governed by concrete rules set, land management is still extremely problematic and there are 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 in to diverse forms. However, there are three common types of land disputes: 1) Problems caused by uncertain real estate information; 2) problem caused by land transfer without ownership; and 3) problems caused by the use of a nominee in real estate transactions.

### **2.1 Problems of Uncertain 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 procession conveyancing transactions. As a result, these diversified organizations overlap in terms of territorial claims, which is one of problematic issue 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 area of land. 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 mission within one area. Consequently, these regulations and missions sometimes collide and make it difficult to determine who is entitle to the land. Wang Nam Khieo-Nakornratchasrima<sup>4</sup>, Khao Kor-Phetchaboon<sup>5</sup>, and Bang Kanoon forest-Phuket<sup>6</sup> are examples of those area where there are more than one Agency has authority over the land, and two types of certificates of ownership are issued to the local. Both certificate are issue legitimately, but issued under different law. The owners has earned the rights according to the certificate they hold, but may wrongfully act under another law.

## 2.2 Problems of Land Transfer without Ownership

Transfer of land without ownership is the most common argument over land in Thailand. This is the situation in which the transferor is not the owner of the land and has no right to pass the

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<sup>4</sup> Het Wang Nam Khiaw Khaipit Khaithok [A Cause ‘Wang Nam Khiaw Who is Right, Who is Wrong] (Faculty Of Environment and Resource Studies, 2011) <[http://www.en.mahidol.ac.th/thai/news/envi\\_news\\_fullv2.php?id=1163](http://www.en.mahidol.ac.th/thai/news/envi_news_fullv2.php?id=1163)> accessed 5 May 2017 (เหตุ วังน้ำเขียว ใครผิด ใครถูก) (คณะสิ่งแวดล้อมและทรัพยากรศาสตร์, 2554) เข้าถึง 5 พฤษภาคม 2560

<sup>5</sup> Naithun Khommisi Hupthidin “Khao Ko” Ropthit [Investors-Colored People Grab Every Direction Of “Khao-Ko”] (ASTV Manager Online, 2013) <<http://www.manager.co.th/local/viewnews.aspx?NewsID=9560000143651>> accessed 5 May 2017 นายทุน-คนมีสี ยุบ “ทีดิน “เขาก้อ” รอบทิศ (ASTV ผู้จัดการออนไลน์, 2556) เข้าถึง 5 พฤษภาคม 2560

<sup>6</sup> Khonsuanplam Yangpara 45 Rai Bukrukpasanguan Bangkhanun Phuket [Invaded Bang Kanoon Preserved Forest, Phuket to Demolish 45-Rai Of Palm-And-Rubber-Tree Farm] (Komchadluek, 2016) <<http://www.komchadluek.net/news/regional/233768>> accessed 5 May 2017 โคน杉ป่าล้ม-ยางพารา45ไร่บุกรุกป่าสงวนบางขุนภูเก็ต (คมชัดลึก, 2559) เข้าถึง 5 พฤษภาคม 2562

ownership to another person. The transferor seizes or embezzles the land from 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. The transaction will not only damage the real owner, but it will also cause a problem for the transferee and a third party as well. Based on the crop of lawsuits, there are diverse tricks to transfer the land belonging to another person to oneself or to others, for example: the land owner empowered someone with a blank power of attorney and such person use the power of attorney to transfer the land to someone else<sup>7</sup>; or individuals, who is not the real owner of the land, falsely report to the land official that they have lost their certificate of ownership and request to issue a new document for his own use.<sup>8</sup>

### 2.3 Problems of the Use of a Nominee in Real Estate Transactions

There are various laws under the Thai jurisdiction that limit foreigners' capability to own some kinds of immovable property, especially Land.<sup>9</sup> Therefore, many foreigners search for loopholes in the Thai law to acquire land and one of the most popular way to do is to appoint a local called a nominee to hold the land for them by engaging in some kind of legal relationship which will allow the foreigner to entrust the nominee to hold his property instead of him. This legal

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<sup>7</sup> Thai Supreme Court Judgements: No.7906/2544, No.8929/2542, No.4708/2533

<sup>8</sup> Thai Supreme Court Judgements: No.2071/2532, No.2803/2535, No.2093/2542, No.8018/2544, No.7223/2556, No.6239/2555

<sup>9</sup> Thai Land Act s 86 – s 96ter

relationship conceals their real intention, which is to make a real estate transaction. The three popular kinds of legal relationships that foreigners commonly use are: 1) marriage, 2) setting up a company and 3) hiring a nominee directly. As a result, there are many reports and news about foreigners owning land in many commercial areas and tourism resorts. One of the significant official reports is the report in the conference of the Standing Committee of Commerce, Industry and Labor the National Legislative Assembly in 2555 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 law.<sup>10</sup>

### 3. The Intermediary in Real Estate Transaction in Foreign Countries

The intermediary in real estate transactions of four countries: two civil-law countries namely France, Germany, and; two common-law countries namely the United Kingdom (England and Wales) and the United States of America in order to study the characteristics and the roles of the intermediary in each country and how they are used as an intervention in real estate transactions for preventing land disputes.

Since France and Germany are the regions where the Roman prevailed in the past, they adopted the Roman notaries and has developed them into their unique systems. The civil-law notaries in these two countries have the similar characteristics and functions, but

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<sup>10</sup> Industry and Labour the Standing Committee on Commerce, the National Legislative Assembly, Sarup Raingan Sammana Rueang “Nitikam Amprang” [The Summary of The Conference Title: Hidden Transactions: Foreigners and Land Possession] (The Secretariat of the Senate, 2012)) <<http://www.senate.go.th/w3c/senate/pictures/comm/68/2555/sammana/2555/sam.report.nitikamaompangTeedin12.03.55.pdf>> accessed 17 December 2017 คณฑ์กรรมการเศรษฐกิจ การพาณิชย์และอุตสาหกรรมวุฒิสภา และการแรงงาน สถาบันตีบัญญัติแห่งชาติ, สรุปรายงานสัมมนา เรื่อง นิติกรรม ว่าพระ: ต่างชาติกับการถือครองที่ดิน (สำนักงานเลขานุการวุฒิสภา - สถาบันตีบัญญัติแห่งชาติ, 2555) เข้าถึง 17 ธันวาคม 2560

they are not entirely the same. Notwithstanding, the French notaries and the German notaries in this modern times are very solid and systematic profession. As notaries' works involve with some legal works, legal knowledge is one of the requirements to become a notary in France and Germany. They are not only required to have basic legal knowledge, but they must also have high legal education and specialized trainings in this profession. Therefore, notaries in these countries are one kind of legal professions. Although some notaries are also advocates, they usually have higher status than general advocates. They have special functions and vital roles in certain businesses including real estate transactions. In both countries, notaries are mandatory to be part of the real estate transaction and notaries' authentication is the vital condition for real estate registration. Without notaries' participation, real estate transactions cannot be registered and consequently, are not enforceable against third parties. The law requires notarial acts as a requirement because before notaries notarize the transaction they must conduct a title search to verify the ownership and other important information of the realty first. Their notarial act guarantee their work and guarantee that there will be no dispute after the notarization. If there is any land disputes after the authentication, French notaries and Germany notaries are subject to liabilities for malpractice and mistake. As notarial act is high reliable, they are considered as public acts and are used as the intervention in the real estate transactions.

On the other hand, this thesis does not discuss a lot about the common-law notaries in England and Wales and in America because they do not have a significant role in real estate transactions like the notaries in France and Germany, so this thesis focus on the other

professions that have notable roles in the real estate transactions instead.

Even though English notaries can also work in real estate transactions, they are not commonly hired to work in real estate transactions. In England, real estate conveyancing works are actually dominated by solicitors and licensed conveyancers. The roles and duties of solicitors and licensed conveyancers in real estate transactions are similar to civil-law notaries' functions. Yet, they are not required to be part of the real estate transaction or for real estate registration by laws. Solicitors and licensed conveyancers are hired to provide convenient and security to their clients. By being the real estate professionals, they provide information and help the clients to make a better decision. However, solicitors and licensed conveyancers are not wholly the same though they have the same roles and authority when conducting the real estate transactions. Licensed conveyancers are legal practitioners who are specialists in real estate areas whereas solicitors offer broader functions than licensed conveyancers. They can conduct litigations or legal actions such as clearing encumbrance, eviction etc., as well, so the majority of the real estate works are indeed conducted by solicitors.

For the U.S., American notaries do not have any roles in real estate transactions, because they do not have any legal education nor specialized in any area, so they only perform the basic functions of common-law notaries. The two notable professionals in real estate transactions in the U.S. actually are real estate salespersons and title insurance agents. Real estate salespersons are simply the third party who are the facilitators of the real estate transactions on behalf of their clients until the transaction is completed whereas title insurance agents are those who are authorized to sell title insurance guaranteeing the

correctness of the title. They are not the persons who insure against the defects in title, but they usually conduct a title search to verify that the information on the title is correct before they sell title insurance. Thus, the functions of the two profession are similar to the functions of civil-law notaries. These functions, especially the function of title insurance agents, can provide security in the real estate transactions, but as they are not mandatory by law, some people do not hire real estate agents nor title insurance agents, or both, in order to save some cost. Yet, when the property is bought via mortgage, the mortgage lenders usually request a title insurance before issuing the loan.

All in all, in these four countries, 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 qualified and appointed 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 fell secure that there will be no dispute afterwards. Unlike the civil-law notaries, the other real estate professionals in the United Kingdom and the United State 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 the United State are merely

the acts of commercial agents, so their credibility cannot be compared to the conducts of civil-law notaries.

#### **4. 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 U.S.), 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 transactions. The flaws caused by the absence of an intermediary in Thailand's real estate businesses can be summarized in the following five points:

##### **4.1 The Lack of Verification on Parties' Identity**

In Thailand, there are no independent real estate professionals who assist the contractual parties in any kind of real estate transactions, like in the four foreign countries discussed earlier, 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 connection 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 the case where in which 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, 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.

#### **4.2 The Lack of Verification and Certification of Titles**

In the other four countries considered, there are independent real estate professionals 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. The results of title search can ensure that the information on the title is correct and represents true information about the property, so 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. On contrary, 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 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. 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.

#### **4.3 The Lack of Certification of Transactions**

In countries where there are civil-law notaries, the two parties are required to sign the contract in front of notaries, and notary will

sign and stamp his seal to certify the transaction. This practice called notary act. As notaries hold a neutral position in the transaction, they will make sure that all parties know and understand all the terms and situations, and that the parties accept such agreement unanimously. Yet, Thai law does not see that certification of real estate transactions as crucial, as a notarial act is not a requirement for real estate registration. In fact, notarial act or any kind of authentication does not exist 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. 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. Thus, in Thailand, the certification by a registrar is not as credible nor equivalent to the acts of a civil law notary. 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.

#### 4.4 The Absence of a Central Information Centre

There is no central information centre that gathers information about all of the real estate properties in Thailand, and Land 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. These problems demonstrate that the current land management is inefficient because the boundaries for each authority are unclear and overlapping, and there is no central information centre where information about land ownership can be checked. The absence of a central information centre 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 lose their ownership over the property if the title deeds were issued wrongfully, leading to title deed revocation. 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.

#### 4.5 The Inefficiency of the Present Notaries in Real Estate Transactions in Thailand

Nowadays, there are notaries in Thailand, but they are like those notaries in common law countries, particularly American notaries. Thai notaries 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 certification is required. In addition, Thai notaries are

also lawyers. These two professions have completely different nature: Notaries is a neutral position in the transaction while lawyers are representing only one party- the clients.

## 5. The Solution to Real Estate Problem 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.

### 5.1 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. The information centre will 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, and 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. There should also be information relating to present policies, the history of the land 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.

Nonetheless, there should be some limitation to this access, since some information should be kept for public security reasons and privacy reasons. 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.

## **5.2 An 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 mistaken in a transaction may result in an incomplete transaction or a transactions being revoked. Currently, the only two profession who have notable roles in real estate transactions are the land officials and lawyers in Thailand. However, the performance of these two professions are still not effective enough, so there still many real estate disputes in the country. 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. Notaries are property specialists, so they are required to have a good understanding of the law as well as real estate transactions. Notaries, must have a neutral position, and are concerned about the benefit for both sides before they certify a transaction, 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.

## 6. Conclusion

In Thailand, there are a lot of disputes over land possession because 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, additionally 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. As a result, the 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.

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