

Does the *Rest of the World* Need the “Civil Law Notary Model”? *A Preliminary Answer from the Real Estate Crises in the United States and China*

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By adopting aspects of the “Civil Law Notary Model”, such as responsibility for the entire transaction, confirmation of the parties’ intentions, careful due diligence, and document authentication, Common Law jurisdictions could strengthen their legal systems. The potential impact of this can be seen in the current financial and real estate crises in two contrasting countries: the United States and China, a civil law country that has yet to fully implement the “Civil Law Notary Model”. To illustrate, we will examine two questions:

- 1. Could the “Civil Law Notary Model” have mitigated the U.S. financial crisis?*
- 2. Could the “Civil Law Notary Model” have mitigated the China real estate crisis?*

After having answered both questions, we will then consider how to strengthen the “Civil Law Notary Model” in the U.S. and China.

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² CNN International Affairs Office (Consiglio Nazionale del Notariato).

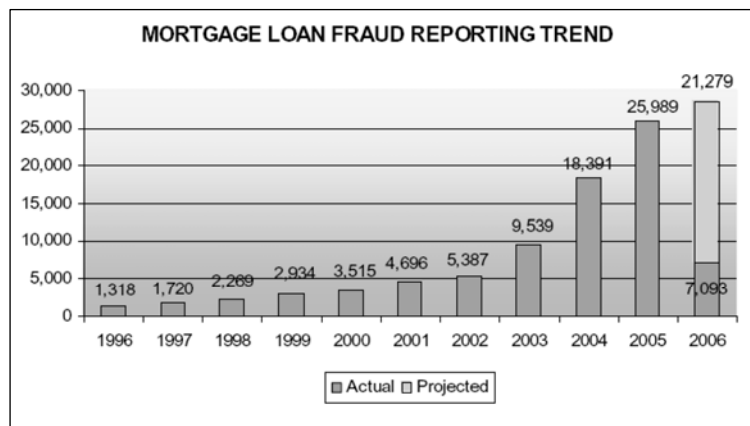
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1. COULD THE “CIVIL LAW NOTARY MODEL” HAVE MITIGATED THE U.S. FINANCIAL CRISIS?

The current financial crisis in the U.S. points up deficiencies not only in the financial regulatory, but also in its legal system. The deficiencies in the legal system, as will be seen, could be corrected by adapting aspects of the “Civil Law Notary Model”.

Prominent among the causes of the financial crisis are the U.S. residential real estate market and, therein, 1) borrowers’ fraud and 2) lenders’ predatory practices, in residential mortgages.

Mortgage fraud by borrowers – such as, fraudulent use of another’s identity, application fraud, and collusion involving and industry professional – has risen sharply since 1996, as the following graph shows:



Source: US Department of the Treasury, Financial Crimes Enforcement Network’s Office of Regulatory Analysis, regulatory policy and Programs Division, Mortgage Loan Fraud. An Industry Assessment based upon Suspicious Activity Report Analysis. November (2006).

During the same period, lenders engaging in predatory practices set about cheating borrowers by:

- Deceptively convincing borrowers to agree to unfair and abusive terms;
- Systematically violating those terms in ways that make it difficult for the borrower to defend against;
- Convincing the borrower to take a mortgage the lender has strong reason to believe the borrower cannot afford (e.g. sub-prime mortgages).

Accelerating both borrowers’ fraud and lenders’ predatory practices was a reversal of the requirement that a home buyer be represented by a lawyer. Although bar associations fought to keep lawyers in residential real estate transactions, they lost in every state. For the home buyer, the lawyer was replaced by the standardized real estate contract, the title company, the banker, the nota-

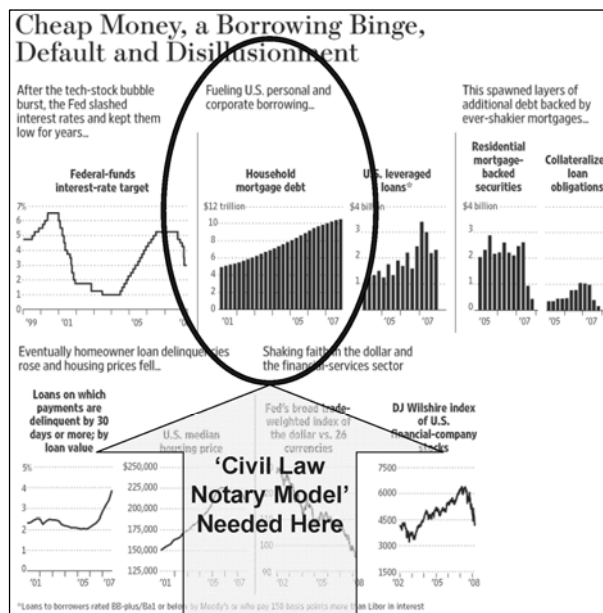
ry public (a signing agent, not to be confused with the “Civil Law Notary”), and the mortgage broker – the very group that made 50% of the sub-prime mortgages.

An obvious solution going forward would be to re-introduce the requirement that the home buyer engage a lawyer to represent and protect his interests. But this is not enough. On the borrower’s side, the lawyer is not required to do due diligence on the transaction; on the lender’s side, the lawyer is not required to examine the borrower and his circumstances.

Because Common Law converges with Civil Law most closely in the real estate transaction, a more complete solution would be to introduce aspects of the “Civil Law Notary Model”. Unlike the Common Law lawyer, the Civil Law Notary:

- Is responsible for the entire transaction – not just the interests of one party;
- Must confirm the intentions of the parties – making predatory mortgage lending practices difficult;
- Authenticates documents – reducing litigation through the presumption of correctness.

Had the U.S. adopted both the requirement of a lawyer and these aspects of the “Civil Law Notary Model”, much of the borrowers’ fraud and lenders’ predatory practices might have caught, and the crisis might have been mitigated at its root, as the following chart shows:



Source: WSJ Market Data Group; Federal Reserve. National Association of Realtors via Moody's Economy.com; Saint Louis Federal Reserve; Down Jones Indexes (2008).

2. COULD THE “CIVIL LAW NOTARY MODEL” HAVE MITIGATED THE REAL CRISIS IN CHINA?

China, a civil law country with a cadre of Civil Law Notaries, presents a contrasting example of how the “Civil Law Notary Model” failed to mitigate its real estate crisis because it was not fully and vigorously implemented.

Like most of the world, China is in the middle of a real estate crisis. Unlike the rest of the world, this was not brought on by securitized residential mortgages, but by the economic slowdown, Chinese government policy, and systemic market factors. Key among these factors is low home buyer confidence.

There are varied reasons for this. Chinese have only been allowed to buy residences in the last 20 years, and the system is unsettled. Government regulations change without ‘grandfathering’ current rights. There is uncertainty about whether or not ‘land use rights’ are valid. Developers and banks limit negotiation of documents. Developers sometimes take down payments, then abandon the projects and steal the money. When there are disputes, the judicial system is unreliable and slow. And, whereas, real estate prices were skyrocketing before, they are now falling.

As in the U.S., but for somewhat different reasons, the “Civil Law Notary Model”, had it been fully functioning, could address the problems underlying low buyer confidence by bringing stability and order to Chinese real estate transactions.

In principle, this should be much more easily accomplished in China than in the U.S. China, as already mentioned, is a civil law country with Civil Law Notaries. Requirements to be appointed a notary are stringent: Chinese citizen; be an intern for two years or a lawyer for three years, or have 10 years’ ‘professional experience’ as a professor, government official, or lawyer; and, pass a state examination. Chinese notarial acts have the force of law and are presumed correct – an authenticated document has the strength of an executive act of the Chinese government. In 2006, China enacted a new notary law, and, with this, the quality and quantity of notarial services have improved greatly – each year there are more than 10,000,000 notarial acts, 3,000,000 of these for international transactions. And, China is member of the UINL³.

In practice, though, there are two obstacles. First, Chinese do not have the habit of consulting either a lawyer or a Civil Law Notary when buying a home. Second, among a population of 1.3 billion people, there are only 12,000 notaries – one for about every 110,000 people – in just 3,150 offices for a country the size of the United States.

³ International Union of Notaries

To overcome these obstacles, China needs more notaries, and better trained notaries. Its notaries need to have adequate malpractice insurance. Notaries themselves must promote themselves to explain why buyers need their services. And, once there are sufficient notaries, the Chinese government should require that all transfers of property are handled by notaries.

All these steps would bring more stability and order to real estate transactions. But, perhaps most importantly, Civil Law Notaries, through their extrajudicial role⁴, would make up for the Chinese courts’ unreliability.

3. STRENGTHENING THE “CIVIL LAW NOTARY MODEL” IN CHINA AND THE U.S.

In China, the CNN⁵ has an exceptional opportunity to strengthen the role of the Civil Law Notary. China is a civil law country with an exceptional interest in Roman Law. The majority of Chinese students in exchange programs between Chinese and Italian universities study Roman Law. By coordinating with these programs, the CNN might build on this by introducing the ‘Civil Law Notary Model’ to these Chinese students, offering internships in notarial offices, and the like. In this way, the CNN could influence the very top of the Chinese legal establishment.

In the U.S., both the CNN and the UNIL have been instrumental in helping introduce the “Civil Law Notary Model” to the U.S. Here is the history of that introduction.

In 1997, under UINL guidance, the Florida Legislature enacted the “Civil Law Notary” statute. A Florida Civil Law Notary, according to the Statute, is required to be:

- A lawyer in good standing with The Florida Bar;
 - Who has practiced law for at least five years;
 - Who completes civil law notary training and passes a written examination,
- and
- Who is appointed by the Florida Secretary of State as a Civil Law Notary.

Note that the Florida Secretary of State appoints the Civil Law Notary, in part because that is the official who issues apostilles. But, note too that the Florida ‘Civil Law Notary’ is also a Florida lawyer and must also adhere to standards and ethical practices required by The Florida Bar. Following the Statute, in 1999, the first class of Florida Civil Law Notaries was graduated. Following Flor-

⁴ See also “Antonio Cappiello (2008), *Analysis and Features of Real Estate Market in China. What role for Civil Law Notaries?* Cambridge (MA, USA), [mission report / internal paper]”

⁵ Consiglio Nazionale del Notariato (National Board of Italian Notaries).

ida’s lead, the Alabama State Legislature also enacted its own “Civil Law Notary Statute” in 2001.

In 1999, the National Association of Civil Law Notaries (NACLN) was founded, and in 2002, became affiliated. NACLN’s purpose, among others, is to:

- Promote the model of the civil law notary;
- Provide civil law notary education;
- Improve laws and regulations for civil law notaries.

There are now about 130 Civil Law Notaries in the U.S. (not including Louisiana). At all times, the driving force for all of these activities was the well-respected jurist, Todd Kocurek, who has continually obtained guidance from the UINL and the CNN.

The original purpose of the statute was to make transactions between Florida and civil law jurisdictions as smooth and seamless as possible. In this way, Florida gained a competitive edge by now being able to present to foreign Civil Law Notaries ‘authenticated’ documents that had the required presumption of correctness and that were prepared by legal professionals bound by a strict code of legal ethics and by professional and financial responsibility. The current aim is to expand the Florida Civil Law Notaries’ practice to include domestic as well as international transactions.

To accomplish this, U.S. Civil Law Notaries have much more work to do to promote the “Civil Law Notary Model” in the United States. But, as the foregoing discussion shows, the Model will fill an important – and dangerous – gap in the U.S. legal system. The United States, NACLN, and its Civil Law Notaries look forward to deepening its relationship with CNN and UINL and to continuing to receive their invaluable guidance and support.

4. CONCLUSIONS

There are aspects of the “Civil Law Notary Model”, such as responsibility for the entire transaction, confirmation of the parties’ intentions, careful due diligence, and document authentication that would correct deficiencies in the Common Law system. An outstanding example of this is the failure of the U.S. legal system to catch both borrowers’ fraud and lenders’ predatory practices in residential mortgages. This failure has had a devastating impact on the U.S. and world economies.

China, on the other hand, has Civil Law Notaries, but in insufficient numbers to affect its transaction. Just as in the U.S., if the “Civil Law Notary Model” had been fully functioning, China might have avoided the low confidence that home buyers have in buying a residence. This, in turn, might have mitigated the downturn in the China real estate.

Coming from different directions, both China and the U.S. are working to strengthen the “Civil Law Notary Model” in their respective jurisdictions. The U.S., through the efforts of Florida and Alabama and the National Association of

Civil Law Notaries, is introducing the Model to the U.S.; the Chinese are working to grow and make relevant its core of Civil Law Notaries.

The UINL and the CNN have guided the U.S. in its work and will, all hope, continue to nurture the U.S. Civil Law Notaries. The CNN, given China's scholars unusual interest in studying Roman Law at Italian universities, is in a unique position to influence the development of the "Civil Law Notary Model" in China.

The U.S. and China are but two examples of the need for the "Civil Law Notary Model". The need is just as great in the rest of the world.

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