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MEXICAN REAL ESTATE TRANSACTIONS BY FOREIGNERS

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The desire of foreigners to reside in, or to own real property, in Mexico goes back, at least, to Cortez' voyage from Cuba to Mexico in 1519.¹ The first invaders and settlers sought primarily the abundant mineral wealth, agricultural lands, converts and slaves, while in contrast, the first twentieth century visitors sought primarily petroleum and business and manufacturing opportunities. As these later opportunities disappeared or diminished due to restrictive laws and regulations, a new breed, mostly from the United States, came as friends usually seeking the sunny climes, the lovely broad beaches and the wonderful world of water sports. The net effect of these latter day "invaders" on Mexico's economy has been tremendously beneficial.

Each period of Mexico's past has had a part in shaping its numerous Constitutions² and various laws, resulting in today's unique type of federal democracy. The large estates and ancient land grants (*latifundios*), from the Mexican social viewpoint, had to be broken up to provide a means of livelihood for the unlanded, poor rural workers. The petroleum resources had to be nationalized to prevent foreign exploitation to the detriment of the Republic, and gradually, some parts of the business and commercial fields of activity were prohibited to, or restricted for, foreigners in order to assure Mexicans a fair opportunity to develop their own sources of production and wealth.

Undoubtedly, the pressures of the human waves that have sought to exploit, or to enjoy, Mexico have resulted in such self-protective clauses as Article 27 of the Constitution adopted in 1917, which provides, in part:

Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

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1. J. DELOREDO & SOTELO, *HISTORIA DE MEXICO* 279 (1955).

2. L. SUTTON, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MEXICO* (1973).

Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity.

. . . In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands; . . . all minerals . . . , [and] petroleum . . .

In the Nation is likewise vested the ownership of . . . [all waters territorial and inland] . . . waters extracted from mines . . . Under-ground waters may be brought to the surface by artificial works and utilized by the surface owner . . . [subject to certain restrictions] . . .

Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions:

(I) Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters. The State *may* grant such rights to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property and bind themselves not to invoke the protection of their government in matters relating thereto; under penalty in case of non-compliance with this agreement, of forfeiture of the property acquired to the Nation. [This is known as the Calvo Clause].³ *Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country.* [emphasis added]⁴

In Mexico, all real property, unless restricted in some manner, may be acquired by "qualified" persons by purchase, gift, inheritance, exchange and adverse possession.⁵ Generally, realty held and claimed in good faith adversely for five years, or even in bad faith for ten years, can result in the ouster of the legal title holder⁶ under the applicable Statute of Limitations. Due to the many facets of the subject under consideration, this article will consider only selective categories of realty interests concerning foreigners in Mexico which seem to be of the greatest current interest.

I. COMMERCIAL AND BUSINESS SITES

Land for commercial and business uses may be acquired by qualified foreigners (as defined under "IV Home Sites in General," *infra*), except in the prohibited zones, to the extent necessary for their opera-

3. Named after Carlos Calvo (1830-1890) of Argentina, the validity of the clause was upheld by the United States Claims Commission in *North American Dredging Company (United States v. Mexico)*, Opinions of the Commissioners 21 (Ct. Cl. 1926). For a discussion of this case, see M. KATZ & K. BREWSTER, *INTERNATIONAL TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* 144 (1960). For a discussion of the Calvo Clause see Eder, *Expropriation: Hickenlooper and Hereafter*, 4 INT'L LAWYER 611 (1970).

4. CONSTITUTION OF MEXICO, conveniently found in 'SUTTON, *supra* note 2, at 8-15 (hereinafter cited as CONSTITUTION).

5. ORGANIZATION OF AMERICAN STATES, *A STATEMENT OF THE LAWS OF MEXICO IN MATTERS AFFECTING BUSINESS* (4th ed. 1970) (hereinafter cited as OAS).

6. *Id.* at 243.

tions, provided they first procure the consent of the Ministry of Foreign Affairs (Secretaria de Relaciones Exteriores). In Mexico, consent by a prospective seller to an alien buyer is meaningless without governmental approval, which is obtained only after the completion of a suitable petition, governmental investigation and consent by the foreign buyer to the Calvo Clause. As a widely used provision in many Latin American countries in dealings with foreigners, the Calvo Clause should not be a matter of great concern because Mexican law protects fully any national, or qualified foreigner, who lawfully possesses real property in Mexico.⁷ Although Mexican law states that agriculture and livestock raising are commercial enterprises, foreigners are not "qualified" persons to acquire farms and ranch lands.⁸

II. FARM AND RANCH LANDS

Under Mexican law, rural property is divided into three classes: the *ejidos* (communal), small properties and medium-sized properties;⁹ and the Constitution provides for the adoption of local laws and regulations to govern where larger tracts are necessary.¹⁰ Items 10 to 15 of Article 27, as expanded by the Agrarian Code of December 31, 1948, indicate how individuals or groups may obtain lands, either as restitution or by grant.

Due to its history and its agrarian "revolutions," Mexico adopted laws to cope with its need to break up the large estates and to try to assure the small farmer the opportunity to make a living on his own land. *Ejidos*, devised as a form of communal ownership, are a grant of farm land to a group in an area with a prohibition on sale or transfer by the farmer-owners to protect them against exploitation and dissipation. Only the Federal Government has the power to change the status of such lands by permitting higher or different use, but has seldomly done so, and then, only upon determination that such is beneficial for the owners. In such cases, the communal owners are provided with other suitable lands and, when possible, with job opportunities arising out of the new development of their old lands.

An Organization of American States publication sets forth the small property requirements of Item 15 of Article 27 as follows:

- a. Small agricultural properties will be considered as those which do not exceed 100 hectares (247 acres) of first class irrigated land or their equivalent in other lands under cultivation;
- b. For purposes of equivalence, one hectare of irrigated land will be computed as two of unirrigated (temporal) land, four of summer pasture

7. CONSTITUTION, *supra* note 4, art. 33.

8. OAS, *supra* note 5, at 168-171.

9. *Id.* at 168.

10. CONSTITUTION, *supra* note 4, art. 33, § 15.

(agostadero) land of good quality, and eight of hilly or pasture land in arid sections;

c. Small agricultural lands also include areas which do not exceed 200 hectares of unirrigated crop lands or summer pasture susceptible of cultivation; 150 hectares when the lands are utilized for the cultivation of cotton, if they receive irrigation from rivers or by pumping; and 300 hectares when used for the cultivation of bananas, sugar cane, coffee, henequen, rubber, coconuts, grapes, olives, cinchona, vanilla, cacao or fruit trees;

d. Small stockraising properties are regarded as those which do not exceed an area necessary to maintain up to 500 head of large livestock (cattle) or the equivalent in small livestock (such as sheep), within the terms of the law, in accordance with the forage capacity of the lands;

e. Whenever owing to irrigation, drainage or any other works undertaken by the owners or possessors of a small holding for which a certificate of exemption has been issued, the quality of their lands has been improved for cultivation or stockraising, such property may not be subject to agrarian appropriation even when, by virtue of the improvement obtained, the maximum indicated herein is exceeded, provided they meet the requirements fixed by law."

Pursuant to Item 12 of Article 27, the maximum area of rural holdings and the subdivision of excessive holdings are regulated, respective to jurisdiction, by the Federal Congress or the state legislatures. Thus, the maximum area of land owned by one natural, or juridical, person is fixed by each state, territory and the Federal District. These medium property holdings, as well as the small holdings, are subject to acquisition by foreigners, since:

. . . in accordance with Article 54 of the Agrarian Code the requirement of being a native-born Mexican applies only to recipients of land grants, that is, to the acquisition of *ejidos*.¹¹

Of course, here again, permission must be obtained by foreigners from the Ministry of Foreign Affairs to lease or purchase such lands.

III. EMBASSIES

Article 27 of the 1917 Constitution, by amendment adopted November 9, 1940, provides specifically that:

The State, in accordance with its reciprocity, may in the discretion of the Secretariat of Foreign Affairs authorize foreign states to acquire, at the permanent sites of the Federal Powers, private ownership of real property necessary for the direct services of their embassies or legations.

No known difficulty has been encountered, since 1940, in regard to Embassies. However, the prohibitions and restrictions on private ownership evidently prevail regarding the acquisition of sites for homes for diplomatic and consular personnel and, possibly, even for consulates, whether located in the Federal District, or elsewhere in

11. OAS, *supra* note 5, at 169.

12. *Id.* at 20.

the Republic. Presumably in the border and coastal prohibited zones, title still cannot be acquired outright for such purposes, even today. Apparently, the trust format (Fideicomiso) described herein, in section V, is now applicable in such cases.

IV. HOME SITES—INTERIOR LOCATIONS

As to *interior* sites, amendments to the Population Law of December 30, 1960, require qualified foreigners to obtain prior governmental permission to acquire *any* real property, or rights thereto. Later regulations clarified these requirements, forbidding the ownership of shares in speculative realty companies, and also limited the acquisition of acquiring property as follows:

- a. Nonimmigrants who enter as tourists, transmigrants or visitors (*visitantes*) may not acquire real property or rights (unless prior specific permission is obtained from the Ministry of Foreign Affairs, except such permission is not necessary for residential leases for the term of their authorized stay).
- b. Nonimmigrants who enter as political refugees or students may do so only in exceptional cases.
- c. Immigrants or temporary residents may acquire their dwellings and also other real property or rights provided this is not contrary to their immigration status.
- d. Permanent residents may acquire real property and rights as long as their status is not restricted in this sense.
- e. When a foreigner acquires property rights involuntarily, the Secretariat may grant permission to formalize the operation.
- f. Foreigners may dispose of their properties without permission of the Secretariat.¹³

Thus, it is important to remember that a mere tourist, as such, *cannot* acquire real estate, even in the interior of Mexico, except residential leases. Additionally, one must qualify as a resident or immigrant to be eligible to purchase land or buildings in the interior.

The actual mechanics of a purchase by a qualified buyer requires the execution of a Purchase and Sale Agreement, as in the United States, with a clause therein providing that it shall not be effective until, and unless, consent to the purchase by the foreigner is obtained in a specified time from the Ministry of Foreign Affairs. Written application is made for such permission which, barring unforeseen problems, issues within a reasonable time. The Ministry has wide discretion in granting the application. The value of the property seems to be immaterial in this regard, and the validity of the title is between the parties. This proceeding is presided over by a Notary Public, who is a Mexican lawyer-public official with quasi-judicial authority to see that the evidence of title and status of liens, if any, is as represented. Once all is proper and approved, the Agreement is

13. *Id.*

registered in the Notary Public's "protocol," and he then issues evidence of title. It should be noted that in Mexico there is no title insurance, and that abstracts of title, as such, do not exist. Title searches have to be made by inquiry at the office of the Public Property Register (Registro Publico de la Propiedad) in the jurisdiction where the land is located. Satisfaction of liens and unpaid taxes is evidenced by a Certificate of Freedom from Encumbrances (Certificado de Libertad de Gravámenes).

Under the new 1973 law on foreign investments,¹⁴ all real property of foreigners in Mexico must now be registered with the Ministry of Foreign Affairs. Failure to do so can result in such penalties, as having the ownership declared null and void, fines in case of a flagrant violation, removal of public officials who have authorized any such acts and prison sentences for the *Prestanombres* (Mexican nominees who take title in their names as a "front").

V. HOME SITES—PROHIBITED AREA

Prior to 1971, many foreigners, through the use of *Prestanombres*, Mexican corporations with bearer shares or tier corporations, acquired realty in the prohibited zones in Mexico. One can presume that the English common law maxim, that one cannot do by indirection what one cannot do directly, could have been applied by the courts which, upon a proper challenge by the Government, would have pierced the corporate veil and denied title validity to the reputed owners of many hotels and other properties dotting the coasts of Mexico. Rather, President Luis Echeverria, by Presidential Decree on April 30, 1971,¹⁵ validated titles for definite periods by authorizing the creation of land Trusts for limited periods of time in order to clear up the old "arrangements" and to encourage new developments by foreigners benefitting the Mexican Economy through new foreign investment, technology and know-how. The net effect gives foreign persons and foreign capital the legal right to use and derive benefits from such "prohibited" lands, without the need of subterfuges, through the use of the "Fideicomiso" (land Trust).

A "Fideicomiso," is a legal structure patterned after the concept of the English common law trust, although not having all the characteristics of one, as used in the United States. The term "Trust" is used herein, therefore, only as a translated word for "Fideicomiso."

The substance of the Decree of 1971 was later adopted and approved by the Mexican Congress as a law on March 9, 1973 and

14. Law to Promote Mexican Investment and to Regulate Foreign Investment, Diario Oficial, March 9, 1973.

15. For the full text of the Decree see Diario Oficial, April 30, 1971.

became fully effective on May 8, 1973.¹⁶ The gist of the law is that authorized banks in Mexico, on proper application by a foreigner (who need not now be a resident or immigrant) may direct a qualified Trustee to purchase and hold title to real property in the prohibited zones for him for up to thirty years. This, as usual, is subject to the granting of a permit from the Ministry of Foreign Affairs. The new foreign beneficiary, then, has the right to use, rent or sublease his trust property, subject only to the restriction that the sublease term cannot be for more than ten years. Under the present law, by the end of the thirty year period, unless the trust beneficiary desires to let his trust expire, he may sell or dispose of his trust property to a then "qualified buyer" with the foreigner receiving the net proceeds. Under present interpretation by the Mexican Government, a "qualified buyer" must be a Mexican national. At this time, there is speculation that by the end of thirty years the Mexican Government may amend the law to permit a renewal of the trust agreement for up to another thirty years, but no foreigner should buy with that in mind.¹⁷

For multi-family developments and industrial or commercial enterprises requiring more than one owner, a single Master Trust format is allowed. Usually the buyer would create a Mexican corporation for such purposes. In such cases, once the seller and buyer have agreed on a price, the buyer negotiates a Master Trust Agreement with a qualified bank with the purchaser as the beneficial interest owner. The Trustee bank, then, prepares the application for the trust permit to the Ministry of Foreign Relations. The latter decides each case on its merits after consulting with the seven member Intersecretarial Consulting Commission (La Comision Intersecretarial para Inversiones Extranjeras), which basically considers the social and economic effects of the venture. The names of the eventual Certificate Participation holders need not be known in advance, in applying for such a Trust Use Permit. The transaction is finalized before a Notary Public.

A Trustee bank, in order to proceed, will have to be furnished:

- (a) a certificate of title obtained from the aforementioned Public Property Register;
- (b) a Certificate of Freedom of Encumbrances;
- (c) a copy of the corporate charter, if incorporated; and
- (d) an appraisal of the real estate for tax and fee purposes.

Charges for services by a Trustee bank are based on the size, improvements and value of the realty. Trustees also charge an annual

16. Law to Promote Mexican Investment, *supra* note 14.

17. See M. Rodriguez, Acquisition of Real Property in Mexico by Non-Resident Aliens (unpublished paper submitted as a class requirement to Professor Chayet).

handling fee payable by participation holders. Currently transfers result in an additional charge of 1 percent of the then value of the property.¹⁸

Financing of land purchases in Mexico through Mexican sources is available, but because of the high (by U.S. standards) interest rates and the shortness of the term of the usual mortgage, it is not generally used by foreigners. If necessary to finance in Mexico, however, then the required formalities must be observed. One should keep in mind that a mortgage is a right *in rem*, therefore, a foreigner who is a party to a mortgage instrument must get a permit from the Ministry of the Interior to participate in such transaction.¹⁹ Conditional sales contracts (*Venta con Reserva de Dominio*), *after* compliance with the formalities, may also be used in Mexico to acquire realty except for realty Trusts. The latter must be paid for in full upon purchase due to the fact that title to the property has to be transferred free and clear to the Trustee. Possession under a conditional sale is in the buyer, with title remaining in the seller, until he is paid in full. According to Rivera,²⁰ until full payment is made, neither party can resell, and a suitable notation in the public records (*Registro Publico*) assures this is not violated. Foreclosures, if a default occurs on a mortgage, require a court decree.²¹ If a foreign lender attempts to foreclose on land in a restricted zone, he cannot acquire title to the property, but will be paid off from the sale.²²

VI. LEASES

A lease of residential property in the prohibited zones by a foreigner for more than ten years is considered a type of real estate precluded by Article 27 of the Constitution. Leases with maximum ten year terms are permissible, and they may be legally renewed.²³ Permission to lease for up to ten years, whether in the restricted areas or elsewhere, does not require the prior consent of the Ministry of Foreign Relations for qualified persons, but the area for residential use is limited to the home and yard. For the establishment or operation of a commercial or industrial enterprise, governmental consent is required, and only the area necessary for operation can be obtained.

18. Estrella, *Legal and Practical Aspects of Trust Agreements on Real Property in Coastal and Border Areas—Role of Banco Nacional de Mexico* (unpublished paper presented as part of a Mexican law symposium sponsored by the Los Angeles County Bar Association).

19. Rivera, *An Introduction to Secured Real Estate Transactions in Mexico*, 12 ARIZ. L. REV. 290 (1970).

20. *Id.*

21. *Id.*

22. Gutierrez, *Investment in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, 12 ARIZ. L. REV. 270 (1970).

23. *Id.* See also OAS *supra* note 5, at 246.

Agricultural land *per se* may be leased.²⁴ The maximum lease term for commercial purposes is 15 years and for industrial uses is 20 years.²⁵ A lessee is not permitted to sublet in whole, or in part, nor can he transfer his rights without the consent of his lessor.²⁶

VII. CONCLUSION

The law of Mexico relating to the acquisition of real estate by foreigners rests first, and properly, on the Constitution of 1917, particularly Article 27. Other provisions, though, are scattered throughout various statutes and regulations. All this inevitably leads to the conclusion, as in the United States, that it is always wise not only to have your own lawyer represent you, but also to have him work with a competent Mexican counterpart, when attempting to carry out any transaction involving the acquisition of real property interests in Mexico.

The foreigner is welcome in Mexico as investor, tourist and immigrant, under conditions prescribed by Mexico to protect its interests and to allow the outsider to enjoy fairly the benefits of this lovely land and its rich culture and heritage.

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