

## **CAN FOREIGNERS REALLY OWN PROPERTY IN MEXICO?**

Yes, Americans and other foreigners may obtain direct ownership of property in the interior of Mexico. However, under Mexican law, foreigners cannot own property outright within the restricted zone. Instead, a real estate trust must be set up to hold title for the foreigner. Since foreigners are not able to enter into contracts in buy real estate, they must have a bank act on their behalf, much as a trust is use to hold property for minors because they also can not contract. The following is a brief outline of the law regarding such trust, known as "fideicomisos", but potential buyers should always get advice and have all real estate transactions overview by a licensed Mexican attorney.

## **WHO'S INVOLVED IN REAL ESTATE TRANSACTIONS IN MEXICO?**

Normally, there are three to four players involved in any real estate transaction in the restricted zone:

- A real estate company
- The buyer's lawyer
- A bank
- A public notary

All four are helpful in their respective areas in assisting with real estate transactions. Transactions outside of the restricted zone do not involve a bank since it is not necessary to establish a real estate trust in those areas. Otherwise the transactions are much the same.

Because of the similarities of real estate transactions in general, it is easy to assume that the basic terms and principles which are familiar in the United States also hold true in Mexico. This assumption becomes easier to make when United States real estate terminology is adopted for transactions in Mexico. Much of the paperwork is similar, if not exactly the same, as that used in the US. Although, there are many aspects of Mexican real estate transactions that are identical to procedures carried out in the United States, there are many aspects that are completely different. As a rule, a foreigner should assume nothing.

Mexican real estate transactions are not carried out in the same manner as United States real estate transactions. The buyer must retain professionals to assist in the transaction. Mexico has yet to regulate real estate transactions. Real estate agents and brokers are not legally licensed in Mexico. Consequently, a foreign buyer cannot always depend on the normal safeguards that would be applied to real estate transactions in the United States. The old saying "let the buyer beware" is very appropriate. Anyone can set up a real estate company in Mexico. There are no special requirements or brokerage licenses to obtain. A would-be real estate agent merely has to establish a Mexican corporation, obtain a work visa, and he is in business.

There are good reasons why the real estate industry in the United States is highly regulated. Until the real estate industry is regulated in Mexico, there will always be some real estate companies who prefer that buyers know as little as possible about real estate transactions. After all, a buyer cannot ask questions if he does not have any knowledge of the laws.

Currently there is nothing similar to a Real Estate Commissioner or a Department of Real Estate in Mexico. Some states are beginning to look at some kind of real estate legislation, but it might be some time before this is a reality. The American Embassy and the American consulates in Mexico are good places to start when trying to determine if a real estate company is reputable. Some of the real estate companies have established quite a reputation for themselves at some of the Consulates.

A Mexican attorney should be involved to draw up contracts and to review the conditions and terms of sale. Additionally, an attorney can do a title search and point out any problems or alternatives a buyer may have. The buyer should always have his or her own attorney rather than using the attorney of the seller or some attorney used by a real estate company free of charge. As the old saying goes, you get

what you pay for, and usually if someone's services are offered free of charge you are probably paying for them in some other way. Legally, only a licensed Mexican attorney should provide advice on the law. If an attorney is licensed in Mexico he should be able to produce a "cédula profesional." This document is a registered license to practice law in Mexico and includes a photo of the attorney and his signature. To be sure that an attorney is licensed in Mexico, a foreign buyer should ask to see the attorney's license, or have the attorney's license number included in a retainer agreement before employing any services.

American attorneys are not licensed to practice law in Mexico and should not give advice on Mexican Law. I should clarify, here, that I am referring to individuals who are licensed to practice law in the United States, and not merely individuals who are citizens of that country. There are currently very few Americans who are licensed to practice law in Mexico. The fact that a person is licensed to practice law in the United States in no way allows him or her to practice law in Mexico: Mexican or United States law.

Besides formalizing your real estate transaction, an attorney can be very helpful in saving you money. This is because attorneys are involved in many different transactions and have contacts with banks, notaries, and the Mexican government on a regular basis. Because of this they are aware of the most competitive cost and fees involved in a transaction and can make sure that the buyer is given the best possible prices. An attorney can also inform the buyer regarding his or her legal options and by doing so can make sure that no opportunities are missed: tax planning considerations, closing costs which should be paid by the seller, and ways of taking title to the trust rights which make sense for the particular circumstances of a specific buyer. Very often one piece of good advice can save the buyer thousands of dollars in tax savings or other savings when the buyer eventually sells the property.

When looking for an attorney it is important to remember that any Mexican attorney can normally handle a real estate transaction. The buyer is not limited to only the local attorneys where the property is located. All real estate transactions involving a trust are governed by federal law. This means that all such transactions are carried out the same way regardless if the property is in Cancun or Los Cabos.

### **THE RESTRICTED ZONE AND "FIDEICOMISOS"**

The law declares that the Mexican nation has original ownership to all land and water in Mexico, as well as minerals, salts, ore deposits, natural gas and oil; but that such ownership may be assigned to individuals.

The Mexican Constitution prohibits direct ownership of real estate by foreigners in what has come to be known as the "restricted zone." The restricted zone encompasses all land located within 100 kilometers (about 62 miles) of any Mexican border, and within 50 kilometers (about 31 miles) of any Mexican coastline. However, in order to permit foreign investment in these areas, the Mexican government created the "fideicomiso," (FEE-DAY-E-CO-ME-SO) which is, roughly translated, a real estate trust. Essentially, this type of trust is similar to trusts set up in the United States, but a Mexican bank must be designated as the trustee and, as such, has title to the property and is the owner of record. The Mexican Government created the "fideicomiso" to reconcile the problems involved in developing the restricted zone and to attract foreign capital. This enabled foreigners, as beneficiaries of the trusts, to enjoy unrestricted use of land located in the restricted zone without violating the law.

A "fideicomiso" is a trust agreement created for the benefit of a foreign buyer, executed between a Mexican bank and the seller of property in the restricted zone. Foreign buyers cannot own real estate in the restricted zone due to Constitutional restrictions. The bank acts on behalf of the foreign buyer, taking title to real property. The bank, as trustee, buys the property for the foreigner, then has a fiduciary obligation to follow instructions given by the foreigner who is the trust beneficiary. The trust beneficiary retains and enjoys all the rights of ownership while the bank holds title to the property. The foreigner is entitled to use, enjoy, and even sell the property that is held in trust at its market value to any eligible buyer.

In order to allow foreigners to enter into the agreement contained in the Calvo Clause, Mexico requires all foreigners to apply for and obtain a permit from the Ministry of Foreign Affairs prior to contracting to acquire real estate in Mexico. This is currently done by the trustee/bank at the time a real estate trust is

set-up.

Given the changes made for 1997 in the foreign investment Law, and the fact that a buyer can now apply for and obtain a trust permit in a matter of days, it is always better to secure the trust permit from the Ministry of Foreign Affairs before entering into any contract.

The bank, as trustee, must get a permit from the Ministry of Foreign Affairs to establish a real estate trust and acquire rights on real property located within the restricted zone. The purpose of the trust is to allow the trust's beneficiary the use and exploitation of the property without constituting real property rights. The beneficiaries of the trust (fideicomisarios) may be:

- Mexican corporations with foreign investment
- Foreign individuals or legal entities

The law defines "use" and "exploitation" as the right to use or possess the property, including its fruits, products, or any revenue that results from its operation and exploitation by third parties or from the bank/trustee.

The law does not clarify how trust permits will be issued. Article 14 of the law states that the Ministry shall decide on issuing the permits "...considering the economic and social benefit, which the realization of such operations imply for the nation." The basic criteria used to determine such benefits are likely to change somewhat with the publication of the new foreign investment regulations. However, it is reasonable to anticipate that some of the unwritten rules used by the Mexican government in the area of real estate trusts will be included in the new foreign investment regulations. It is also possible that some of the confusing elements will be eliminated. It is important to understand the application of the current regulations, even if they are going to be replaced, as well as some of the unwritten policies the government has used in the past, to better understand what criteria will be used by the Ministry in the future.

The Ministry of Foreign Affairs must grant any petition for a trust permit that complies with the stipulated requirements within 5 working days following the date of its presentation to the Ministry's central office in Mexico City. It must be granted in 30 days if the application is submitted to one of the Ministry's state offices. The Ministry of Foreign Affairs must confirm the registration of any property acquired by foreign-owned Mexican corporations a maximum period of 15 days following the filing of the petition. In both cases, if the maximum period passes with no action by the Ministry, the trust permit or registration are considered authorized.

There is a common misconception among foreigners investing in Mexico that once the trust expires, the beneficiary loses all rights and benefits of the sale of the property held in trust. This is not the case. On the contrary, the beneficiary has a contractual right under the trust agreement with the Mexican bank to all benefits that may result from the use or sale of that property, even though he does not hold title to the property. Under Mexican Law, the bank, as trustee, has a fiduciary obligation to respect the rights of the beneficiary.

A real estate trust is not a lease. The beneficiary can instruct the bank to sell or lease the property at any time. The beneficiary can develop and use the property to his liking and benefit, within the provisions of the law. Generally, the law allows most activities engaged in by foreigners.