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CONSULAR IMMUNITIES:
LOCAL LAW FOR LOCAL OFFICIALS

By Asa William Markel

Many people are aware of the existence of diplomatic immunity, and while consular license plates can be seen in Phoenix traffic, few understand the differences both in the roles of diplomatic and consular officials, and in their respective immunities within the receiving state. While relations between the United States and foreign governments are conducted by diplomatic personnel, based in embassies situated in Washington, D.C., consular posts throughout the country see to the interests of foreign nationals and their businesses. In spite of international efforts to standardize the treatment of foreign consular officials, within the United States, the extent of consular immunity can often be a parochial matter.

The 1963 Vienna Convention on Consular Relations (VCCR) is supposed to provide a uniform law relating to consuls. Its Article 43(1) provides that a consular officer is immune from all judicial and administrative proceedings for "acts performed in the exercise of consular functions." This jurisdictional immunity also applies to honorary consuls, who are a frequent fixture in Arizona and other western states. Yet, this consular immunity is more nuanced than the blanket immunity provided to diplomatic officials, and U.S. courts have struggled to determine where the immunity actually applies.

The Second Circuit, in *Heaney v. Spain*,[1] found that a consular official's agreements with an American citizen to disseminate propaganda regarding another country were within his official duties, and entitling him to immunity on the subsequent contract claim. However, the Ninth Circuit, in *Gerritsen v. de la Madrid Hurtado*,[2] refused immunity to consular staff who intimidated a protester outside a consulate, since such actions were an "interference with the United States' internal affairs."

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Until the United States Supreme Court settles the scope of consular immunity in this country, state courts will also be divided on the test to be applied. The decisions of the federal circuit courts are not binding on the states, so each American jurisdiction could theoretically develop its own rule. For example, the Supreme Judicial Court of Massachusetts, in *Commonwealth v. Jerez*,[3] has found that the VCCR provided a consular official with immunity from prosecution for assaulting a police officer, where the consular agent was traveling to attend a cultural event in an official capacity. Whereas the California Court of Appeal's decision in *Silva v. Superior Court*,[4] held that the test of whether consular immunity attaches to an action revolves around the "manner" in which the action was undertaken.

Yet, these tests of "interference" and "manner" seem to stray from the classic example of consular immunity, given by the Paris Court of Appeal's decision in *Bigelow v. Princess Zizianoff*,[5] where it was confirmed that a consular official's refusal to issue a visa was immune from local judicial action, but that immunity did not protect the official's subsequent defamation of the applicant. The Vienna Convention's consular immunity provisions appear to be based upon the *Bigelow* decision in their differentiating between official and non-official acts. Along these lines, since the Convention's ratification, the French Cour de cassation has refused immunity to a foreign consul for an action concerning a private residential lease.[6]

Indeed, U.S. courts have followed this official/non-official dichotomy in employment disputes involving foreign consulates and trade missions. In such cases, the decision as to whether the employee is able to sue the foreign government is based upon whether the employee exercised any public policy functions for the foreign government.[7] The concern for such courts is whether the consulate's employment of the plaintiff fits within the "commercial activity exception" to the Foreign Sovereign Immunities Act of 1976.[8] Yet, some U.S. decisions have confusingly examined whether the office where the employee worked performed governmental functions, rather than examining the employee's own scope of work.[9] Such an employer-based analysis yields the same result as is obtained in the United Kingdom, where Section 16 of the State Immunity Act 1978 effectively blocks most suits by local consular employees.[10]

For consulates and honorary consulates in Arizona and other western states, the question of the extent of immunity concerning the actions of consular agents and the employment of local staff can be a murky one. A decision by the United States Supreme Court, or a revision of the Diplomatic Relations Act of 1978 by Congress might appear to create consistency. Yet, such clarifications may simply create a different range of divergences along new lines.

endnotes

1. 445 F.2d 501, 505 – 06 (2d Cir. 1971).
2. 819 F.2d 1511, 1516 (9th Cir. 1987).
3. 390 Mass. 456, 461, 457 N.E.2d 1105, 1108 (1983).
4. 52 Cal. App.3d 269, 280, 125 Cal. Rptr. 78, 87 (1975).
5. 61 Clunet 982 (1934).
6. *Hotel George V v. Spanish State*, 1973 Bull. Civ. I, No. 24, JCP 1973 II No. 17395 (reversing Ct. App. Paris, Case No. 1971-02-25).
7. *Holden v. Canadian Consulate*, 92 F.3d 918, 922 (9th Cir. 1996) (allowing sex and age discrimination suit against consulate by former marketing agent).
8. *See* 28 U.S.C. § 1605(a)(2).
9. *Claim of Iacobelli*, 107 A.D.2d 882, 883, 484 N.Y.S.2d 318, 319 (1985) (claim against Japan Development Bank (JDB) by secretary for unemployment benefits).
10. *Ahmed v. Kingdom of Saudi Arabia*, [1996] 2 All E.R. 248, 252 (Eng. CA.) (per Gibson, L.J.).

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relevant aspects about distribution contracts prepared in the USA and enforced in Mexico

By Mario Molina

By definition, most of the Distribution Contracts signed between US distributors and Mexican growers, involve two different applicable laws and jurisdictions. Even though the majority of these contracts are prepared and signed under the regulations of some US state, once the default of the grower comes up, those contracts need to be enforced by a Mexican Court, where the grower is actually located.[1]

In this scenario, we find that when the Federal Mexican Civil Code prevents the application of a foreign law by the local or federal courts (applicable for commercial cases), previously established jurisdiction and applicable law clauses, that didn't take into consideration any of the Mexican law regulations, often limit the legal action the distributor can really accomplish on this side of the border.

Since Mexican and US laws have a substantially different structure (common law vs civil law), in most cases, the quickness and speed of US law hits against the formality of the Mexican Law with not very good results for the

distributor. The first collision takes place when the plaintiff attempts to execute the remedies he is entitled under US law, which in the agriculture business often are the most carefully planned clauses: the Mexican Courts have no jurisdiction to admit the claim or cannot act on the grower's assets without a complete trial or a final resolution.[2]

REMEDIES

US law provides a number of remedies that can be immediately executed before a final resolution has been dictated in a controversy. Mexican law, on the other hand, provides only very special remedies under specific circumstances that can be executed before the conflict has reached its final instance.

JURISDICTION

Different to Mexican law, some foreign regulations prevent the privilege of the plaintiff to file a claim or attempt enforcement of the remedies of the Distribution Contract in whichever jurisdiction the grower or the product is located, waiving a previously designated jurisdiction clause in the contract.

Jurisdiction is a very complex matter in Mexico. There are strict formal rules that must be followed in order to legally waive the Mexican courts' jurisdiction. These rules are even different for civil and commercial matters. When these rules aren't followed, the jurisdiction clause can be declared null by the local courts and the party located in Mexican territory would need to be defeated before a local Judge.

Distributors have a tendency to consider that regulation by US law provides them with a more expedited access to their remedies, considering also that such is the law with which they are generally more familiar. It must be considered however that, in practice, the enforcement of a Distribution Contract subject to foreign jurisdiction against a Mexican grower and in respect to an eventual crop located in Mexico, has proven to be a far more complex ordeal than it is to proceed against a grower under a contract regulated by Mexican law and subject to the jurisdiction of the courts of Mexico.

Nonetheless, parallel documents can be signed and prepared for every operation, keeping US law as the applicable law for the main contract, but introducing some important provisions of Mexican law, and preparing additional documents in order to have a better starting point when the time comes to execute the remedies.

endnotes

1. Different to the common law systems, no foreign judgments can be executed in Mexico when such shall be resultant from the exercise of rights 'in rem'.

2. According to article 1347A of the Commercial Code, Foreign resolutions seeking to be enforced must pass a "homologación de sentencia" procedure, which means that it shall be assumed by a Mexican court as if such would have been issued by the same.

ABOUT THE AUTHOR

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WHAT'S THE RISK IN NOT HAVING YOUR MEXICAN TITLE OR BANK TRUST YET?

POSSIBLY LOSING YOUR ENTIRE INVESTMENT

By Mark B. Raven, Esq., Christopher S. McDonagh, Esq., Lic. Miguel A. Tapia, Lic. Ricardo Bours and Lic. Ricardo Borquez

It is all too common for buyers of Mexican real estate to pay all or a significant part of the purchase price before receiving properly formalized and registered legal title or Mexican bank trust (*fideicomiso*) rights to the property.[1] Many buyers mistakenly believe they are fully legally protected because they have a signed (but unregistered) "purchase contract" or "promise of trust agreement." Some buyers might believe their rights to the property are protected because they have been given possession of the property or were told by the seller or real estate agent that a "closing" has occurred and that the property belongs to the buyer at the time the seller signs a purchase contract or promise of trust agreement. Other buyers (for example, buyers making installment payments of the purchase price under the purchase contract or seller-carryback promissory note) understand the seller won't transfer title until the purchase price is fully paid, but might not fully appreciate the risks to their rights to the property while the seller retains title.

Depending on the situation, even when the buyer and seller have a binding purchase contract (and even if the purchase price has been paid), there could be situations where the buyer's unregistered legal rights can face significant challenges by third party claims to the property. In the worst case, the rights of a third party with a prior registered real property right (*derecho real*) could prevail over the buyer's rights. In that case, the buyer could lose all legal rights to the property, and could also lose all the money invested, except to the extent the buyer can recover such amounts

from the seller. A less drastic, but still costly, possibility is that the buyer's legal rights would prevail, but the buyer might have to spend significant time and money in litigation to have its rights and their priority versus third party claims formally recognized by a Mexican court. In many cases, these potential problems can be avoided by conducting proper due diligence, promptly formalizing and registering buyer's property rights at closing (or as soon thereafter as possible) in the public registry for real property in the jurisdiction where the property is located (the "Public Registry"), and obtaining title insurance.

OVERVIEW OF SOME RELEVANT MEXICAN LEGAL PRINCIPLES

Before addressing the details of these potential problems, an overview of some of the applicable relevant Mexican legal principles will be helpful.[2]

First, it is important to distinguish between (1) the establishment of a binding contract or transfer of property rights between buyer and seller, and (2) the enforceability or priority of such rights versus third parties with competing claims against the property. This article will focus on circumstances where a buyer may establish ownership rights versus a seller based on an executed contract, but nevertheless encounter problems of enforceability or priority versus certain types of third party rights if the buyer's rights have not been formalized before a Mexican notary public ("*Notario Público*" or "*Notario*") and registered in the Public Registry before such third party rights are registered.

A general principle under the Civil Codes in Mexico (e.g., Art. 2249 of the Federal Civil Code and Art. 2484 of the Sonoran Civil Code) is that a purchase agreement is deemed as materialized and perfected when seller and buyer agree on the price and the subject matter of the sale, regardless of whether or not the buyer has paid the purchase price. As a general rule, this means that when buyer and seller sign a private contract that establishes a price and subject matter, the property is then considered to be owned by and under the domain of the buyer, unless the contract reserves domain to the seller (e.g., until the full purchase price is paid or certain conditions are met). This is the case, even if the buyer's rights have not been formalized before a Mexican *Notario* via a public deed (*escritura pública*) ("Public Deed") and registered in the Public Registry.

In other words, it is not legally required that the buyer's rights be formalized before a Mexican *Notario* or registered in the Public Registry in order to be valid and binding *against the seller*. Ownership rights are not created by registration in the Public Registry. Rather, registration in the Public Registry is a means by which legal acts affecting real property are publicized to third parties, so that they can establish priority and have a legal effect against third parties.[3]

There are various circumstances where a buyer may have signed a contract (and paid money), but not have acquired legal rights to the property, because the purported seller did not have legal authority to transfer such rights.

Of course, to be binding against third parties (and against the property owner), the buyer must have acquired legally binding property rights from the true property owner (or the owner's agent) with authority to transfer such rights. There are various circumstances where a buyer may have signed a contract (and paid money), but not have acquired legal rights to the property, because the purported seller did not have legal authority to transfer such rights. This could occur, for example, in cases of fraud, forgery, incapacity to enter contracts (e.g., invalid power of attorney, community property transfer signed by only one spouse, senility), or attempts to sell property that does not exist (e.g., in some cases, purported subdivisions of property that has not yet been subdivided; incorrect legal descriptions).[4] This article does not address such issues. Instead, it assumes a binding contract or transfer of property rights exists between buyer and seller, in order to focus on the issues arising from the failure to register such rights in the Public Registry.

As in Arizona, registration in the Public Registry does not guarantee that the person or entity appearing as owner of record is the actual owner, does not cure any prior de-

fect in title, nor prevent another from contesting title.[5] Nevertheless, buyers are better able to defend their rights against third parties if the buyer's rights are registered. The law of Sonora, for instance, creates a rebuttable presumption that rights registered in the Public Registry do exist and belong to the holder of record, unless otherwise proven.[6] The law of Sonora also provides that real property rights (*derechos reales*) and, in general, liens and limitations on real property rights, must be registered in order to be effective against third parties.[7]

Consequently, any failure or delay in formalizing and registering a buyer's rights can, depending upon the circumstances, create a risk of lack of enforceability or loss of priority versus certain claims by third parties, in particular, third party real property rights, liens or claims to the same property (*derechos reales*) that are registered in the Public Registry before buyer's rights. Examples of *derechos reales* include mortgages and competing claims to ownership of the property. It is possible under Mexican law (as under U.S. law) for more than one person to have a legally valid claim against the seller. For example, the seller might have entered into purchase contracts with more than one buyer. Or the seller might have voluntarily allowed a mortgage to be placed on the property.

Not every claim by a third party will have a preferential right to the property, even if registered. For example, certain rights are considered under Mexican law as "personal rights" (*derechos personales*), which in most cases do not have a preferential right against real property rights (*derechos reales*) even when the personal rights are registered before the buyer's rights. Examples of personal rights include lawsuits and liens (e.g., unsecured creditors' claims; labor and social security liens) against the seller that seek to attach against the property for collection, but do not contest ownership of the property. Real property rights (*derechos reales*) usually have a preferential right over personal rights even when not registered, as long as they were properly formalized via a Public Deed. In addition, depending on the circumstances, even agreements containing real rights that have not been formalized could have preferential rights over personal rights. Therefore, a buyer's real property rights will generally prevail over personal rights asserted against the property. Nevertheless, the buyer might have to litigate in Mexico to have its rights confirmed by a Mexican court. This can be a time-consuming and costly process, and still the outcome is not guaranteed, as there can be circumstances where personal rights could prevail over real rights. By having prior registered real property rights, a buyer reduces the chances that litigation would be necessary and also increases the chances of prevailing if there is litigation.

Competing real property rights (*derechos reales*) are the most dangerous, because they can trump the rights of the buyer, especially if they have been registered in the Public Registry before the buyer's rights are registered. In the case of valid, competing claims of real property rights, Mexican law generally provides that the party whose rights prevail is the party that has first registered those rights in the Public Registry. *The first in time, the first in right*. One caveat to this general rule is that the prevailing party must not have acquired its rights while on notice of pre-existing real property rights, but the party asserting

this exception would have to prove it in court. This is similar to the "race-notice" title registration laws in Arizona and most U.S. states, with some exceptions. For the same reasons real estate transactions in the U.S. almost always require registration of the deed from the seller at closing (or as soon thereafter as possible), the same prudent procedure should be followed with Mexican property purchases.

Buyers who have not formalized their rights before a *Notario* and registered their rights at closing are advised to do so as soon as possible in order to gain protection against subsequently registered third party real property claims. If there are competing real property claims and none of them are registered, then the buyer's best protection may be to register first. Otherwise, the buyer would have only one of competing unregistered claims, and face uncertain, costly and time-consuming litigation in Mexico, just to have a chance of having the buyer's rights to the property validated by a Mexican court. If a third party has already registered a real property claim before the buyer's rights are registered, then the buyer faces an even more difficult and uncertain legal battle.

If the buyer loses all legal right to the property itself, the buyer will likely still have a valid legal claim against the seller to return money received from the buyer. However, if the seller is unwilling or unable to voluntarily return the money, the buyer may be left in a difficult position. Even with a valid legal claim, it might be an expensive, difficult and/or long process to successfully obtain a judgment to recover the money. Furthermore, any judgment obtained is only as good as the extent to which the buyer can actually collect from the seller, and the net recovery will be reduced by attorneys' fees and court costs unless those can be recovered as part of the judgment. Finally, even if a lawsuit is not required in order to have the seller acknowledge the debt, the current economic crisis increases the odds that the buyer may not be able to collect the full amount from the seller and/or might have to incur further expenses or delays in collection or bankruptcy court.

The only certain way to eliminate such risks is to formalize the buyer's ownership of the property through a Public Deed and register it in the Public Registry prior to any other third party.

The risk of third party rights prevailing over those of unregistered buyers are significantly increased in the current economic environment. Of particular concern now are Mexican developers or sellers whose projects have stalled due to lack of financing, or who are (or might become) bankrupt or have liens on the property that might be foreclosed on by the seller's lenders, which are scenarios that could require litigation and greatly complicate the defense of the buyer's rights. Here are some existing or possible scenarios involving buyers who have paid all or part of the purchase price, but not yet received a properly registered title or trust ("unregistered buyers"). We have assisted clients in some of these situations and others are likely to arise in the near future.

FORECLOSURE BY SELLER'S LENDER

All buyers understand the risk that if they borrow money to buy a property and grant the lender a mortgage on the property, the lender can foreclose on the property if the buyer defaults on the loan. However, not all buyers understand that their property may also be subject to foreclosure by the *seller's* lender, if the lender has a valid security interest the property, through a mortgage or, in some cases, through a master trust.[8] The nature of the risks the buyer faces, and the available responses, depend on the particular circumstances, which would need to be analyzed on a case-by-case basis. Among other circumstances, there can be a significant difference in the buyer's rights if the lender has a mortgage compared to if the property is held in a master trust, as discussed below. The following are a few common examples. In all cases, buyers are well advised to try to obtain the release of the mortgage or master trust and have their purchase formalized and registered free and clear of any mortgage or master trust as soon as possible, before there is a foreclosure or litigation between the lender and seller.

If there is a valid, pre-existing, registered mortgage or master trust, then the buyer's rights will be subject to that mortgage or master trust. Often, a seller borrows money to finance construction of the property and the seller's lender has a mortgage on the entire development. Even though an unregistered buyer has paid the entire purchase price, or is current on making installment payments, the seller's lender might still be able to foreclose on the property if the seller defaults on its loan. Unfinished developments are of particular concern, especially if there are construction delays that often are signs of financial difficulty. This is currently the case with a number of developments in Rocky Point and other areas of Mexico.

A title search (which should be part of the buyer's due diligence before releasing funds to the seller) would reveal such a mortgage or master trust. Unfortunately, some buyers sign contracts and pay significant amounts to sellers without conducting a title search. Such buyers are generally stuck with the situation into which they have put themselves, though, depending on the circumstances, they may be able to resolve the situation through litigation or negotiation. In the case of a master trust, this might be of less concern to buyers. Buyers might find themselves protected if the master trust agreement provides that the master trustee is obligated to release individual properties to buyers upon payment of the purchase price. However, even in this case, buyers must be careful to make the payment to the proper party required under the master trust agreement. For example, if the master trust agreement requires payment of the purchase price to the master trustee or lender, then a buyer who has paid the seller could be considered not to have paid the purchase price. The specific terms of the master trust agreement will determine the parties' rights and need to be reviewed by legal counsel on a case-by-case basis.

If there is a valid, pre-existing, but unregistered mortgage or master trust, then the buyer faces a competing, unregistered real property right (*derecho real*). As noted above, Mexican law generally provides in such cases that the party whose rights prevail is the party that has first registered those rights in the Public Registry.

Unregistered buyers should also be concerned that sellers might allow a lien against the property after the buyer has signed a purchase contract and/or paid money. As a practical matter, whoever holds registered legal title to the property can allow a mortgage or other lien against the property to be registered. The buyer cannot prevent such liens until registered title is transferred to the buyer or the buyer's trust. Once a lien is registered, it can be removed only by the lienholder (e.g., the lender) or a Mexican court. As discussed above, even if the buyer's rights might legally prevail over such liens, the buyer might have to litigate to have a Mexican court uphold its rights.

In these and other scenarios where there is a lien on the buyer's individual property or an entire development, usually the buyer cannot obtain registered title or trust rights to its property until the seller's lender (or master trustee) releases the buyer's particular property from that lender's mortgage lien (or master trust). Typically, even though the buyer has a written contract from the seller to transfer title to the buyer, the contract might not be binding on the seller's lender (or master trustee), and the seller might be unable to release or transfer the property without the authorization of the lender (or master trustee). Unfortunately for the buyer, if the seller is in default on its loan, a lender might refuse to release property from its lien and may even be able to foreclose on the development, thereby possibly terminating the rights of buyers to any property to which the lender's lien applies. The buyer can thus have their property rights "frozen" pending litigation or possibly terminated by a lienholder. As noted above, when the property is in a master trust, the master trust agreements often have provisions to protect the buyers, e.g., allowing the purchase price to be paid directly to the lender or master trustee, which will then allow the release of the buyer's property.

SELLER'S BANKRUPTCY AND CREDITORS' "PERSONAL RIGHTS" LIENS

Similar problems can result if, before the buyer has received a registered title or trust, the seller goes into bankruptcy or the sellers' creditors file "personal rights" (*derechos personales*) liens against the property. This is especially of concern in the current economic circumstances where developers might have difficulty meeting their payment obligations to their lenders, investors, employees, contractors, suppliers or others who might already have liens (or be able to place a lien) on the property. In these cases, the buyer may suddenly find that instead of clearly being an owner of Mexican property, the buyer risks being considered one of a number of unsecured creditors of the seller looking to recover in a Mexican bankruptcy court what may be a mere fraction of the buyer's investment. The

buyer might legally have a preferential real property right (*derecho real*) to the property versus the seller's creditors, but the buyer will likely have to establish this legal right in court at significant time and/or cost. Property held in a master trust might provide some protections for buyers from a seller's bankruptcy due to the fact that real property in a master trust is generally not part of the seller's property subject to claims by seller's creditors. The buyer's protections and rights would depend on the terms of the master trust agreement, which could be determined by buyer's attorney's review of the agreement.

LITIGATION OVER WHO OWNS THE PROPERTY

If a lawsuit is filed in Mexico contesting ownership of a development or specific property, an unregistered buyer might be unable to obtain registered title or a trust until the lawsuit is concluded. It is possible the buyer could lose all rights depending on the outcome of the litigation. A buyer is in a much stronger position if he or she obtains registered title or a trust before such a lawsuit is filed. However, the buyer should be aware that, depending on the circumstances, if a Mexican court rules that the seller did not have legal title, then the buyer could lose the rights to the property despite having registered title or a trust. That risk is one reason, among others, that we recommend complete, proper due diligence prior to acquiring real estate and releasing funds to the seller and that buyers consider obtaining title insurance that they can enforce against a well-established and well-financed title company.

POSSIBLE SOLUTIONS

Fortunately, we have had some success in such circumstances in obtaining the release of the buyer's property from the lien of a seller's lender and completing the transfer of registered ownership to the buyer's trust. One example is reaching an arrangement with a developer and its lender for the following to occur: our client, the buyer, pays all or part of the remainder of its purchase price directly to the lender; in exchange for this payment the lender releases its lien; the developer gives our client an irrevocable power of attorney and letter of instructions to enable our client to have its trust formed and registered; and the buyer pays any remainder of the purchase price to the developer only when the buyer's trust has been formalized by a *Notario* in a Public Deed and notice of the transfer to the buyer has been actually filed in the Public Registry.

If the buyer's property is not yet fully constructed, the buyer should be very cautious about paying any more money directly to the developer or lienholder until construction is complete. However, the buyer might safely agree to deposit all or part of the remaining purchase price in a secure escrow account in the U.S. until construction is complete.

Another scenario is where the buyer is still making installment payments of the purchase price under the purchase contract or seller-carryback promissory note. Often the seller has sold the note to someone else to whom the buyer makes the rest of the payments. In these cases, the seller has been fully paid but retains title in order to guarantee payment to the note holder. A common arrangement is that the seller won't transfer title until the note is fully paid. Buyers in this circumstance should be aware that their rights to the property are subject to the risks described above until title is registered in their name (or in their trust). If buyers cannot immediately pay off the loan, it may still be possible to have title transferred now from the seller/developer and thus eliminate the risks discussed above.

These approaches are more likely to succeed where the lienholder and seller have an incentive to agree to the procedure, such as receiving the remaining purchase price from the buyer. If the buyer has already paid the entire purchase price, the lienholder or seller might be more reluctant or require a different incentive.

CONCLUSION

Unless buyers of Mexican property have legal title or Mexican bank trust (*fideicomiso*) rights registered in the Public Registry, they risk having to undergo costly and lengthy litigation in Mexico to establish their property rights, and can even lose any legal claim to the property. Such buyers can be left with only a legal claim against the seller, who might be judgment proof, and which in any event will likely require litigation. Given the current economic situation, the risks are increasing, and include foreclosure by sellers' lenders, sellers' bankruptcies, and litigation over who owns the property. Buyers without registered ownership rights are therefore well advised to formalize and register their ownership rights as soon as possible.

endnotes

1. A non-Mexican cannot acquire direct title to property in the "Restricted Zone" (*i.e.*, within the area 100 kilometers from the Mexican border, 50 kilometers from the beach, and all of Baja). However, non-Mexicans can acquire full rights to use, rent and sell property in the Restricted Zone by having title to the property transferred to a Mexican bank trust of which the buyer is beneficiary. The trust can be created for an initial term of up to 50 years, which is subject to automatic renewal for an additional 50 years upon the request of the beneficiary. If the property is already in a Mexican bank trust, the buyer can have the beneficiary rights assigned to the buyer. Title to ***non-residential*** property in the Restricted Zone can also be legally held by a Mexican corporation, which may be wholly owned by non-Mexicans. Non-Mexicans can acquire direct title to real property outside the Restricted Zone. Mexican citizens can directly own title to property throughout Mexico.

2. This article will concentrate only on the civil ownership regime for real property. There are two main real estate ownership regimes under Mexican Law: (1) the agrarian regime (which restricts the free transfer of agrarian property (e.g., *ejidos* and *colonias*) unless a privatization process is correctly completed before the proper federal authorities), and (2) the civil ownership regime (which is the type of unrestricted ownership we commonly know that allows the free transfer of property ownership). Although many investors purchase land under the agrarian unrestricted ownership regime, and could risk such investment when not following the proper process, this article will concentrate on the civil type of ownership.

3. *See, e.g.*, Art. 47 and 57 of the Public Registry Law (*Ley Catastral y Registral*) for the State of Sonora.

4. Some of these potential title problems might be discovered by a *Notario* in the process of formalizing the property transfer, in which case the *Notario* would refuse to process the transfer. However, even though a *Notario* will check some of the chain of title and the seller's identification, and will have the seller certify as to capacity to transfer the property, the *Notario* will not be able to prevent (and is not a guarantor against) all types of potential title problems (e.g., fraud, forgery, incorrect legal descriptions). Title insurance may provide protection against some of the title problems that can exist despite a *Notario*'s formalization of the transfer and registration in the Public Registry.

5. *See, e.g.*, Art. 54-55 of the Public Registry Law for the State of Sonora.

6. Art. 56 of the Public Registry Law for the State of Sonora.

7. Art. 57 of the Public Registry Law for the State of Sonora.

8. A master trust is often used by lenders to acquire a security interest in an entire development or subdivision. Legal title is transferred in trust to a Mexican bank trustee, which must administer transfers of the property subject to the terms of the master trust agreement.

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