

Most Frequently asked Questions for Foreigners acquiring property in Mexico

By Javier Mazoy Esq. (Corredor Publico # 2)

1) Is Mexican legal System similar to the one form the Us or Canada?

No, Mexico's legal system is, based on the Greek, Roman and French legal systems, and the Mexican system is more similar to other legal systems throughout the world than the U.S. legal system. With NAFTA, more and more American or Canadian attorneys have to deal with issues related to Mexican Law, than they use to deal before. This means that U.S. and Canadian legal counselors, with clients doing business in Mexico should have a more detailed knowledge of Mexican practices, laws and courts. Mexico is part of the civil law (code) system, while the US and Canada (with some exceptions) are part of the Common Law System. The U.S. common law system is based on the case law and statutory law of England and the American Colonies. The traditional common law system emphasizes case law, customs and usage rather than legislative enactments. In contrast, Mexico's civil law system is derived primarily from Roman law as set forth in the compilation of codes and statutes of the Emperor Justinian, called Corpus Juris Civilis, and later refined in the French or Napoleonic Code of 1804. Interestingly, the development of Mexican commercial law drew heavily on Italian law. Mexico's legal system is also influenced by colonial law (the Spanish and "Indian" law of Spain's colonization in the areas that became Mexico and other present-day Latin American countries), which was a highly formal body of law, including specific collections of not only laws but customs or accepted legal practices, that required the use of intricate regulations and elaborate writings associated with every important act of one's life, such as birth or marriage; It also had an influence of ecclesiastical law. This distinction between the two systems based on their respective origins, along with the unique traditions and practices stemming from these different origins, is today the clearest and most important distinction.

Historically another important distinction between the civil law system and common law has been the codification of Mexican law, The adoption of codes such as the Civil Code, Commercial Code and others. However, codification, however, is no longer a significant distinction between the US and Mexico legal systems. Indeed, the U.S. has enacted several federal codes such as the Tax, Bankruptcy and Immigration Codes, and collections of federal criminal statutes and civil and criminal procedure. Further, virtually every U.S. state has adopted some version of the Uniform Commercial Code. Also, most states have enacted codes covering such areas as Property, Probate, Tax, Family, Education, Government, Health and Safety, Penal matters, Insurance, and Elections. In the US there is a trend towards codification.

2) Who are the persons involved in the transferring of Real Estate or Beneficiary Rights under a Trust in Mexico?

Attorneys, Realtors but the most important figure are State Notary Public and in limited cases (When there are Beneficiary Rights under a Trust) Corredores Publicos (Federal Notaries).

3) Is the role of a Notary Public the same as in the US?

No, a Mexican Notary Public like in Spain, France, Italy, Argentina, Germany and some other countries **must** be an attorney and they do a very similar work to the role of a Title Company.

The Mexican Notary Public and the Corredor Publico are a very special part of the Mexican legal and Tax System, because they, among other things incorporate companies, transfer title over properties and also calculate and collect taxes on behalf of the government under their personal responsibility.

In Mexico, a "notary public" (Notario Publico) is much different than what is referred to as a notary public in the U.S. A Mexican notary public/ Corredor Publico is a very prestigious activity. In fact, a it is certified lawyer (In Mexico to become a Lawyer it is 5 to 6 years of law school after 12 to 13 years of elementary and secondary school) and an expert who is also a public official appointed by a Mexican state or the Federal District in the case of the Notaries, and by the Federal Government in the Case of the Corredores Publicos. To be selected he has to go through a rigorous application process and examination. Such an appointment is considered a delegation of governmental authority for the certification or official recognition of certain acts and documents. Their public duties and authority include authenticating facts which become irrefutable, unless the notary is proven to have committed fraud; conducting title searches (not unlike many of the functions performed by U.S. title companies); acting as public recorder; and examining wills and contracts as to proper form. Also, he is responsible of collecting all the taxes that are subject to be paid and arise of any transaction in which they have had participated. The position of notary public and Corredor Publico in Mexico is much coveted, and one acquires it only after years of apprenticeship under the guidance of another notary public. People who do business in Mexico will undoubtedly come in contact with a Mexican notary public when they incorporate Mexican companies, record certain types of contracts, buy or sell land (Notaries are the only persons allowed), authenticate powers of attorney, or engage in other business. The Corredor Publico acts only on a Federal Level and can just act on Federal Issues.

The Notary Public is the only one authorized to certificate any real Estate transactions, and with out this certification, any contract will lack the formality required according to the Mexican Law

4) How do foreigners acquire property in Mexico?

As a General Rule, Mexicans and foreigners can acquire property in Mexico, however for a foreigner to acquire property in Mexico in the so called restricted zone there are some special provisions:

The Mexican Constitution limits acquisition by foreign investors of real estate within the so- which is a strip of land extending 100 kilometers along the borders and 50 kilometers inland along the coasts of Mexican territory. In order to acquire real estate for Residential purposes, this can only be carried out through a Real Estate Trust called FIDEICOMISO in Spanish, with the prior approval of the Secretaria de Relaciones Exteriores. (Secretariat of Foreign Affairs).

5) Is there any other way to acquire property without a Trust?

In order to promote Tourism and Foreign investment the Trust was created. In 1993 the area of Real Property, the Law gives Foreign Investment the right to acquire “direct” ownership rights over real property in the Restricted Zone, provided three basic conditions are met:

- (i). it must be for nonresidential purposes
- (ii). it must be through the vehicle of a Mexican company and
- (iii). the transaction must be registered with the Ministry of Foreign Relations.

So it must have to be to develop land, create a Hotel or any other commercial issue. When foreigners acquire property for the sole purpose of having a place to go on vacation or to live in they Must incorporate a Trust. For that reason acquisition of real property by a Mexican company with foreign investment for purposes deemed residential must be undertaken through a trust mechanism through an authorized Credit Institution. Foreign Ministry permission is required for the institution to acquire the land or the house or condominium . The trust gives the Mexican company, as beneficiary, the rights to the use and profit from the land, without acquiring ownership rights .

6) How does the trust works?

THE TRUST

At its most basic, a trust is a mechanism through which the Maker (Trustor) transfers ownership over property or rights over to a Trustee, who pursuant to instructions from the Maker, administers the property for the Beneficiary until the fulfillment of a stated objective, by agreement or by law.

a) The Maker:

The Maker is the party who creates the trust, transferring the property over to the Trustee and specifying what the purpose of the trust shall be. Often, the Maker will have ownership over the thing or right to be placed in trust, such as property to guarantee the performance of an obligation. However, with respect to foreign investment in Mexico through real property trusts, the Maker is the seller, who upon sale transfers of the property over to the Trustee for the Beneficiary buyer. The Maker may designate and remove Beneficiaries and Trustees, and may name itself as the Beneficiary of the trust.

b) The Trustee

In the operation of a trust, the Trustee is the party in whose care the property or rights are placed in. The Trustee is charged with the administering that which is placed in trust, as per the agreement with the Maker and operation of law. According to Mexican Law, the Trustee must be a financial institution duly authorized by the Federal government to engage in trust operations. The Trustee is empowered with the rights and actions to administer the trust for the accomplishment of its purpose, subject to the terms and conditions of the trust agreement.

c) The Beneficiary :

The Beneficiary of a trust is the party who receives the benefit of the trust, either through the express wish of the Maker or the operation of the trust.

An individual or legal entity may be a beneficiary of the trust, provided that it possesses the legal capacity to enjoy the benefits of the trust under Mexican Law. In addition to those rights accorded the beneficiary by way of the trust agreement, the rights of a beneficiary include: the right to force the Trustee's compliance with the trust agreement; the right to attack the legal validity of any acts by the Trustee which are detrimental to the beneficiary, in bad faith or in excess of their Trustee powers, and the right to recover the property which was taken out of the trust. The recovered property goes back in trust. There may be several Beneficiaries to a trust, or none at all. When there are several beneficiaries, it is necessary that there be a decision reached by majority

agreement in order to exercise those rights and decisions not contemplated by the trust agreement .

7) Is the Trust considered a Personal Trust?

No, it is a Property Trust, which means it is related to the property not to the person. Persons or Beneficiaries can be changed within the Existing trust and there are no personal liabilities.

8) What is the duration of a Trust?

50 years

9) What happens at the end of the 50 years?

The term can be extended for another 50 years

10) Then, what happens then at the end of the 100 years?

A new trust will need to be incorporated

11) What happens if the trustee bank files bankruptcy?

Nothing, because properties under a trust to acquire property in the restricted zone are not part of the Bank Assets. A new Trustee bank will take care of the existing trust.

12) What are the costs involved in the acquisition of a property and the incorporation of a new trust?

Incorporation government Fees, Trustee Bank Fees, Notary Fees, Public Registry Fees, approximately 2% acquisition tax, appraisal fees, limited attorney fees (due to the notary is an attorney and he plays a big role in the closing), title insurance fees (if requested) and at some point some translation fees. The fees vary depending the transaction. The Capital Gains tax is paid by the Seller.

13) What happens if the beneficiary under a Trust dies?

Since the incorporation of the trust or the appointment of Beneficiaries under a Trust the primary beneficiary can appoint beneficiaries in case of death, so in this case they will just have to prove to the Trustee Bank that the Estate proceeding in the country of origin has started and that in the will of that person no one else was appointed as a new beneficiary.

14) What is the difference between an Assignment of Beneficiary Rights (*Cesión de Derechos*) and the Incorporation of a New Trust (“Constitución de Nuevo Fideicomiso”)

When a property is first transferred to a foreigner or there is no trust in place a new Fideicomiso is needed. However if there is an already existing Trust (Fideicomiso) instead of creating a new trust, the existing trust is used and the Trustee Bank appoints the buyer as new beneficiary.

15) How much does a bank charges as Annual Management Fee?

It varies from Bank to Bank but the fees go from \$400.00 plus IVA to \$750.00 plus IVA dollars a year.

16) When a foreigner sells is there any capital Gain Tax?

Yes, according to the Mexican Revenue Code foreigners must pay capital gains tax. The rate is either 25% of the Selling price without deductions or 35% of the real profit taking as a tax basis the acquisition price, plus all the acquisition expenses, including selling and buying commissions. It is important to note that taxes are calculated in Pesos

17) Is it possible to record transactions in Dollars?

Yes, but the prices are exchanged and fixed into pesos at the date of closing and taxes are paid on the basis of pesos.

18) Are there any Title Insurance Companies in Mexico?

Title insurance is not used in Mexico and in 98% of the transactions it is not used between Mexicans. However in the last years there has been a trend to use and obtain title insurance in transactions where foreigners are involved and there are several companies that issue title insurance in Mexico. Stewart Title Guaranty Company, First American Title Company, Fidelity and some others as well as a Mexican Company named Title Insurance de Mexico that works closely with First American. The policies are issued as in the US and they are enforceable in the US.

19) Are there any companies from the US borrowing funds to acquire property in Mexico?

There are a few but the requirements are extensive.

