



LEGAL ASPECTS OF:
-ACQUIRING REAL ESTATE
-SETTING UP A SMALL
BUSINESS AND
-EXPORTING TO MEXICO

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OVERVIEW

- Acquiring real property and related issues
- Starting up a small business
- Exporting goods and services
- Potential pitfalls and tips



MEXICAN CONSTITUTION & THE CALVO CLAUSE—ART. 27

- Default rule: Property belongs to the “**Nation**”
- Nation can transfer ownership to indivs = **Private Property**
- **Foreign citizens** may acquire property if they sign “**Calvo Clause**”:
 - Foreigner considers himself as Mexican re: Property and to not invoke protection of home government
 - If violated, rights to property revert to Nation.
 - Roots and history of Calvo Clause



RESTRICTED ZONE AND FOREIGN INVESTMENT LAW

- **Restricted Zone**” = 50 km of the coast or 100 km of border
- No foreigner may acquire direct title over real property in RZ
- Foreigners can acquire indirect title in RZ through:
 - A Mexican corporation owned and managed by foreigners; or
 - An property trust (*fideicomiso*) with a Mexican bank acting as trustee and you as beneficiary.



ACQUIRING PROPERTY OUTSIDE RZ

- Foreigners can acquire, direct, fee simple title to land in the interior of Mexico (outside the Restricted Zone) (e.g., San Miguel de Allende)
- Only requirement is a Notice to Foreign Relations Dept. and signing “Calvo Clause”



RZ TRUSTS—“FIDEICOMISO”

- **Seller (*fideicomitente*/trustor)** irrevocably transfers to
- **Bank (*fiduciario*/trustee),** title to Property so that
- **Foreigner (*fideicomisario*/ beneficiary)** can use and enjoy Property.
- Foreigner holds beneficial title
- Mexican bank holds legal title
- Permit from Foreign Affairs Dept. required
- Trust in force for 50 years and may be renewed
- Bank cannot restrict beneficiary’s use as long as lawful
- Bank cannot encumber, securitize, or sell the property (exception: Guaranty Trust)



PURCHASE CONTRACTS & CLOSING PROCESS

- **Reservation**
 - Offer to purchase
 - Letter of Intent
- **Use of Title Companies, Notaries, Lawyers, Closing Companies, Brokers**
- Escrow Agreement (sometimes)
- Title Insurance



PURCHASE CONTRACTS & CLOSING PROCESS

○ Reciprocal Promises/Options

- Promissory agreements (purchase/create a trust)
- Private purchase agreements
- Option contracts
- Sometimes not necessary of offer agreement

○ Closing

- Definitive transfer agreement (deed)
- Reservation of title/reversion provisions
- “Public Faith” and Recordation
- Release of Funds



PURCHASE CONTRACTS—KEY TERMS

- Seller declarations, disclosures and representations
- Reserving “right to buy” (“tying up” the property)
- Defining when money becomes “hard”
- Liquidated damages and specific performance
- Dispute resolution



FINANCING REAL ESTATE INVESTMENTS

- **Bank financing: mortgages vs. guaranty trusts**
 - Legal foundation: Civil Law vs. Negotiable Instruments and Credit Transactions Law
 - Foreclosing procedures
 - Loans offered by US banks to US residents
 - Loans offered by Mexican banks (foreign and Mexican-owned)



FINANCING REAL ESTATE INVESTMENTS

- **Seller/Developer financing**
 - Promissory notes and payment schedules
 - Conditional (promissory) purchase agreements
 - Purchase and sale with reservation of title
 - Lease with option to buy
- **Pre-Sale “Buyer” financing:**
 - Largely a thing of the past



DUE DILIGENCE

- **“Due Diligence”** refers to the **investigation** that Buyer conducts to ensure he is “getting what he is paying for” and to **avoid “unpleasant surprises”**.
- Legal due diligence related to real property acquisitions includes:



DUE DILIGENCE

- Capacity of the Seller
- Powers of attorney
- Title (history and chain of title; current status)
- Ejido (agrarian) matters
- Land use (permissible uses, density)
- Environmental: pollution liability, water rights
- Corporate and tax obligations
- Utilities and public infrastructure



TAXATION ON REAL ESTATE

○ **Income (Capital gains) Tax**

- 30% of the gain or 25% of the gross
- Documenting your deductions
- Recording the actual sale price
- Also applies when you sell a company (e.g., a US LLC)
- Homestead exemption
- Tax credit under US-Mexico Treaty to Avoid Double Taxation



TAXATION ON REAL ESTATE

- **VAT (Value Added Tax)**
 - 16% = general rule
 - 11% in border zone (all of Baja, Cancun and Riviera Maya)
 - Land and residential = exempt
- **Property Tax** – +/- 0.5% of appraised value/ year
- **Real Estate Transfer (acquisition) Tax**



MEXICAN COMPANIES

- Alternative to RZ trust that allows direct ownership
- Must have a true business purpose (cannot be used for residential purposes)
- Effective if buyer sees property as an investment
- Compliance can be onerous (see below)



STARTING UP A SMALL BUSINESS IN MEXICO

- Establishing a business in Mexico requires **forming a Mexican entity**.
- This entity will enable you to:
 - Create a “**corporate veil**” protecting you and your partners from personal liability in Mexico.
 - Avoid subjecting your US company (or you, if an individual shareholder) to **tax** (permanent establishment) and **labor liability** in Mexico.
 - Enable you to invoice Mexican customers (e.g., tenants, customers), import product into Mexico, take deductions, and obtain the licenses and permits necessary to operate your business
 - **Have your own business in Mexico!**



STARTING UP A SMALL BUSINESS (CONT.)

- Types of commonly used entities: **SRL vs. SA**
- **SA (Sociedad Anonima)**
 - Most traditional and commonly used
 - Closely held stock corporation (akin to an “S Corp” in the US)
 - Provides shareholders “limited liability”
- **SRL (Sociedad de Responsabilidad Limitada)**
 - Has become popular with US investors over last 8 years as a result of US Tax Code “Check the Box” provision
 - Offers members limited liability, akin to an LLC



STARTING UP A SMALL BUSINESS IN MEXICO (CONT.)

- **Other requirements**
 - Importer's Registry
 - Monthly Tax filings
 - Permitting: industry/activity specific



STEPS TO INCORPORATE

- Drawing up Bylaws and articles of incorporation including:
 - Type of entity
 - Corporate purpose
 - Governance and decision-making
 - Transfer of shares and interests
 - Powers of attorney and officers
 - Special provisions and care needed if JV entity
- Relevance of the apostille: a seal placed on a document making it “legal” in the foreign country where it will be used
- Foreign Investment registration and Mexican tax ID (“RFC”)



EXPORTING UNDER NAFTA

- Import duties removed on virtually all products produced in either USA or Canada
- Rules of Origin rule of thumb: 50%+ = NAFTA = Duty Free
- What if products are produced in China but sold into Mexico from USA?



EXPORTING TO MEXICO—GOODS, SERVICES, TECHNOLOGY

- **Goods:** Fruits & vegetables, airplanes, personal computers
- **Services:** Consulting, Engineering & Construction, Legal, Accounting
- **Technology:** software (copyright licensing), computer programming, know-how



MARKET ENTRY VEHICLES

- Direct exports
- Manufacturers' representatives and agents
- Local distribution
- Subsidiary sales office
- Licensing and franchising
- Partnerships and joint ventures



WATCH OUT FOR...

- **Non-tariff barriers to trade (importation requirements):**
 - Importer's registry
 - NOM (Mandatory Standards)
 - Labeling, etc.



WATCH OUT FOR...

○ **Tax Laws (and Treaty)**

- Permanent Establishments & Mexico ‘Source Income’
- Value Added Tax & its Implications

○ **Immigration Laws**

- Signing contracts in Mexico
- Business visitor: FMN
- Long-term visitor : FM3
- Resident: FM2



WATCH OUT FOR...

o **Labor & Employment Laws**

- Workers' rights enshrined in Constitution
- Hiring and firing in Mexico – job as an entitlement
- Salaries and minimum wage
- Mandatory benefits



A FEW FINAL TIPS...

- Use your common sense
- Don't leave your brains at the border!
- Doing things right (e.g., obtaining proper permits) from the beginning will save you time, money and headaches down the road
- Follow the law! Foreigners may be held to a higher standard
- Do your due diligence
- Value relationships



FOLLOW-UP QUESTIONS?

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