



STRUCTURING CROSS-BORDER REAL ESTATE DEVELOPMENT TRANSACTIONS

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OVERVIEW

- Drivers and Key Considerations
- Choosing the vehicle
- Papering the deal – the Buy-Sell
 - Representations and warranties
 - Purchasing stock instead of assets
 - Reservation agreements
 - Promissory agreements
 - Definitive Agreements
 - “Dominion” reservation/reversion clauses



STRUCTURING THE CROSS-BORDER TRANSACTION

- Drivers on the US side of the Border:
 - Creating vehicle(s) to attract debt and equity partners
 - Providing legal certainty
 - Tax
- Key considerations:
 - Operations, ROIs, management and decision-making



STRUCTURING THE CROSS-BORDER TRANSACTION

- **Drivers on the Mexican side of the Border:**
 - Art. 27 and Foreign Investment Law
 - Title situation – is seller ready to transfer?
 - Cash transaction? Or Seller financing/JV?
 - Tax - Buyer and Seller!
- **Key considerations**
 - Land as cost/Immediate deductibility
 - Watch out for asset tax
 - Debt-equity ratios
 - X-border service agreements
 - Ability to “check the box”



CHOOSING THE VEHICLE

US LLC



Mexican **SRL**

US Entity



Mexican **Development Trust**

US Entity



Mexican **SA**

US Entity



Mexican **REIT, SAPI**



DEVELOPMENT/ GUARANTY TRUSTS

- Same concept as RZ Trusts but different purposes, e.g.:
 - Create devel vehicle while avoiding Capital Gains and Transfer Taxes
 - Disregarded if no business purposes – key!
 - Establish JV Vehicle (P1 = landowner; P2 = developer/builder)
 - Allow seller to retain rights (e.g., payment)
 - Multi-purpose (development + guarantee)
 - Master trust = ease of transfer to create RZ trusts
 - Reversion clauses
 - Separate land ownership from development



DEVELOPMENT/ GUARANTY TRUSTS

- Alternative to JV entities or other forms of Seller financing
- Safer for developers/builders than simple K
- Dual purpose: Seller financing/JV + bank guarantee
- Use of Technical Committees and partial release mechanisms
- Reversion clauses



PAPERING THE BUY-SELL

- You've decided on the structure, so now you need to **paper the agreement between Buyer, Seller and lenders**
- Up to four phases:
 - LOI/Offer
 - Option/Promise
 - Definitive
 - Release of Guarantees/Liens



SELLER REPS & WARRANTIES

- **Convert your Due Diligence Report into reps and warranties of Seller!**
 - Corporate Authority; consents
 - Powers of attorney
 - Capacity and “Personality”
 - Clean Title
 - Description of Property – metes and bounds + survey
 - Buildings and structures
 - Federal Zone Concessions
 - Land Use
 - No boundary disputes
 - No Possessors/squatters
 - No litigation
 - No labor liability
 - No environmental liabilities
 - No flood zone/arroyos



SHARE PURCHASE TRANSACTIONS

- **Buying stock instead of assets?** may be preferred when:
 - Seller is selling not only land but a business (e.g., hotel)
 - Entitlements are not easily transferred; have strategic value
 - Parties wish to avoid high Closing costs, transfer tax, public sale
 - Tax considerations (Seller has significant loss carry forwards)
 - Seller retains some ownership or control (JV or deferred payment)
- If so, **reps/warranties even more important!**
 - Watch out for labor, tax and corporate liability!

RESERVING THE PROPERTY

- Ovoid US-style **offer agreements** unless “Mexicanized” to contain at least:
 - ID property (deed + property tax ID + survey/plan)
 - ID Seller and his “personality” & authority
 - Price
 - Term
 - Preferably in Spanish (dual column OK)
 - Seller’s obligation to sell
- **LOIs** = best form when Buyer not yet obligated but wants to tie up property



PROMISSORY & OPTION CONTRACTS

○ Promesa de Compraventa

- Traditional Mexican pre-sale agreement
- Best if non-refundable deposit upon contract execution

○ Option contracts

- Tie property up then do DD before \$ going hard
- “Pay to Play” consideration



PROMISSORY & OPTION CONTRACTS

○ Key considerations and provisions

- Reps & warranties
- DD period/closing date
- Use of Conditions Precedent (e.g., tie Buyer's obligation to Title Commitment)
- Liquidated damages and specific performance clauses
- Assignable?
- Private Buy-Sell as a third alternative
- Possessory and development rights?
- Release of final payment



DEFINITIVE AGREEMENTS

- Common denominator = Executed before *Notario* and Publicly Recorded
- Almost always involves:
 - Transfer of “dominion” (as opposed to “title”)
 - Transfer of possession
 - Payment of final consideration (unless cl. re:
 - Reservation of dominion
 - Reversion
 - Mortgage)
- Applies with or without a trust



REMOVING GUARANTEES/LIENS

- Removal of a mortgage, reservation of dominion clause, or guarantee beneficiary of a trust
 - Also must be recorded
 - Usually represented by public deed
 - May be triggered by/tied to lot sales, partial release mechanism
 - Often concurrent with canceling a note



FOLLOW-UP QUESTIONS?

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