

Challenges in Conducting Cross-Border Real Estate Transactions Due to Differences in Legal Practices, Language and Culture – a Mexico Perspective

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Mexico is the United States second-largest export market just after Canada and its third-largest trading partner (after Canada and China). Thousands of cross-border transactions are conducted each day between the two countries, including many involving real estate investments. When participating in a cross-border deal lawyers and entrepreneurs from both sides of the border may encounter that the transaction, process, legal or business practice, may be different than expected. This document briefly discusses the most common differences that an international attorney (and his client) may encounter when participating in an industrial or commercial transaction involving real estate located in Mexico. Among the many types of transactions, conveyancing provides an excellent example of the challenges to be faced.

In general, one can say that the procedure for the transfer of title of real estate located in Mexico is different than in the United States. Despite some similarities in the real estate jargon, a same term of art can have a significant different meanings and implications in each jurisdiction. As an example, the effects of executing a "contract of sale" and a "contrato de compraventa" are very distinct as to the effects for the transfer of title as discussed below.

In a typical real estate conveyance in Mexico, the buyer and seller will agree on a price and other material terms of the transfer and execute a promissory agreement (contrato de promesa). A promissory agreement is a contract in which the parties agree to execute another contract in the future. For our purposes, that future contract will be the contract of sale (contrato de compraventa). Upon the execution of the promissory agreement a certain commitment to purchase and sell is in place, subject to certain conditions precedent. Note, however, that the scope of the promise agreement is limited to binding the parties to sign a future contract and there is no transfer of title or purchase price at this point. By statute, the promissory agreement must be in writing, include the essential terms of the future contract and have a fixed termination date. Typically, it also includes a list of the conditions precedent required for closing and specifics about the due diligence period. If either party refuses to execute the contract of sale, the non-breaching party can seek specific performance and enforce it by court action.

The period running from the execution of the promissory agreement until the execution of the sale and contract of sale is commonly used by purchaser to conduct its due diligence. It is during this window that purchaser's advisors audit the legal and physical conditions of the property, and also during which the parties negotiate the contract for sale. During the due diligence period, the seller remains in possession of the property and will bear the risk of loss. If the audit's result is favorable, the parties will "close" by executing the purchase and sale agreement on the agreed date.

The contract of sale's scope is the parties' obligation to purchase and sell a given property at a certain price. Mexican law requires that a real estate contract of sale is made in writing and that such writing is formalized in a public document (*escritura*), issued by a Notary Public. The *escritura* must contain a reference to the previous conveyance and the property's legal description as accurate as possible, including metes and bounds. Typically, this contract also includes representations and warranties of the seller, but they are not required. In absence, the purchaser will be entitled by certain remedies by statute such as defense of title. The *escritura* containing the contract of sale must be in Spanish and once executed by the parties and the notary, recorded with the Property and Commerce Registry to be effective before third parties. This *escritura* will serve as the buyer's "deed" and is the document that will be presented by buyer to third parties to evidence his ownership over the property.

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The notary will review the contract of sale and just before closing will finalize drafting its technical notarial aspects. As to the transaction itself, the notary will procure the closing documents to be attached to the contract of sale, whether produced by purchaser and seller or third parties; such as survey, appraisal, or certificates showing that there are no encumbrances affecting the property. Although for negotiation purposes the original language of the contract of sale may have been drafted by the parties in English, for closing it must be translated into Spanish and approved by the notary.

At closing, the parties will appear before the notary public and sign the *escritura* containing the contract of sale. The price and title exchange occurs upon the execution of the contract of sale and the promissory agreement will then cease to have any effect. The transfer taxes and registration fees are also collected by the notary at closing.

The process just described may be unfamiliar to a foreign investor for many reasons. First, the transfer of the title will happen at the execution of the contract of sale, being no deed involved. A purchaser's lawyer must be careful when drafting and negotiating the promissory agreement since such contract is the one that will set the rules for closing and the possible exit options. Also, the international attorney and client need to be aware that once executed the contract of sale the transfer of title will take place.

In a typical United States transaction when the parties agree on the price and material terms of a transaction, they sign a purchase and sale agreement, which does not convey the title of the property. After executing this contract of sale, purchaser conducts their due diligence and subject to the satisfaction of certain conditions, at closing seller and purchaser exchange purchase price and a deed. The contract of sale disappears at closing. Once the deed is accepted by the purchaser the contract of sale merges into the deed and its effects cease. The deed is a document simpler than the Mexican contract for sale, with a description of the property and seller's conveyance of title. Under Texas law, the deed must be executed by the seller (but not by the buyer) and in order to be recorded it must be notarized or signed before two witnesses.

Another significant difference is the role of the notary and its degree of involvement in the transaction. Although in both countries conveyancing will involve interacting with a notary, in Mexico his role will be much more substantial. The Mexican notarial system stems from Roman law highly focused on formalities. Notaries in Mexico are highly qualified attorneys that have clerked with another notary, passed a set of certification exams, and if due to the size of the corresponding State's population there is a license available, the Governor will grant the notary a life tenure government license to issue public documents (among other duties). Notary services fees are calculated by applying a percentage to the transaction amount and can be a lucrative occupation. As a trained legal professional, the notary is in charge of reviewing the content of the legal documents he certifies and provides impartial advice to the parties. In real estate transactions, it is common practice that buyer appoints the notary due to his degree of involvement. Another significant difference to a United States notary is that a Mexican notary will be jointly liable for the taxes triggered in the transactions he certifies.

On the contrary, the role of a Texas notary is limited to certifying signer's (seller's) identity. The notary does not need to be a legal professional and obtaining a notary's authorization is a rather simple process. Texas Government Code sets out the maximum fees a Notary Public may charge for notary public services ranging from fifty cents to six dollars. According to Texas law, a notary cannot state or imply to be an attorney licensed to practice law and is prevented from advertising his services using the words "notario" or "Notario Publico" to avoid deception.

As to the language aspects of these transactions, it is common that the parties draft and negotiate contracts in English. However, although parties may agree on the contents of a Contract of Sale in English, the document they execute before the notary public must be in Spanish. Translators are often used; however attorneys must take the necessary steps to make sure that both, the English and Spanish versions are consistent and accurate. As in any international transaction, consulting with local counsel is a vital aspect for due diligence purposes and to handle post-closing procedures. Only local counsel will be qualified to review a document produced by seller as zoning certificate or operating license or whether there are any liens affecting the property. Communication with public officials and many times with the notary will also be conducted in local language. The international lawyer is presented with the challenge of maintaining a streamline communication in a transaction involving parties speaking different languages.

Finally, an important factor to consider when planning a transaction of this nature is of course timing. The attorney coordinating the cross-border deal will need to plan carefully with the assistance of local counsel the transaction schedule. The real estate acquisition process in Mexico may be lengthy and sometimes cumbersome, especially when government authorizations are required prior to closing, such as the subdivision or merger of plots of land, changing the applicable zoning. In sum, dealing with cross-border transactions may be challenging to the attorney and an interesting endeavor for the investor to say the least, but careful planning and the integration of the appropriate team will help prevent pitfalls and yield better results for all parties involved.

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