



Fall | 23



INTERNATIONAL LAWYERS NETWORK



MARTÍNEZ, ALGABA, DE HARO & CURIEL, S.C.
MARTINEZ BERLANGA ABOGADOS, S.C.
BUYING AND SELLING REAL ESTATE IN MEXICO



KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER MEXICAN LAW

Preface

Martínez, Algaba, De Haro y Curiel, S.C. (“**MAHC**”) and Martínez Berlanga Abogados, S.C. (“**MBA**”) are law firms in Mexico with recognized trajectory, based in Mexico City and Monterrey, committed to provide the highest standard of professional legal counsel and representation.

MAHC was established in 1969 and is comprised of a highly experienced and qualified team of professionals in the diverse areas of law practiced by the firm. MAHC is reputed to be one of the few law firms in Mexico that offers first class litigation services, encompassing virtually every aspect of commercial, civil and administrative legal procedures, including domestic and international arbitration, as well as a consulting legal area to prevent risks in matters related to corporate, financial, banking, regulatory, restructurings, real estate, energy and communications, designing and implementing strategies to promptly and efficiently address, mitigate and neutralize risks and crisis.

MBA, established in 2006, is comprised by professionals with high experience and standards in providing quality and personal legal services in general corporate matters, restructurings, financial matters, corporate finance, mergers and acquisitions, joint-ventures, commercial matters, contractual relationships, cross border transactions, real estate, local and cross border trust structures and testamentary successions, as well as regulatory matters.

These combination of practice areas and fields of expertise allow our firms to render enhanced legal advice, a result of the synergy and collective experience of our trial and consultant lawyers that grants our clients a competitive advantage hard to match by any law firm in Mexico.

I. Real Estate General Overview

The real estate business in Mexico has been increasingly growing during the last decades to the point that now it is considered as a serious, viable and promising economic activity among both Mexicans and foreigners. This growth has developed in a more dynamic and secure economic sector in our country. However, in some respects it is still a growing business, in which real estate agents are not yet required to be licensed and real estate professional organizations are not as regulated as in other countries.

Investors now can find a variety of specialized agents and corporations that provide tailor-made services, ideal for foreign investors that seek to buy or sell real estate in the country. These services are highly recommended specially for those not familiar with the local real estate regulations and the Spanish language.

Recently the real estate market in Mexico is booming due to the recent “near shoring” phenomenon (nearshoring can be described as a strategy in which a company moves all or part of its production closer to the final consumer, reducing costs and avoiding logistical setbacks. In the last couple of years, many businesses around the world have started to look at this as an alternative, primarily to avoid supply chain issues) that has surged and has given Mexico a great opportunity to attract foreign investment of facilities that are looking for more secure places to manufacture goods or provide services and be close to the big consumer markets. Being so close to the USA and having a big network of international trade agreements have placed Mexico in such a privilege situation. Qualified labor, competitive salaries and a big real estate market also contributes to Mexico’s benefit.



II. Property Rights in Mexico and Limitations

In Mexico, all property rights come from the State itself, who owns *“the original property of lands and water... and has had and has the right to transfer ownership of property to private persons, thus, transforming it into private property.”*¹ Accordingly, the Mexican Federal Civil Code (*Código Civil Federal*), as well as those Civil Codes of each Mexican State, provide that it is the people’s right to use, enjoy and dispose of their property, under the limitations and modalities established under Mexican law.

There are also other several limitations to the ownership rights of real estate property imposed in the Mexican Constitution, like, for example, the Nation’s direct domain over natural resources such as oil, minerals and underground water, or the expropriation of the land by the State in case of public interest situations pursuant to a prior indemnification.

As a general rule, only Mexican citizens, by birth or naturalization, and Mexican corporations, have the right to acquire real estate property or to obtain concessions from the Mexican State to exploit national natural resources. However, the Mexican Constitution states that the Nation may grant the same rights to foreigners, provided that they agree before the Mexican Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores* or **“SRE”**) to consider themselves as nationals in respect of such acquired property and shall agree not to invoke the protection of their government in respect thereof, under the penalty, in case of failure to honor such commitment, to forfeit such real estate property to the benefit of the Mexican Nation. This covenant or statement is known as the *“Calvo Clause”*.

Another restriction to foreigners imposed in the Mexican Constitution is that they will not be able to directly acquire real estate within 100 kilometers (approximately 62.13 miles) along the borders and 50 kilometer (approximately 31.06 miles) from the coast, referred to in Mexican law as the **“Restricted Zone”** (*zona restringida*). However, pursuant to the Mexican Foreign Investment Law (*Ley de Inversión Extranjera* or **“LIE”**) and its regulations, foreigners may acquire property located in the Restricted Zone for non-residential purposes, in which case, they would require to give a notice to the SRE of such acquisition within the next sixty (60) days following the date of the acquisition. In such cases, as we will further analyze, a foreign-owned Mexican corporation or a Mexican trust must be created to acquire real estate property.

Non-residential purposes pursuant to the regulations of the LIE are considered as those destined to time sharing, industrial, commercial or tourism related activities and generally those used by entities pursuant to their corporate purpose, such as sales or transfers, urbanization, construction or development of real estate projects.

Finally, foreigners may acquire real estate properties outside of the Restricted Zone provided that they must obtain a permit from the SRE for such purposes.

III. Ways of Acquiring and/or to Invest in Real Estate Property in Mexico

After the prospective buyer has find the desired real estate property and its offer has been accepted by the seller, there are several legal vehicles or capacities classically used to own real estate property in Mexico.

¹ Article 27 of the Mexican United States Political Constitution (*Constitución Política de los Estados Unidos Mexicanos*) (the **“Mexican Constitution”**).



An individual may hold title over real estate property in Mexico, directly or indirectly, allowing her/him to use, enjoy and dispose such property, through three different means: (i) as the direct owner, holding a property title under her/his name; (ii) through a Mexican corporation, as a stockholder; or (iii) through a bank trust, as a beneficiary. As a foreigner, the latter two would be the most recommended vehicles to hold title of land in Mexico.

(a) Foreign-Owned Mexican Corporation

A foreign-owned Mexican corporation (a “Mexican Corporation”) is a vehicle frequently used by foreign investors to carry on business in the country and not just to hold title over real estate. As a national, provided that all LIE requirements are met, a Mexican Corporation complies with the Mexican Constitution requisite to hold title over private property. However, it is important to point out that holding title of real estate through a Mexican Corporation must be achieved in accordance with the corporate purpose of the entity.

A Mexican Corporation is typically incorporated before a “public faith officer”, such as *Notarios Públicos* (authorized by local governments) or *Corredores Públicos* (authorized by federal authorities) and requires a minimum of two (2) shares or equity holders since the concept of single-stockholder corporations —with a sole exception²— is not allowed under Mexican law. It will have to carry out the corporate activities of any company, such as annual stakeholders’ meetings, have an active

administrative body, file tax statements, etc. We strongly advise seeking local legal counsel in order to properly incorporate and tailor-make the corporation’s purpose to the specific client’s needs.

The main advantages of holding real estate property through a Mexican Corporation could be, for example, that a national entity, pursuant to applicable immigration requirements, would directly own the real estate, it could allow its stakeholders to live and work in the country and there is no limit as to the number of properties it may own.

While the main disadvantages of a Mexican Corporation could be, for example, the undertaking of the daily corporate activities, including, but not limited to, its management, accounting reports, tax filings, LIE filings regarding its foreign stakeholders, etc.

(b) Mexican Trusts

Mexican trusts are very useful and flexible and therefore widely used by foreigners as a vehicle not only to acquire real estate, but for general business purposes as well. It provides solution to a wide range of personal and commercial needs. Trusts are mainly regulated by the Mexican General Law for Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito* or “LGTOC”).

Pursuant to the LGTOC, a Mexican trust is created pursuant to a commercial contract by which a settlor transfers title and management of certain assets and/or rights

² Simplified stock corporation (*sociedad por acciones simplificada*), which is a recently created type of entity not useful to acquire real estate. It is allowed to be incorporated by an individual single-shareholder (no entities allowed as shareholders). However, this type of entity is not recommended for foreign investment purposes, since its main purpose is to regulate small

businesses. Its shareholders may not have any equity participation in any other Mexican entity that allows them to control such entity and the corporation’s annual total income shall not exceed the equivalent to \$6.8 million Pesos (approximately \$405,000.00 Dollars, as of September 2023).



to a trustee —*generally a bank or any other financial institution authorized to act as such under applicable Law*—, so that the trustee manages such assets under agreed terms, for the benefit of a person —*could be, among others, a Mexican Corporation, a foreign individual or a foreign entity*— appointed as beneficiary thereto.

The bank, as trustee, will be subject to fiduciary duties while representing the settlor's interests in the trust assets. For example, should the trust purchase real estate property, the trustee should only carry out the transaction after verifying that all the title documents, property dimensions and/or any other documentation related to the property, are in order. On the contrary, if the real estate is not in good standing or up to date with the applicable legislation, the bank's fiduciary duties shall prevent the trust acquiring such irregular property.

During the past few decades, it has been very popular among foreign investors to hold property of real estate through a Mexican trust, where the individual investor or a corporation transfers financial resources to the trust and then the trust itself acquires the real estate and holds title thereof. Thus, it can be created to indirectly acquire the property, whereby the real estate is settled in trust, since no real estate rights would be owned directly by the trust beneficiaries, they would only hold trust rights.

The maximum duration of such trust is 50 years, subject to renewal; provided further that, in such cases it is required to obtain a permit from the SRE in order for such trust to own the relevant real estate property in the Restricted Zone. As of today, there have been no amendments to the relevant laws in

order to delete this foreign investment restriction on real estate.

There are great benefits and advantages of holding real estate property through a Mexican trust, for example, the trustee shall be legally responsible for the administrative work and for the conservation and protection of the trust assets —*subject to an annual fee paid to the trustee*—, the investor's heirs can inherit the rights to the trust and some tax advantages, among others. However, trustees often require that the day-to-day administration of the trust property —*the real estate property*— be delegated either to the settlor, a technical committee or a hired administrator through a management or services agreement. Nonetheless, the trustee's fiduciary duties and responsibility cannot be delegated.

(c) Real Estate Investment Trusts

In recent years, Real Estate Investment Trusts (*Fideicomiso de Inversión en Bienes Raíces* or "**FIBRAS**") have also become important investment vehicles for foreigners who seek to invest their capital in Mexico. They are a specific type of trust designed for the real estate business and are regulated by, among others: (i) the LGTOC; (ii) the Mexican Securities Law (*Ley del Mercado de Valores* or "**LMV**"); and (iii) the Mexican Income Tax Law (*Ley del Impuesto sobre la Renta* or "**LISR**"). A FIBRA would be the equivalent to a REIT in the USA.

The Mexican Congress, in order to make more attractive the investment of capital in the real estate market in Mexico, included special tax benefits for FIBRAS in the LISR.

According to the LISR³, in order for a trust to be considered a FIBRA and to have the tax benefits provided by the LISR, it needs to

³ Article 187 of the LISR.



comply, among others, with the following requirements:

- (i) to be executed pursuant to Mexican laws and with a Mexican trustee.
- (ii) to have as its main purpose the acquisition or construction of real estate in Mexico that may be destined for lease, or the right to obtain income from the real estate.
- (iii) that the real estate built or acquired by the FIBRA be destined to lease (or equivalent) and not be sold within a period of 4 years following the date the construction of the real estate was completed or as of the date of the acquisition of the real estate, as applicable.
- (iv) that the trustee of the FIBRA issues trust certificates to represent the assets allocated in the FIBRA so that such certificates may be placed through a public offering in the Mexican Stock Exchange and registered before the National Securities and Intermediaries Registry (*Registro Nacional de Valores*); and
- (v) that the trustee of the FIBRA distributes to the holders of the relevant trust certificates issued through the public offer, at least once a year and no later than March 15th of each year, at least ninety-five percent (95%) of the total taxable income accrued during the immediately preceding fiscal year.

Please be aware that a FIBRA is a way for investors to invest in securities in a stock market of a special vehicle trust backed by leased real estate property but in no way can it be a

vehicle that can be settled by a foreigner to invest, use and enjoy real estate property in Mexico.

IV. Preparatory, Promissory and Purchase Agreements

Once the buyer has decided in what capacity she/he will acquire title over the real estate, whether directly or through a Mexican Corporation or through a Mexican trust, the transfer of ownership will take place through the execution of a definitive agreement.

It is customary and sometimes recommended, before closing of the definitive agreement, to undertake a thorough due diligence and seek proper legal advice before engaging in any transaction.

The following are the agreements typically used to formalize the real estate property acquisition in Mexico:

(a) Preparatory, Promissory Agreement (*contrato de promesa*)

A promissory purchase agreement is a very common way to agree with a seller about the acquisition of a real estate property, without executing at that point the final purchase agreement itself. Through a promissory purchase agreement both parties reciprocally agree or promise, one to sell and the other to purchase real estate property at a stated price, as well as to enter into a definitive purchase agreement within a certain period of time, having agreed upon the essential terms thereof.

This type of agreement is different from a “letter of intent” since, under Mexican law, a promissory agreement is binding on its parties and may be judicially enforced, in order to oblige the promisors to execute the final agreement. Meanwhile, a letter of intent is largely used merely to express a non-binding intention of one party, lacking



the essential terms of the final agreement. It is customary to also have a letter of intent or a signed offer to purchase before the promissory agreement. Letters of intent and promissory agreements do not require more formalities other than to have the signatures of the parties involved.

The promissory purchase agreement, as well as the private purchase agreement —*as analyzed herein after*—, are commonly used as a preparatory agreement providing the parties with an agreed timeframe generally used to finalize the due diligence and draft the final and definitive agreement to be executed at a later date. For instance, before executing the final agreement, the public notary needs to draft the correspondent public deed comprising the definitive agreement, collect data and personal information of the parties and the real estate property, file a preemptive notice and request a lien certificate before the Public Property Registry for priority or preference purposes, calculate taxes, etc.

It is not uncommon to agree therein to a down payment from the promisor buyer, usually held in deposit by the promisor seller. After the agreed period of time, should the promisor buyer fail to buy, at no fault of the promisor seller, then the promisor buyer will forfeit the down payment. On the contrary, failure from the promisor seller to sell would generally trigger an agreed penalty, usually consisting on an amount equal to the down payment,

plus returning the deposit to the promisor buyer. In the case that the promisor seller does not return the down payment and/or pays the agreed penalty, then the promisor buyer will have a strong claim against the promisor seller, in order to judicially demand either the deposit and penalty due or the execution of the final purchase agreement, as some courts may consider some promissory purchase agreements —*pursuant to the provisions therein*— as a definitive private purchase agreement.

Upon the agreed period, the parties shall execute the final purchase agreement before a public notary —*as analyzed herein after*—, pursuant to the essential terms agreed upon on the promissory agreement.

(b) Definitive Purchase Agreement
(*contrato de compraventa*)

Contrary to the promissory agreement⁴, the definitive purchase agreement itself is the final and definitively contract. However, it may be executed either privately, as a preparatory agreement —*needing to later comply with the relevant legal formal requirements*—, or directly through a public deed granted before a notary public. As a general rule, the sale is perfect and obligatory for the parties when they have agreed on the object —*the real estate*— and its price, even if the first has not been delivered nor the second satisfied.⁵

The private purchase agreement, similar to the promissory agreement, is commonly

⁴ However, pursuant to the terms and conditions set forth therein, courts may consider some promissory purchase agreements as final agreements. “*When a promissory purchase agreement contains elements that belong to definitive transactions, such as the way in which the price will be paid, or it is stipulated that the purchased thing is delivered, the promissory purchase agreement is disrupted, because then the consent therein no longer refers to*

granting a future contract, but actually the final contract is being entered into.” Judicial precedent entitled “PURCHASE UNDER APPEARANCE OF PROMISSORY PURCHASE” (“*COMPRAVENTA BAJO ASPECTO DE PROMESA DE VENTA.*”), with registry number 241344.

⁵ Article 2249 of the Mexican Federal Civil Code (*Código Civil Federal*).



used as a preparatory agreement providing the parties and the notary public with an agreed timeframe to prepare the definitive agreement. As mentioned above, before executing the final agreement, preparations need to be made, such as due diligence, drafting of the correspondent public deed, filing a preemptive notice and request a lien certificate before the Public Property Registry for priority or preference purposes, etc.

Pursuant to the legal formal requirements stated on the applicable Civil Codes, a real estate purchase agreement shall be generally executed through a public deed and recorded before the local Public Property Registry, in order to be effective against third parties.⁶

The public notaries will be responsible to ensure the validity and enforcement of the transaction. Prior to closing, they will check for the existence of any debts or liens against the property; that the correspondent taxes and other government fees are paid in full, that the real estate description is correct, and that the seller has the capacity to execute the transaction. In addition, they will take care of the tax matters of the transaction, for instance, that the property taxes, transfer fees/taxes and any capital gains taxes are paid at or prior to closing. They are also responsible to properly record the transaction before the local Public Property Registry.

After closing, the notary public will be responsible to provide each party with a certified copy of the property title, duly registered before the relevant authorities.

V. Closing and Ongoing Costs

(a) Closing costs

For guidance purposes only, the following are the expenses that a buyer typically needs to take into consideration when acquiring real estate in Mexico, subject to different local requirements that each City or State may have in the correspondent local regulation:

- (i) In case of a Mexican Corporation, incorporation costs such as notary public fees and registration fees — *regulated locally in each State*—;
- (ii) In case of a Mexican trust, notary public fees and registration fees — *regulated locally in each State*—, as well as applicable trustee's fees;
- (iii) Real estate appraisal;
- (iv) Notice to SRE, if applicable;
- (v) Tax or services certificates, evidencing that no government fees or taxes are outstanding;
- (vi) Taxes, whether local or federal, if applicable, such as income tax —*for the seller*—, acquisition of real estate tax, value added tax, etc.; and
- (vii) Notary fees and filing fees, such as, preemptive notices, certificate of encumbrances, registration of the change of title thereof, expedition of public deeds, etc.

(b) Ongoing costs

For guidance purposes only, the following are the ongoing expenses that a real estate owner, direct or indirect, typically needs to take into consideration in Mexico, subject

⁶ Articles 2316 to 2322 of the Mexican Federal Civil Code (*Código Civil Federal*).



to different local requirements that each City or State may have in the correspondent local regulation:

- (i) In case of a Mexican Corporation, issuance of annual financial statements and filing fees before the Public Commercial Registry in case of Stakeholders Meetings minutes required to be recorded therein, for example, amendments to by-laws, transformation, mergers, spin-offs, dissolution, liquidation and, optionally, the powers of attorney granted by the corporation⁷;
- (ii) In case of a regular Mexican trust, formalization and trustee's annual fees;
- (iii) Annual property taxes, like real estate tax (*impuesto predial*); and
- (iv) Payment of services, such as water, electricity and gas supply, among others.

Disclaimer

This note is for general guidance only. Specific legal advice should be obtained in all cases.

"Martinez, Algaba, De Haro y Curiel, S.C." and "Martínez Berlanga Abogados, S.C." accept no liability for anything contained in this brochure or for any reader who relies on its content. Before concrete actions or decisions are taken by you or your business, you should seek specific legal advice.

We remain at your disposal in relation to questions regarding this note and in relation to your business and look forward to assisting you.

⁷ Articles 19 and 21 subsection VII of the Mexican Commercial Code (*Código de Comercio*).

This paper was prepared by the law firms "Martínez, Algaba, de Haro y Curiel, S.C." and by "Martínez Berlanga Abogados, S.C." Copyrights pending. September 2023.