Global Corporate Real Estate Guide - Mexico

Real Estate Law

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# What is included in the term “real estate”?

The term “real estate” is generally defined as follows:

Land

All fixtures adhered to the land

Any type of personal and real right to the land such as the right of use or the lifetime usufruct

All infrastructure built over and under the land

All fruit, vegetation and products generated from the land

Any construction built on the land

Land itself in Mexico is classified into two categories: “private” property and “public” property. Private property can be “private” or “social” property. Under the category of social property, there is “Ejido” property and “communal” property.

Private property is owned by individuals or legal entities for their exploitation and use as they may deem convenient.

Ejido property

Ejido property is land granted by the Mexican government to a group of individuals for agricultural and ranching purposes. Ejidos are structured as communities or townships. They have internal administration and surveillance boards, respectively known as the Ejido board (Comisariado Ejidal) and the surveillance committee (Comite de Vigilancia). Ejido property may exist either for the exclusive use of an individual beneficiary (Ejidatario) in the form of “Ejido individual parcels” or for the common benefit of the Ejido community in the form of “Ejido community parcels.”

Communal property

Communal property is land that belongs to the community for its common use and enjoyment.

Except for certain specific cases, Ejido and communal properties are inalienable and not subject to liens or attachments. Both Ejido and communal property require registration with the National Agrarian Registry. This kind of property can be disincorporated from its regime and converted into private property; however, this involves a complex and formal legal procedure. In the event of disincorporation from the Ejido and communal regime, the land would be registered before the Public Registry of Property in the appropriate jurisdiction and subject to civil law provisions.

If a property is disincorporated from an Ejido or communal regime, all the members of the Ejido or community will have a right of first refusal to acquire the disincorporated property, when the owners decide to make the first sale after the disincorporation.

Public property

Public property is the land that belongs to the nation, also known as national property. The national property is property that (i) has not been acquired as private property, (ii) has not been granted by the Mexican government to an Ejido or community, or (iii) is under a federal regime, such as the federal zone, water bodies or federal communication routes.

# What laws govern real estate transactions?

The Mexican legal system is a civil code-based system. A real estate transaction is generally governed by the local civil code and other local laws of the jurisdiction where the property is located.

Real estate transactions in Mexico are subject primarily to civil law as opposed to commercial law, to which they may be subject when the main corporate purpose of the parties involved in a given transaction is to commercialize real estate. Civil law is within the jurisdiction of the states; commercial law falls under federal jurisdiction, governed primarily by the Federal Code of Commerce. There is substantial uniformity among the different civil codes and related statutes of the states.

# What is the land registration system?

Conveyances of title are executed by the parties before a notary public. The civil law notary, as a licensed attorney, has the duty of verifying that: (i) proper title is being conveyed; (ii) the respective no-liens certificate and no property tax debt certificate have been obtained; (iii) a property tax appraisal is done; (iv) the real estate transfer tax is paid; (v) the description of metes and bounds of the property has been properly transcribed in the corresponding background section of the public instrument that contains the title deed (Escritura Pública) whereby title to a property is conveyed; and (vi) all obligations are complied with and information delivered, with respect to anti-money laundering provisions in Mexico. All real estate transactions must be recorded before the Public Registry of Property in the appropriate jurisdiction. Although recording the instrument issued by the notary public containing the corresponding real estate contract is not the operative formality that creates the rights and obligations between the parties, its declaratory effects are necessary for it to be effective vis-à-vis third parties.

# Which authority manages the registration of titles?

Title registration is managed by the Public Registry of Property with jurisdiction over the area in which the property is located. This registry is the administrative entity in charge of maintaining the official records of the legal status of title of real estate. The registry’s records would reveal limitations of domain or use burdening the property such as easements, long-term leases, purchase options, promise agreements and liens or encumbrances.

# What rights over real property are required to be registered?

Any legal acts creating or evidencing an interest in real estate are generally considered as recordable instruments, including the following:

Title transfers

Mortgages

Easements

Restrictive covenants

Leases (only under certain circumstances, such as (i) if their term or duration exceeds a certain period, generally six years, or (ii) if a tenant pays rent in advance for a certain period, generally for more than three years)

Co-ownership agreements

Options to purchase

Promise agreements (to purchase and/or sale)

Condominium regimes

Trust agreements whereby a Mexican bank trustee holds direct title to real estate

# What documents can landowners use to prove ownership over real property?

Landownership is evidenced by providing the title deed (Escritura Pública) recorded with the Public Registry of Property regarding private property and a parcel rights certificate recorded with the Agrarian Registry regarding Ejido or communal land.

# Can a title search be conducted online?

Yes, in certain Public Registry of Property offices. However, not all Public Registry of Property offices in Mexico have the infrastructure to conduct online title searches.

# Can foreigners own real property? Are there nationality restrictions on land ownership?

Pursuant to the Mexican Constitution and the Foreign Investment Law, to acquire ownership of a real property in Mexican territory it is necessary to consider (i) the place where the property is located, (ii) whether the property will be used for residential purposes and (iii) the nature and nationality of the acquirer.

Regarding consideration (i), the Mexican Constitution divides the national territory into two major areas, each with different requirements for nationals and foreigners to acquire ownership, or the use and enjoyment of real property. Such areas are (a) real estate lying within 50 kilometers of the coastline or within 100 kilometers of the land borders (“**Restricted Zone**”), which encompasses approximately 40% of the land in Mexico, and (b) any land or property located outside the Restricted Zone.

Regarding consideration (ii), for acquiring real estate, it is also important to determine if the property will be acquired for residential purposes, whereby a “residential purpose” is defined as intended exclusively for housing for the use of the owner or third parties, or for any other nature, such as agricultural, commercial, industrial, etc.

Finally, and in addition to the location and purpose of the property, Mexican law provides different mechanisms for acquiring real estate in Mexico for (a) Mexican companies with foreign investment or (b) foreign nationals or entities.

Based on the foregoing considerations, foreigners can acquire real properties in Mexico subject to the following requirements:

Mexican companies with foreign investment can acquire ownership of real properties located outside the Restricted Zone, solely if the bylaws of the company contain a provision that in Mexico is known as the “Calvo Clause”. This is an agreement and representation where a foreign national must agree not to seek the protection of their government, otherwise they will forego their rights over the property acquired for the benefit of the Mexican state.

Mexican companies with foreign investment can acquire direct ownership of real properties located within the Restricted Zone, solely when acquired for nonresidential purposes. In this event, the company must file a notice before the Ministry of Foreign Affairs (SRE) within 60 business days after finalizing the acquisition.

Mexican companies with foreign investment cannot acquire direct ownership of real properties located within the Restricted Zone for residential purposes. However, they can acquire indirect ownership, use and enjoyment by means of a real estate trust approved by SRE with local banking institutions acting as trustee.

A foreign national or entity can acquire direct ownership of real properties located outside the Restricted Zone, subject to (1) filing a request before SRE committing to accept the terms of the Calvo Clause and (2) securing a permit from SRE for the acquisition.

A foreign national or entity cannot acquire direct ownership of real properties located within the Restricted Zone. However, they can acquire indirect ownership, use and enjoyment by means of a real estate trust approved by SRE with local banking institutions acting as trustees.

Pursuant to the Mexican Constitution, the state has direct title with respect to minerals, water and hydrocarbon resources that exist below the land’s surface. The exploitation of mineral and water deposits, excluding hydrocarbon fuels, may be carried out by private parties through a concession from the federal government. Concession rights on minerals are recorded in the Public Registry of Mining, while water rights are registered with the National Water Commission (CONAGUA).

Mexican law permits the acquisition of mining and water concession rights by foreign individuals outside of the Restricted Zone under certain conditions. Individuals may acquire direct title over mining and water concession rights by obtaining a special permit from the SRE and by agreeing to the Calvo Clause.

# Can the government expropriate real property?

Yes. Real property can be expropriated by the government if due compensation is paid to the owner.

In addition, pursuant to the Hydrocarbons Law, exploration and production of petroleum (upstream activities) are considered to be of social and public interest, hence, they should prevail over any other activity implying the exploitation of the surface or subsoil of lands affected by the same.

In connection with that and pursuant to the terms of the Hydrocarbons Law and its regulations, for petroleum exploration and production activities, the terms, conditions and the consideration for the use, enjoyment or encumbrance of lands, property or rights necessary to perform such activities must be negotiated by the contractors or entitlement holders (“**Interested Party**”) with the owner of the land, or with the holders of the rights or assets (“**Owner**”). The negotiation will be carried out considering the following process:

The Interested Party will express in writing its interest in using or acquiring the property, land or right to the Owner (“**Expression of Interest**”).

The Interested Party must describe the project that it intends to develop under the corresponding entitlement or exploration and production contract.

The Interested Party must notify the Ministry of Energy (SENER) and the Ministry of Agrarian, Territorial and Urban Development (SEDATU) of the negotiations with the Owner.

The Interested Party may occupy the Owner’s property through a lease, easement, superficial or temporary occupation, sale or any other suitable contract for the development of the project, if it does not contravene the applicable legislation.

The consideration payable to the Owner should cover: (i) the payment for affecting property or rights, as well as the possible damages and lost profits arising from the performance of upstream operations; (ii) the rent regarding the occupation, easements or the use of the land; and (iii) in case of extraction of petroleum projects, a percentage of the revenue of the Interested Party in the project. In such case, SENER, assisted by the National Hydrocarbons Commission, will establish the methodology, guidelines and parameters for the determination of such percentage. The consideration may be paid in cash.

The consideration, and the other terms and conditions for the occupation of property or affecting goods or rights, should be determined through a contract in writing, pursuant to the model contracts issued by SENER considering the opinion of SEDATU.

Furthermore, if the land, assets and rights are comprised within any of the regimes of the Agrarian Law, the provisions of such law will also apply.

The contract reached between the Interested Party and the Owner should be submitted before a civil district judge or before a unitary agrarian court (jointly, “**Courts**”), to have full validity by considering it res judicata. The Courts will validate whether the contract complied with the requirements provided by the applicable regulations.

If the parties do not reach a contract after 180 calendar days as of the date of receiving the Expression of Interest, the Interested Party may file before any of the Courts a request for the creation of a legal petroleum easement, which will comprise the right for individuals to transit and the right of transportation and conduction and storage of materials of any kind. On the other hand, the Interested Party may also request before SEDATU a mediation that should deal with the forms or models of acquisition, occupation, enjoyment or encumbrance of the lands, property or rights as well as the relevant consideration.

# How can real estate be held?

Generally, an ownership interest is held by any of the following means:

Fee simple conveyance

Conveyances with retention of domain

Trusts

Co-ownership

Condominium regime

# What are the usual structures used in investing in real estate?

The usual structures used in investing in real estate are the following:

Corporations

Co-ownerships

Trusts

# How are real estate transactions usually funded?

Real estate transactions are usually funded by institutional lenders such as banks, nonbank banks and investment funds. Interest rates are based on the rate published by the central bank. A borrower typically pays for all costs, including the lender’s costs.

A lender usually asks for collateral security in real property and related assets. The formalities to create and perfect a lien depend on the type of goods or assets to be encumbered. Certain liens, including without limitation mortgages over real property, require to be recorded with the applicable Public Registry.

The following are the most common collaterals:

Mortgage or guarantee trust over a real property

Stock pledge on the project entities

Floating pledge over inventory

Pledge without transfer of possession over non-fixed assets

Personal/corporate guarantee granted by the holding entity or the majority stockholder

# Who usually produces the documentation in real estate transactions?

Generally, the purchaser’s attorney will prepare the initial draft of the purchase agreement along with the acting notary public.

# Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Other than environmental liabilities, hidden or apparent defects, real estate taxes or liability for lack of governmental permits, an owner or occupier would generally not inherit liability for matters relating to the real estate even if they occurred before the real estate was acquired or occupied. An owner or occupier may also be subject to the loss of rights on real property, if the owner or occupier, or the prior owner or occupier, obtained it illegally, or generally if the real property was used to commit illegal activities, directly or indirectly.

# Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Yes, a seller or occupier would in certain scenarios retain environmental liabilities, responsibility for hidden and apparent defects, past due taxes and for indemnifying the buyer for the case of eviction, i.e., when a third party’s prior and better right is recognized by a Mexican court adversely affecting the buyer.

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