"WHEN DOES REAL ESTATE CLOSE IN MEXICO?"

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The obvious would seem apparent. Real estate deals in Mexico close when the deed of conveyance is executed by the buyer and seller, money changes hands between the parties and the deed is then recorded in the public records. Simple and logical, just like here in the United States. Only it isn't that simple in Mexico.

For more than the past decade, an attitude and transactional manner has pervaded Mexico's residential beach market. In this writer's opinion, it is an alarming methodology, non-standard by U.S. expectations and one that puts foreign buyers at risk when purchasing residences in the "restricted zone" of Mexico. Amazingly, the comment given to Americans desiring to buy in Mexico is, "That's the way we do business here." Let's elaborate on what is so amazing and at the same time so alarming.

The following scenario is typical regardless of the geographic locale and doesn't seem to vary much between Los Cabos, Puerto Vallarta, Puerto Peñasco or the Cancun corridor. Foreign buyers, who more often are American (though many Canadians are also acquiring Mexican real estate), identify a house, condo, villa or lot on the beach they want to buy. Usually they employ the services of a local real estate agent in that market who informs them that in order to proceed to a contract, an initial deposit is required. The deposit may range from $1,000 to $5,000 and the check is written to the agent or to the seller. Generally, the deposit is not tied to an escrow agreement with a third party acting as the escrow agent, and commonly it goes directly into the bank account of the agent. The buyer is told that the deposit is required just to get the process started and more times than not, the deposit will become non-refundable. Keep in mind, buying public, once you write the check and hand it over in Mexico, how are you going to get it back *without* an escrow agreement.

Now we proceed to the letter of intent or the contract stage. The customary process in Mexico ultimately leads to an arrangement between the parties known as a "promise to trust agreement", though there may be other proposals or simple contracts prior to this final document. Upon execution of the promise to trust between the parties, the buyer is invariably required to pay the seller **100 percent** of the agreed purchase price. Since the seller has agreed to convey the property and authorize the Mexican bank acting as trustee for the *fideicomiso* (bank trust) to transfer the beneficiary interest to the new purchaser, he is therefore entitled to **all of his money!** Real estate agents in Mexico will tell foreign purchasers the "closing" of the transaction occurs when the promise to trust agreement is signed. *Caveat emptor*, buying public, *nothing has closed!* Understand what has transpired and what has not in order to have a legal and protocolized beneficiary interest established on the real property under Mexican foreign investment law.

- You, the buyer, have given the seller all of the money contemplated in the transaction and yet you do not have a trust permit required by Mexican law to be issued by the Ministry of Foreign Affairs in order to establish your beneficiary interest.
- You do not have the *escritura publica* (public deed) prepared by the public notary in Mexico. The notary must be authorized by the trust bank to proceed with the transfer of the beneficiary interest via the public deed and which he must draft to effect the transfer.

- There is no property appraisal prepared, yet that is a requirement under Mexican federal statutes for tax purposes in order for the *fideicomiso* to be established.
- There is no lien certificate from the public registry that would indicate any liens or encumbrances on the property and is a required element of any real property conveyance.
- Heck, you, the buyer, really don't even know if the seller has good title to the real estate in question. Why? Because you have never been presented with a copy of the deed that vests the title to the seller. The public notary, at this point, has yet to begin his required title search of the property. You have received verbal assurances from the seller and the agent that there are "no problems" with the title.

It would be this writer's opinion that the reason for this onerous process is twofold. The sale of real property between Mexican nationals is a fairly simple and expeditious transaction via a *compra-venta*. They are not concerned nor do they have to be with Mexico's foreign investment laws. This is not the case, however, when they sell to Americans or Canadians in the restricted zone. Their attitude is, "Why should I wait for my money just because you have to get a bank trust. That's your problem, just pay me." Secondly, this attitude has been pervasive because ***some, not all,*** real estate agents push it and expect it. If the seller receives all of his money, the agent gets paid his commission. Why should the agent be concerned with whether the buyer gets his *fideicomiso* established once he has received the fee due from the seller? Besides, many agents will tell purchasers nothing can or will go wrong, and that is a fallacy. What if the seller dies before the conveyance? What if there are title defects or undisclosed lawsuits, maritime matters or lien issues? What if an agent, who receives the money via a deposit, doesn't give the seller all that he expects? Then who will execute the deed? What if there are unexpected problems with obtaining trust permit or *notario* problems? Or what if the seller has sold the property twice, unknown to you or the agent? The simple truth is you have given the seller your money with little or no chance to get it back other than a lawsuit in Mexico.

In every real estate deal, buyers have choices. There are many properties for sale in Mexico. Buyers need to be smart and educated about the deal, deposits, title and conveyance matters. Many real estate developers sell their property with a percentage down at the time of the promise to trust agreement, with the balance paid when the public deed can be executed to establish the trust. Many developers, and more and more real estate agents, are utilizing third party escrows in the U.S. to protect foreign buyers. Full disclosure of potential issues is becoming more prevalent. Any property in Mexico can be researched and a title investigation can be done in order to issue an Owner's Policy of Title Insurance. Purchasers can be insured when they release their money to the seller upon execution of the *escritura publica* and the issuance of the *notario's* preventive notice to the public registry of property. At the end of the day, foreign buyers have a right to a transaction process that ultimately protects their investment and minimizes their risk. Those who participate in the sale of real estate in Mexico must strive to protect that which "feeds and prospers them." When they don't, purchasers should walk away and buy elsewhere.

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