

SEMINAR ON THE LAW OF REAL PROPERTY ACQUISITION IN MEXICO

Introduction

"To know a science is to know its terminology" was a favorite phrase of a former professor of mine who was much too fond of blunt and easy generalizations. Of course, to know a science a great deal more than its terminology must be known, but an understanding of basic terms and concepts is nonetheless very helpful in beginning any study. In co-sponsoring the joint seminar of the Arizona and Sonora Bars, at the University of Hermosillo on April 10-12, 1970, the purpose of the University of Arizona College of Law was to reach such an understanding of the Mexican law of real estate and mining transactions.

Hopefully, this seminar, the first of its kind to be sponsored by these institutions, will be followed by similar attempts involving areas of United States law of interest to Mexican practitioners and scholars. The reciprocal exposure to the operation of institutions in a problem oriented context should eventually lead to the most socially significant of comparative inquiries: The manner in which a particular institution performs in response to the goals, demands, aspirations and expectations of different societies.

The United States participants in the Hermosillo seminar included practicing lawyers, judges, real estate brokers, bankers, investors, mining engineers, law students and law professors. Because of these diverse backgrounds, the treatment in the lecture periods was very elementary. It was assumed that the audience had no previous exposure to Mexican law. Consequently, each term, concept or institution was treated as new, regardless of apparent similarities with American law. The reader, therefore, should not expect to find exhaustive discourses.

The seminar consisted of three lectures, each followed by discussion periods. The first lecture by Lic. Gilberto Gutierrez was designed to provide an overview of Mexican constitutional and statutory restrictions on real estate transactions by foreigners.¹ It also describes briefly some of the basic Mexican legal institutions such as the sources of law, court structure, basic public and private law remedies especially in relation to real estate acquisitions, the roles of notaries public and other relevant institutions not discussed in other lectures. The Gutierrez lecture was followed by a panel discussion and a question and answer period which were devoted to the various methods by which a foreigner may acquire real estate in Mexico. In this section the questions lead to a somewhat

¹ Gutiérrez, *Investment in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, *infra* at 270.

detailed discussion of how foreigners actually acquire the use of real property in Mexico today.

The second lecture by Lic. Octavio Rivera was devoted to real estate secured financing in Mexico.² The lecture provides a basic description of the various types of secured financing, including an elementary catalogue of parties' rights and duties. In the edited version of Mr. Rivera's lecture, coverage of the land registry was deleted in light of the more extensive treatment given to this topic in the article by this writer.³

Although my article was written after the seminar, some of the materials which were distributed in the discussion period following the Rivera lecture were utilized. Unlike the purpose of these materials which was to outline without evaluating the operation of the Mexican land registry, my article attempts to evaluate critically the present direction of Mexican land registry law, with particular emphasis placed upon recent decisions by the Mexican Supreme Court. In light of the organic connection between secured real estate transactions and the land registry, the article by Rivera and my article which includes an appendix of Mexican case law, should be read jointly.

The lecture by Lic. Gustavo J. Perez on the mining law and regulations summarizes a most complex and lengthy set of statutory materials, providing whenever possible some indications of current practices.⁴ As with the preceding topics a panel discussion and question and answer period followed the lecture.

These materials are followed by a select bilingual bibliography on the seminar topics prepared by Dr. Eugenio L. Revilla, the University of Arizona, College of Law, Foreign Law Librarian.⁵

The painstaking task of transcribing and editing the question and answer periods has been felt justified for two reasons. In the first place there is a good deal of information provided during these sessions by a most qualified group of Mexican experts that could not be incorporated into the texts of the lectures without very substantial modification of their coverage.⁶ The answers given by these men in areas where there was very

² Rivera, *An Introduction to Secured Real Estate Transactions in Mexico*, *infra* at 290.

³ Kozolchyk, *The Mexican Land Registry: A Critical Evaluation*, *infra* at 308.

⁴ Perez, *The Mexican Mining Concession—Its Features, Regulation and Practice*, *infra* at 356.

⁵ Revilla, *A Select Bibliography on Mexican Real Property Law*, *infra* at 374.

⁶ Participants in the panels included Lic. Eduardo Estrella, President of the Sonora Bar; Lic. Francisco Acuña, Vice-President of the Sonora Bar; Lic. Carlos Cabrera, Dean of the University of Sonora College of Law; Philip A. Robbins, Chairman, and Armando de Leon, Program Co-ordinator of the Latin American Law Committee of the State Bar of Arizona; Lic. Erasmo Lozano, Cananea, Sonora attorney; Mitchell New Delman, International Counsel for Motorola in Phoenix, Arizona; Professor August G. Eckhardt of the University of Wisconsin College of Law; Lic. Octavio Rivera, Mazatlan, Sinaloa attorney; and Lic. Gustavo Perez, Mexico City attorney. I acted as moderator and translator for the panel sessions.

little, if any, judicial or administrative decisional law were thus significant in themselves. Secondly, the panelists' approach to foreign property acquisition and the related law occasionally reveal a distinctive method of decision-making. This is an important datum in the understanding of certain legal-cultural institutions.

In Lics. Lozano's and Rivera's discussion of foreign acquisition of land within the forbidden zone, for example, the answers reveal the extent to which certain methods would be prohibited as subterfuges and others approved as legitimate transactions, despite their apparently uniform purpose which is the beneficial use of the land. The form a transaction takes is as important as its ultimate purpose in this area of Mexican law. Certain transactions are illegal *per se* if they allow a foreigner to gain control of property. To the uninitiated, therefore, the restrictions in this area of the law seemingly may be circumvented by the simple expedient of simulating a valid intent, *i.e.*, purporting to engage in a valid transaction while in effect engaging in an invalid one. In a certain sense, this is true.

What is not as apparent is that there is room for "good" and "bad" simulations, as there is indeed also room for avoidance and evasion in United States tax law. In other words, parties may be allowed to take advantage of what appears to be a loophole, but the reason is not official neglect or unintentional oversight but rather a deliberate policy of permissiveness within certain limits. If these limits are transgressed the simulation will be regarded as illegal and the consequences of the illegality will follow.

There is a telling contrast with the answers provided by Lic. Perez's discussion of mining law where there is much less room for simulation. One is tempted to speculate on the economic reasons behind the differences in legal policy in the two areas. With regard to real property acquisitions, foreigners still are allowed much greater freedom of maneuver because the resources that they usually seek to enjoy are those for which the Mexican legislature has found no better use. No independent economic value is likely to be attributed to unimproved and otherwise barren land.

Once the soil proves to be rich in minerals, however, a different rationale prevails. The overriding concern then becomes the implementation of the most efficient means of exploiting a depleting resource, considering first the benefit of the nation and only secondly that of the concessionaire. This is the reason for the casuistic nature of the mining law and for the futility of simulation under it. The possible loss of the subsidization benefits by non-compliance with the "Mexicanization" provisions of the law is so significant that foreign control cannot be risked. Strict compliance is thus encouraged through a system of highly attractive fiscal incentives and costly disincentives.

In concluding this introduction I would like to express my appreciation to Messrs. Ted J. Thayer and Kenneth R. Reed of the Editorial Board of

the *Arizona Law Review* for their very fine help and cooperation in the preparation of manuscripts, and to Mr. Ted Borek, a staff writer, for his research assistance. Mmes. Mary Mazon and Kay Clark deserve our gratitude for their work in connection with the transcription and typing of the seminar materials. Finally, I would like to thank Dr. Eugenio L. Revilla, the University of Arizona College of Law Foreign Law Librarian for his most valuable contribution to the footnoting and documentation of the seminar papers.

It is the hope of the University of Arizona College of Law that by compiling the materials of this seminar a modest contribution can be made to what should be a continuing dialogue between friendly neighbors and vital legal cultures.

*Boris Kozolchyk**

Geography and history have made the United States and Mexico neighbors. Throughout our relations, we have always had our differences, and our common concerns as well. Both are still with us and if we take advantage of them, we shall find that there is nothing to prevent us from having even closer bonds of friendship and cooperation, especially if we attain a level of mutual trust and respect for our respective institutions. Our relationship should not be based upon political generalities but must recognize the cultural, legal and economic facts which affect the existence of both nations.

Our proximity and our mutual desire for progress foretell a strong and lasting relationship. These same factors, however, also place a heavy responsibility on the members of each country's legal profession since it is our profession that must lead in the design and implementation of the policies and programs for true inter-American cooperation.

Events such as this successful seminar are vivid illustrations of what we can gain from even more exchanges between citizens of our countries. I see in this seminar a common purpose: to understand each other better and to be better friends. Please be assured that ours is a most open and sincere attitude.

*Eduardo Estrella Acedo***

We are pleased to present the proceedings of the Seminar and Workshop on the Mexican Law of Real Property held under the spon-

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sorship of the Latin American Law Committee of the State Bar of Arizona, the State Bar of Sonora and the Colleges of Law of the University of Arizona and the University of Sonora. In addition to the material presented at the seminar, this publication includes supplemental materials designed to provide answers to many of the questions raised by participants in the seminar.

In conducting this seminar, we hoped to provide basic information on Mexican real property law not only to attorneys but also to bankers, businessmen and real estate investors interested in Mexico. The seminar was not intended to create experts in Mexican law, but merely to convey basic information and the problems that are likely to arise in real estate transactions in Mexico.

We hope that this seminar, and others like it in the future, will provide greater opportunity for the members of the Arizona and Sonora Bars to work together to find solutions to the types of problems discussed during these meetings.

The combined efforts of the speakers and panelists as well as the members of the *Arizona Law Review* and the faculty of the University of Arizona College of Law have made possible the publication of this document. It should become a valuable reference for persons interested in the increasingly vital subject of Mexican real estate transactions. Our special thanks go to our good friends of the Sonora Bar Association and the University of Sonora for their hospitality and help in making the seminar a success. We look forward to further opportunities for working with them in future endeavors of a common interest.

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