

INVESTMENT IN REAL PROPERTY IN MEXICO: AN OVERVIEW OF CONSTITUTIONAL AND STATUTORY RESTRICTIONS*

GILBERTO GUTIERREZ QUIROZ**

You are in a different country. You are our guests, and we are very pleased with your desire to learn about us and about our laws. Some of our laws are similar to yours, while others are quite different. Many of our rules may be incomprehensible to you because of our history and experiences.

BACKGROUND OF THE MEXICAN NATION

The history of our nation truly begins in the 16th century with the fusion of the Spanish and Indian cultures. Language, religion, customs and laws were in a process of amalgamation. During the almost 300 years of Spanish domination, there was very little social or economic progress and the main interest of the colonizers was to send gold and silver to Spain.

With the 19th century begins the epoch of independent Mexico. Sometimes I think that our progress would have paralleled that of the United States if the men who brought about our independence had survived the fight for independence. Mexico would not have lost so many years trying to find herself. From 1810 to 1820, there was the fight for independence. In 1824, we initiated our Middle Ages, our dark epoch, presided over by Antonio Lopez de Santa Ana and marked by war with the United States in which we lost half of our territory.

[T]he Mexican war formally ended on February 2, 1848, with the Treaty of Guadalupe Hidalgo. The indisputable loss of Texas alone would have shaken Mexican pride. Imagine their shock when they discovered that not only Texas had been signed away but also the territory now comprising California, Nevada, Utah, part of Colorado, New Mexico, and Arizona as well. All in all, Mexico lost half of her national territory, receiving in return little more than a paltry fifteen million dollars. Who can deny that Mexico paid dearly for losing a couple of battles to a few soldiers from her supposedly friendly neighbor 'who unfairly invaded Mexico'?¹

Thereafter came the Mexican Renaissance, with the Reform Laws and the matchless figure of Benito Juarez. Juarez tried to strengthen the

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** Attorney, Hermosillo, Sonora.

¹ F. BRANDENBURG, *THE MAKING OF MODERN MEXICO* 36 (1964).

nation, but the conflict with the French Emperor Maximilian and the expansionist interests of the United States were difficult obstacles to overcome. Social and economic development was again delayed.

After the restoration of the Republic came Porfirio Diaz and a long period of tyrannical government, much of it in the service of foreign interests.² There was little development of agriculture, cattle breeding or industry during this time. Diaz's dictatorship finally triggered the Revolution of 1910, which was followed by a seemingly endless number of internal fights between the revolutionary generals and chieftains.³ These bloody fights ended with the formation of a political party uniting the revolutionary leaders. Thus, the real epoch of peace, political stability and progress in Mexico started just about 40 years ago. The 120 years from 1810 to 1930 were lost looking for the awakening of Mexico.

This history of violence and foreign exploitation is reflected in the laws and in the behavior of the Mexican government and people. In his book, *How to Invest and Live in Mexico*, Daniel James describes these attitudes:

Asked what he thought was the biggest problem in the way of Americans getting along with Mexicans, U.S. Ambassador to Mexico Robert C. Hill answered the author in a word:

'Trust.'

The Mexican fears and mistrusts the *gringo*—the term by which the American is familiarly known, and which can carry an unfriendly tone, in Mexico and other Latin American countries. Long generations of close contact with Americans have convinced the Mexicans that most gringos are out to rob them, and that in the final analysis it is their aim to dominate Mexico and in effect make it their 51st state.

This conviction, which practically every Mexican is born with, has some basis in history. Few literate Mexicans forget, for example, that from 1836 to 1848 the United States annexed by war and intrigue considerably more than half of Mexico's national territory. A great many others recall that only fifty years ago Americans owned nearly half the total wealth of

² From 1876 until 1910 Mexico was under the control of Porfirio Diaz during one of the longest dictatorships in the history of the modern world. During this time . . . the dominant economic [and to a considerable extent political] control was American Toward the end of the Diaz period approximately 60,000 Americans were residing in Mexico. This figure is quite revealing when it is considered that, at present, it is calculated that 50,000 Americans reside permanently in Mexico. . . . American investment at that time is estimated to have been approximately \$1.25 billion, calculated in terms of present day values. The present investment in Mexico is . . . approximately \$1 billion. At the end of the Diaz regime three-fourths of the mines, one-half of the oil and approximately one-fourth of the land of Mexico were in American hands. S. Adler, *Legal Aspects of Limitations on Foreign Participation in Mexican Companies* 9, June, 1962 (unpublished thesis submitted to Professor Boris Kozolchuk at Southern Methodist University) (copy on file at the University of Arizona College of Law).

³ See generally J. TURNER, *BARBAROUS MEXICO* (1969).

Mexico and almost as much as the entire Mexican people themselves. And a still greater number, probably a big majority, remember that only twenty years ago a group of American oil companies clashed with the Mexican Government over the root question of whether they or the Government would rule Mexico.⁴

THE MEXICAN LEGAL SYSTEM

Our basic legal system has been shaped by various social movements. It is true, on the one hand, that our constitutional system has some antecedents in the Constitution of the United States and that our system of private law is largely derived from the Continental European system, with predominant French, Spanish and Italian influences. On the other hand, our own struggles, aspirations and sobering experiences, derived from a long revolutionary process, have also been crucial in determining the characteristics of our laws.

Our legal system is based upon written law, and it upholds the principle of equality before the law, predictability of rules and prevalence of the interests of society over those of the individual.⁵ As in most civil law countries, the primary source of the law is found in the constitution.⁶ Subordinated to constitutional rules, but outranking any other source of law, is statutory law. Since Mexico is a federal republic, there are two systems of law. State law deals with criminal and most civil matters, while federal law embraces areas such as commercial transactions, labor law and mining law.

The Mexican judicial system also differs significantly from that in the United States:

The federal judiciary is composed of a number of federal district courts, circuit courts of appeal, and the Supreme Court. There are 46 single-judge district courts (*juzgados de distrito*) who decide civil, criminal, administrative, and labor cases. They also decide appeals from the Federal Fiscal Court in *amparo* proceedings. The circuit courts (*tribunales de circuito*), which exist both in the form of single-judge and collegiate courts, hear appeals from the district courts and settle jurisdictional disputes between district judges except in *amparo* cases. Both district and circuit judges are appointed by the Supreme Court of Mexico, and they are subject to assignment, transfer, and supervision by that Court. Their original term of appointment is for four year; after this their appointment is without time limitation during good behavior. The Supreme Court (*Su-*

⁴ D. JAMES, HOW TO INVEST AND LIVE IN MEXICO 10 (1960).

⁵ The current Mexican Constitution was promulgated in 1917. An English translation may be found in PAN AMERICAN UNION, CONSTITUTION OF MEXICO, 1917 (1968).

⁶ CONSTITUCIÓN arts. 71-72, 89, § 1, 92; CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts. 3, 4, 12, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO CIVIL 42-43 (Porrúa 25th ed. 1970). Hereinafter, all citations to the *Código Civil* will be to the particular article followed by the page on which it may be found in *Leyes y Códigos de México*.

prema Corte de Justicia de la Nación) consists of 21 judges and is divided into four divisions of five members each; the jurisdiction of each division is determined by the particular types of cases.⁷

Unlike the Anglo-American legal system, decisional law is not a formal source of law in Mexico. It may, however, be binding upon lower courts, if a particular rule is repeated five consecutive times by the supreme court.⁸ Statutory law is implemented through legislative enactments or administrative decrees. Custom, particularly in commercial matters,⁹ is also an important source of the law.¹⁰ Among the secondary sources of law, doubtless the most important are the writings of professors and specialists in the various fields. In fact, courts or lawyers will more often than not turn to doctrinal writings as an authoritative source of statutory interpretation.¹¹

Property Ownership Under the Mexican Constitution

In Mexico, property ownership is no longer considered an absolute right allowing the owner to use his property in whatever manner he desires. It is regarded, instead, as an instrument for attaining social objectives considered best for the common good.¹²

The government imposes restrictions upon property acquisition because experience has shown them to be necessary. Too often, foreigners who had acquired property in Mexico attempted to apply the law of their own countries to those acquisitions. In some cases, foreign governments even threatened intervention. While in Mexico's first constitution it was not deemed necessary to regulate foreign land ownership, by the time the Constitution of 1856 was drawn, this need was clearly recognized. The same attitude was reflected in the Constitution of 1910. Frank Brandenburg states:

⁷ WORLD TAX SERIES, TAXATION IN MEXICO 9-10 (1957).

⁸ LEY DE AMPARO arts. 192, 193. See also CONSTITUCIÓN art. 107, § 13, para. 1, in 8 DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES (RIGHTS OF THE MEXICAN PEOPLE: MEXICO THROUGH ITS CONSTITUTION) 11 (1967). Hereinafter, all citations to the Mexican Constitution will be to the particular article followed by the page number on which it may be found in *Derechos del Pueblo Mexicano*. For an English translation, see PAN AMERICAN UNION, *supra* note 5, at 45-46.

See generally ALBERTO TRUEBA URBINA & JORGE TRUEBA BARRERA, NUEVA LEGISLACIÓN DE AMPARO, DOCTRINA, TEXTOS Y JURISPRUDENCIA 201-02 (15th ed. 1969). See also 1 RAFAEL ROJINA VILLEGAS, COMPENDIO DE DERECHO CIVIL 59-65 (4th ed. 1968).

⁹ LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO art. 2, § III in LEYES Y CÓDIGOS DE MEXICO: CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS 230 (Porrua 19th ed. 1969).

¹⁰ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts. 997, 999, 1796, 1856, 2457, 2517, 2607, 2619, 2661, 2741, 2754, *op. cit.* at 218, 326, 334, 425, 434, 449, 451, 457, 470, 473. See also 1 VILLEGAS, *supra* note 8, at 31-34.

¹¹ See Kozolchyyk, *The Mexican Land Registry: A Comparison with Its Civil Law Antecedents* app., *infra* at 308.

¹² See *Motivos del Código Civil* in CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES 7 (Porrua 8th ed. 1962).

The Constitution of Mexico is based on the premise that, without public initiative and control, private enterprise brings disorder and exploitation of the weak by unscrupulous capitalists. Private property is respected within a special social context The 'public interest,' as that concept is circumscribed by constitutional mandates making property a social function, transcends everything else. The patrimony of the nation, including its lands, waters, and natural resources, belongs to the nation; although the state may transfer title thereover to private individuals for specific utilization, its right to retract such concessions is inalienable. Granting concessions to private interests for the development of resources does not mean that the state passes 'ownership' to private parties, but rather that it bestows the privilege of using resources for specific ends approved by the state and always subject to public revision.¹³

The basis of Mexican property law is found in article 27 of the Constitution:

Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property¹⁴

The nation has the right to impose limitations upon private property necessitated by the public interest.¹⁵ This includes the right to expropriate property upon the payment of the proper compensation.¹⁶

The capacity to acquire ownership of lands in Mexico is regulated in several paragraphs of article 27. Only Mexicans by birth or naturalization and Mexican corporations have the right to acquire lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mineral resources.¹⁷ The state may extend this right to foreigners who agree to consider themselves nationals with respect to such property, and who promise not to invoke the protection of their governments in matters relating to it. In case of noncompliance with this agreement, the property acquired is forfeited to the nation.¹⁸ Under no circumstances may foreigners acquire direct ownership of lands or waters within one hundred kilometers of the inland borders or fifty kilometers of the coastline.¹⁹

¹³ BRANDENBURG, *supra* note 1, at 211.

¹⁴ CONSTITUCIÓN art. 27, *op. cit.* at 571. For an English translation of all of article 27, see PAN AMERICAN UNION, *supra* note 5, at 8.

¹⁵ CONSTITUCIÓN art. 27, para. 3, *op. cit.* at 571.

¹⁶ *Id.* para. 2, *op. cit.*, at 571.

¹⁷ For a discussion of the Mexican mining concession, see Perez, *The Mexican Mining Concession—Its Features, Regulation and Practice*, *infra* at 356. See also, Mainero, *Mining in Mexico*, 4 CAL. W.L. REV. 287 (1968).

¹⁸ This type of agreement is commonly utilized in Latin American countries and is frequently referred to as the "Calvo Clause." For a discussion of the Calvo Clause, see H. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES, ch. Restrictions on Foreign Investment—The Laws* (manuscript on file in the University of Arizona, College of Law Library; to be published by the American Society of International Law).

¹⁹ CONSTITUCIÓN art. 27, § I, *op. cit.* at 572-73. For an English translation, see PAN AMERICAN UNION, *supra* note 5, at 10.

The other sections of article 27 refer to types of restrictions or regulations which are not relevant to our discussion. It is important to note, however, that some of these restrictions apply not only for foreigners but also to Mexicans and Mexican institutions.

Foreigners and Article 27

Why does article 27 restrict the acquisition of realty by foreigners? A foreigner who acquires property or invests his capital acquiring a piece of land to build his house or a store is gladly welcomed in most countries. These other countries are not neighbors of the United States, however. Don Porfirio Diaz himself, who so much protected the foreigners, stated in a very well-known phrase: "Pobre Mexico, tan lejos de Diós y tan cerca de los Estados Unidos." (Poor Mexico, so far from God and so near to the United States.)

There is a valid historical justification for the limitations imposed upon foreigners in Mexico. Prior to the 1917 Constitution, we did not have these limitations,²⁰ and with a poor economy and constant internal problems, we were exposed to the imperialistic spirit of those times. Consequently, we lost half of our territory. Moreover, after the revolution, many of the foreign investors demanded that Mexico compensate them for damages, including lost profits. Foreign governments protested Mexico's initial refusal, and many investors were in fact paid.

After the revolution, some of the foreign-owned oil companies, with support from their governments, refused to pay taxes. Because of the resultant financial crisis, it was necessary to expropriate their properties even though this entailed serious risks of international conflicts. During President Carranza's government when the oil situation became critical, however, the constitution did not allow expropriation except upon payment of compensation. Because of the state of public finances in Mexico, this was an impossibility. In the succeeding government of General Lazaro Cardenas the constitution was amended to allow expropriation subject to subsequent compensation. The historical process was aptly summarized by Brandenburg:

[F]oreign capital learned its lessons from land expropriation, new forms of diplomacy, new tax structuring, and a series of instructions highlighted by the expropriation of oil properties. Not even the giant foreign oil companies proved capable of overcoming the economic nationalism of the Revolution. Cardenas dramatically rejuvenated domestic interests by informing the nation that Mexico and the public welfare superseded foreign capital. The oil industry, railroads, agricultural lands, street railways, banking, insurance, and other sectors of the economy

²⁰ See CONSTITUCIÓN DE 1857, art. 27, in DERECHOS DEL PUEBLO MEXICANO, *supra* note 8, at 578.

became reserved for Mexicans, whether by state, private, co-operative, or communal ownership.²¹

To avoid future troubles, the Mexican government decided to limit and restrict property ownership by foreigners and require that they submit to Mexican law. They are now precluded from acquiring legal title (*dominio directo*) over property located in areas such as the borders and beaches where it has been thought that the security of Mexico is at stake.

How Real Property is Acquired

Some of the most frequently used methods of acquisition of real property in Mexico are (1) a contract transferring title through a sale,²² barter,²³ or donative transfer;²⁴ (2) occupation of land not having an identified owner with the intent to own the land;²⁵ (3) adverse possession²⁶ for the appropriate length of time;²⁷ (4) court decree;²⁸ (5) inheritance;²⁹ or (6) by disposition of the law.³⁰

Of the various methods of acquisition, the contractual is the most important to this audience. As a general rule in Mexico, "any sale of immovable property whose value exceeds the sum of 500 pesos, or the creation of a right in rem whose value also exceeds that sum requires the execution of a public deed [*escritura pública*] before a Notary Public."³¹

²¹ BRANDENBURG, *supra* note 1, at 210.

²² CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts 2258-2322, *op. cit.* at 399-405.

²³ *Id.* arts. 2327-31, *op. cit.* at 405-06.

²⁴ *Id.* arts. 2332-83, *op. cit.* at 406-12.

²⁵ *Id.* arts. 785-89, *op. cit.* at 185-86.

²⁶ *Id.* arts. 1135-80, *op. cit.* at 240-48.

²⁷ *Id.* art. 1152:

Real property prescribes:

I. In five years, when it is possessed as owner, in good faith, quietly, continuously, and publicly;

II. In five years, when the real property has been the object of an inscription of possession;

III. In ten years, when possessed in bad faith, if the possession is as owner, quietly, continuously, and publicly;

IV. The time designated in sections I and III shall be increased by one-third if it is proved by any person with a legal interest that the possessor of a rural estate has not cultivated it during the greater part of the time during which he possessed it, or that by reason of the failure of the possessor of an urban property to make the necessary repairs, such property has remained uninhabited during which it was in possession of such person. (translation from O. SCHOENRICH, *THE CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORY OF MEXICO* 235 [1950]).

See also CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts. 826-27, 3024-28, *op. cit.* at 192, 523-25.

²⁸ CÓDIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL Y TERRITORIOS arts. 564-98 in *LEYES Y CÓDIGOS DE MEXICO: CÓDIGO DE PROCEDIMIENTOS CIVILES* 138-147 (Porrua 5th ed. 1963).

²⁹ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts. 1281-94, *op. cit.* at 249-51.

³⁰ *Id.* arts. 1599-1606, *op. cit.* at 296-97. *See also* LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES arts. 2 & 7, in *LEYES Y CÓDIGOS DE MEXICO: LEGISLACIÓN MINERA* 8 & 9 (Porrua 5th ed. 1968).

³¹ LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL Y TERRITORIOS art. 14, in

To most Americans, the formality of the public deed and the importance attached to the notary public may seem exaggerated or too ritualistic. There are, however, valid reasons for such rules.

The Notary Public

In the absence of effective public institutions to insure compliance with essential formalities and notification to third parties, such functions must be delegated to private parties. The more qualified the private party to whom these functions are delegated, the better the service that is provided. The office of notary public is, accordingly, a public office, and only the executive power of the nation may confer the license to carry out notarial functions.³²

[A] notary public is a person who has been invested with a public function and with the authority to ascertain compliance with legal requirements [*fé pública*] in order to authenticate the legal acts and transactions which the interested parties may want to or may need to authenticate in accordance with the laws. They also are authorized to participate in the execution of these acts or transactions, providing the solemnity and legal formality required.³³

The notary public functions as a repository of documents, deeds, or records relevant to transactions in which he has participated.³⁴

The execution of a notarial deed (*escritura pública*) is required by law either as a condition for the validity of certain acts such as the sale of immovable property value of which exceeds 500 pesos,³⁵ or for the perfection of security interests.³⁶ It is advisable to use a notarial deed because it is *prima facie* authentic. In such cases, the parties to the deed are said to have obtained "self-executory instruments" (*título ejecutivo*) and, accordingly, may move for summary judgment based upon what is stated in the deed³⁷ subject to a very limited number of defenses.³⁸

The public or notarial deeds contain the following recitals: (1) time

EDICIONES ANDRADE, CODIFICACIÓN NOTARIAL (3d ed. 1966). Hereinafter, all citations to *Ley del Notariado* will be to the particular article followed by the page on which it may be found in *Ediciones Andrade*.

³² *Id.* art. 1, *op. cit.* at 1.

³³ *Id.* art. 2, *op. cit.* at 2.

Notaries public must be Mexican by birth, be more than 25 years of age and less than 70, with a record of good behavior and must never have been a cleric. They must also be lawyers, and undergo a period of training and a selection process. *Id.* art. 97, *op. cit.* at 33. See generally Luis Carral y de Teresa, *The Public Authority of the Acts of Notaries and Registrars in Mexican Law*, 11 *MIAMI L.Q.* 449 (1957).

³⁴ *LEY DEL NOTARIADO* art. 3, *op. cit.* at 2.

³⁵ *Id.* art. 54, *op. cit.* at 20.

³⁶ *Id.*

³⁷ *CÓDIGO DE PROCEDIMIENTOS CIVILES* art. 443, in *LEYES Y CÓDIGOS DE MEXICO: CÓDIGO DE PROCEDIMIENTOS CIVILES* 109 (Porrua 5th ed. 1963). Hereinafter, all citations to *Código de Procedimientos Civiles* will be to the particular article followed by the page on which it may be found in *Leyes y Códigos de Mexico*.

³⁸ *Id.* art. 36, *op. cit.* at 17.

and place of execution, names of the parties and identification of the notary public;³⁹ (2) a statement that the necessary documents empowering the parties to act as purported under the deed have been examined;⁴⁰ (3) a description of the subject matter of the contract.⁴¹

Once the essential description has been made, the notary must attest that the identity of the parties is known to him and that he is certain of their capacity to enter into the transaction.⁴² He must also state that he read the deed to the parties and witnesses,⁴³ that they understood it, agreed to its terms and conditions, and that it was signed by them or by authorized parties.⁴⁴ The notary also attests that the price was paid or that money, documents or instruments were delivered in purported payment or performance.⁴⁵

Protection of Property

Any person who acquires or lawfully possesses property is fully protected by Mexican law. Under articles 14 and 16 of the Constitution,⁴⁶ one may not be deprived of his property nor interfered with in his right of possession without a prior judicial proceeding. These provisions are binding on the government as well as on private individuals. To protect property rights from governmental invasion, the constitution establishes a legal remedy known as *juicio de amparo*.⁴⁷

The *juicio de amparo* is a claim for protection before the federal courts based upon proof that some governmental authority is violating or has violated substantive rights protected by the constitution. It can be interposed against any official including the President of the Republic until it is determined that the law is being applied correctly and that the constitution is not being violated.

A suit for *amparo* may be brought in basically three types of situations. First, it is available in the case of direct violations by governmental authorities of individual guarantees contained in the first 28 articles of the Constitution. . . .

Secondly, an *amparo* suit may be brought to challenge the constitutionality of laws. There are two opportunities for bringing an action for this purpose. If the law in question is self-executing or has automatic application . . . suit may be brought

³⁹ *Id.* art. 34, § I, *op. cit.* at 14.

⁴⁰ *Id.* § III, *op. cit.* at 14.

⁴¹ *Id.* § VI, *op. cit.* at 15.

⁴² *Id.* § XIIa, *op. cit.* at 16.

⁴³ *Id.* § XIIb, c, *op. cit.* at 16.

⁴⁴ *Id.* § XIIId, *op. cit.* at 16.

⁴⁵ *Id.* § XIII, *op. cit.* at 16.

⁴⁶ CONSTITUCIÓN arts. 14 & 16, *op. cit.* at 11-13. For an English translation, see PAN AMERICAN UNION, *supra* note 5, at 4-5.

⁴⁷ CONSTITUCIÓN arts. 103 and 107, *op. cit.* at 72-81. See also ALBERTO TRUEBA URBINA & JORGE TRUEBA BARRERA, *supra* note 8, at 16; Clagett, *The Mexican Suit of "Amparo,"* 33 GEO. L.J. 418 (1945). For a brief description of the *amparo*, see Hamilton, Book Review, 11 ARIZ. L. REV. 375, 376-77 (1969).

within 30 days of its effective date. Furthermore, all kinds of laws, whether self-executing or not, may be attacked judicially within 15 days from the time the complainant learns of the first application of the law to his detriment. . . .

The most common use of the *amparo* is to obtain review by the highest federal courts of decisions of lower federal courts, local courts, and administrative tribunals that are not subject to appeal.⁴⁸

In addition to the *amparo*, an owner or possessor can defend his property against trespassers by an action of recovery of possession and quieting of title (*acción reivindicatoria*), an action for recovery of possession and determination of better right of possession (*acción publiciana*) or an injunction or "interdict" (*interdicto posesorio*) to prevent acts inconsistent with his possession, including the taking or retaining of his real property.⁴⁹

Present Restrictions on Property Acquisition by Foreigners

Article 27 of the Constitution allows foreigners to acquire land only when they agree to be considered as Mexicans under Mexican law. A foreigner's immigration status is, thus, determinative of his ability to acquire property and engage in other transactions.⁵⁰ Article 27 also provides that foreigners may not acquire land in the "forbidden zone" near the inland borders and seashores. Foreigners could be said to be generally empowered to acquire ownership over land and settle in Mexico when they agree in writing with the Ministry of Foreign Relations to be considered as Mexicans. Foreigners may also lease realty for periods in excess of ten years. The amount of property which may be leased is limited, however, to that required for the establishment of an enterprise or the facilitation of its functions and may not include agricultural activities. In any event, a permit must first be obtained from the Ministry of Foreign Relations.⁵¹

Special requirements are also imposed on foreign participation in

⁴⁸ WRIGHT, *supra* note 18, ch. *The Environment* 42-43.

⁴⁹ CÓDIGO DE PROCEDIMIENTOS CIVILES arts. 4, 9, 16, 17, *op. cit.* at 10-13. These actions are examined in greater detail in the cases collected and translated in Kozolchyk, *The Mexican Land Registry: A Critical Evaluation*, *infra* at 308.

⁵⁰ Tourists (*turistas*) and students (*estudiantes*), for example, may not engage in mercantile transactions, while visitors (*visitantes*) may do so on a temporary basis. LEY GENERAL DE POBLACIÓN art. 50, §§I, III & V, in EDICIONES ANDRADE, EXTRANJERÍA, TURISMO Y POBLACIÓN 434 (2d ed. 1964). In order for a foreigner to obtain a permit from the Ministry of the Interior to acquire realty, he must be an immigrant with the status of a resident (*inmigrante*) or permanent resident (*inmigrado*). REGLAMENTO DE LA GENERAL POBLACIÓN art. 14, in EDICIONES ANDRADE, EXTRANJERÍA, TURISMO Y POBLACIÓN 480-83 (2d ed. 1964).

A resident is a foreigner who enters the country with a permit from the Ministry of the Interior with the purpose of residing in the country. LEY GENERAL DE POBLACIÓN art. 48, *op. cit.* at 432. A permanent resident is a foreigner allowed to stay in the country indefinitely. *Id.* art. 64, *op. cit.* at 437.

⁵¹ LEY ORGÁNICA DE LA FRACCIÓN I DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 10, in EDICIONES ANDRADE, EXTRANJERÍA, TURISMO Y POBLACIÓN 249 (2d ed. 1964).

Mexican businesses. Current rules governing the degree of foreign participation are based on the Decree of June 29, 1944⁵² as implemented by regulations of the Ministry of Foreign Relations.⁵³ Even though investment nearly quadrupled from 1940 to 1965⁵⁴ and foreign investment has been encouraged when integrated with local capital,⁵⁵ there is today an unmistakable trend toward stricter criteria for foreign investment.⁵⁶ By Presidential decree of June 30, 1970 a minimum of 51 percent Mexican capital is required for new companies in the steel, cement, glass, fertilizer, cellulose, and aluminum industries.⁵⁷

It is the federal government, then, and not the prospective seller who grants foreigners the right to acquire property. In order to purchase land a foreigner must obtain a permit from the Ministry of Foreign Relations. These permits are generally granted so long as the applicant can establish his eligibility.

⁵² Art. 1, in 145 DIARIO OFICIAL no. 6, at 2 (July 7, 1944):

For as long as the suspension of the guarantees decreed on June 1, 1942 remains in force, the foreigners and the Mexican business associations that have or may have foreign partners or stockholders will require a special permit issued by the Ministry of Foreign Relations for the following transactions:

a. To acquire business enterprises or to obtain control of those in existence in this country which are devoted to any industrial, agricultural, cattle, forestry activity, or in the exploitation of urban or rural real property including the subdivision and urbanization of real estate;

b. to acquire immovable property devoted to any activities covered in the preceding paragraph;

c. to acquire real property, urban or rural, for any purpose whatsoever;

d. to acquire the ownership of lands, waters and accessions as referred to by section 1 of Article 27 of the Constitution;

e. to acquire the concession of mines, waters, or fuels as provided for in ordinary statutory law.

For the purposes of this decree, the lease for a period of more than ten years and the contracts of *Fideicomiso* in which the beneficiary is one of the persons referred in the first paragraph of this article are deemed covered by paragraphs a, b, c and d of this article.

⁵³ See WRIGHT, *supra* note 18, ch. *The Role of Foreign Investment* 4.

⁵⁴ *Id.* at 63-64.

⁵⁵ Verity, *Mineral Law of Mexico*, in 2 AMERICAN LAW OF MINING § 13.16 (Rocky Mountain Mineral Law Foundation ed. 1970).

⁵⁶ See WRIGHT, *supra* note 18, ch. *Restrictions on Foreign Investments—The Policies*.

⁵⁷ The ownership restrictions of the Mexicanization program extend to other industries as well. Mexican citizens must own 51 percent of the shares and a majority of the directors must be Mexican in corporations involving the production, distribution, and exhibition of films; maritime, air, or land transportation over Mexican territory, with certain exceptions; fishing and packaging of marine products; publishing and advertising; manufacturing of carbonated and bottled beverages; bottling of fruit juices; manufacturing of rubber products; and agriculture. Mexican citizens must own 51 percent of the shares in ordinary mining enterprises and 66 percent in the case of special reserves. See Perez, *The Mexican Mining Concession—Its Features, Regulation and Practice*, *infra* at 356. The radio and television broadcasting industry must be owned entirely by Mexican citizens, thereby precluding foreign participation. The state owns petroleum, basic petrochemicals, railways, postal and telegraphic service, and electric power industries. Secondary petrochemical production, however, may be undertaken with 60 percent Mexican participation. Ernst & Ernst, *New Restrictions on Foreign Ownership of Mexican Corporations*, Sept. 28, 1970 (International Business Series, Special Bulletin 70-12).

Although a foreigner cannot acquire legal title over property in the forbidden zone,⁵⁸ he can acquire the beneficial use of such property by other legal means. He might, for example, choose to lease property legally owned by Mexicans for ten years with the right to renew the lease. It would thus be possible to enjoy a house on the beach for an appreciable period of time.

The lease, the once prohibited *fideicomiso*,⁵⁹ the formation of Mexican real estate corporations, mortgages, and attachments are other legal methods which have been used to hold land in the forbidden zone. Their utility depends on the degree of interest one has in the land and the trust he has in his Mexican fiduciary agent rather than the feeling of absolute property ownership.

CONCLUSION

I want to assure you that it has been a long time since a foreigner has complained of an action taken against him by the Mexican government. On the contrary, in recent years more and more foreigners have come to live in Mexico and acquire property. There are also many American enterprises which have conducted business in Mexico. They have at their disposal the land they need so long as they comply with the legal requirements.

Many corporations and individuals have found legal means of utilizing land and making both personal and commercial investments in Mexico. Those who seek to explore investment opportunities in Mexico should examine these successful transactions but, in doing so, they must remember that competent Mexican counsel should be consulted.

COMMENTARY

Prof. Kozolchyk: Prior to the first question, I would like to clarify the meaning of one of the terms in article 27 of the Mexican Constitution.

Article 27 uses the term "direct ownership" (*dominio directo*) to describe a type of ownership which may fall short of full ownership, but in which the nation grants a proprietary interest while retaining its own preeminent right. In Spanish and Latin American real property parlance, the term "direct ownership" is used in contrast to the "useful" or "beneficial" ownership (*dominio útil*) enjoyed by the holder of a life estate interest. Thus, the reversionary interest of the grantor in the life estate (*usufructo*) is termed a direct ownership until he regains beneficial use, at which time it becomes once more absolute or full ownership (*dominio absoluto o propiedad*). The analogy with the common law categories

⁵⁸ CONSTITUCIÓN art. 27, § I, *op. cit.* at 21-22.

⁵⁹ See Rivera, *An Introduction to Secured Real Estate Transactions in Mexico*, *infra* at 290.

of legal and equitable title is a close one, and accordingly we have translated references to "direct" ownership as "legal title." Dr. Rivera Farber's discussion of the Mexican *fideicomiso* transaction—a counterpart to the Anglo-American trust—later in this seminar will further clarify the extent to which Mexican law recognizes legal and equitable title.

Lic. Erasmo Lozano Rocha: At the outset I would like to make some general statements about foreign investment in Mexico. We Mexican lawyers feel somewhat embarrassed when an American attorney expects very categorical advice on investment problems, and we cannot come up with absolute answers. You should bear in mind, however, that our uncertainty reflects the true state of the law. We are embarrassed because Mexico has progressed in many ways, but our regulation of foreign investment has not kept pace with other social developments. Unfortunately, we have legal provisions scattered throughout our constitution, codes and laws. In addition to article 27 of the constitution which is the fundamental article regulating ownership of the land, waters and mines, we have the so-called regulatory laws. We have a law which regulates article 27, and we have a regulation for that regulatory law. In addition, we have many other bodies of law which refer to the same problem. Sometimes we find contradictions in these articles, and we can only look for the most plausible interpretation, and many times we are dependent upon the discretion of governmental officials acting on a case by case basis. This is why it is so difficult for us to provide precise answers to questions.

By now we should have enacted a separate code covering all the aspects of foreign investment in Mexico, but unfortunately we have not done so. Maybe the government wants it this way because if we had a specific set of rules, there would be no room for arbitrary governmental decisions and the government would not enjoy the discretionary powers it now has.

Despite this state of uncertainty, I must ask you not to feel discouraged or rejected as a prospective investor in Mexico. On the contrary, Mexico welcomes foreign capital with only the restriction or qualification that investors comply with our constitution and laws—even though they are often difficult to interpret.

The mistakes of the past are behind us. We are improving our relations with the states along our northern border, and we are looking forward to new and better times with you and with the United States government. I think that our history explains our past outlook, but it does not preclude us from changing our attitude toward foreign capital that wants to come into Mexico.

Prof. August Eckhardt: I would like to raise just a few questions which I think would bear further discussion. Dealing specifically with the problem of acquiring title to real property in Mexico, it seemed to me that one of the requirements listed was that of establishing residency. If that is true, I would be interested to know what constitutes establishing residence

and whether an alien can come to Mexico, spend very little time here, and meet this requirement?

The statement that foreigners can consider themselves as Mexicans for some purposes and that they must say that they will not use the power of their government to protect them and their rights here interests me. I wonder if such a requirement has any real usefulness.

Lic. Lozano: First, we must distinguish between tourists (*turistas*) and immigrants (*inmigrantes* or *inmigrados*). A tourist cannot buy land as such, but he may lease it for a period not in excess of ten years. An immigrant who has been authorized to come to this country as a resident (*inmigrante*), or as a permanent resident (*inmigrado*), can acquire land.

In my opinion, an immigrant (*inmigrante*) who is a resident of Mexico, can acquire land in Mexico outside of the forbidden zone—100 kilometers from the border and 50 kilometers from the seashore—but only after obtaining permission from the Ministry of Foreign Relations and presenting evidence that he intends to continue as a permanent resident. It is within the discretion of the Ministry of Foreign Relations to grant or deny such a permit. An *inmigrado*, one who has been living in Mexico for five or more years and has complied with all the immigration requirements will have a much better chance of obtaining permission to buy land outside the restricted zone. I feel that even during the first year of an immigrant's residence, he can request permission to buy land outside of the forbidden zone.

In applying for such permission, one has to waive his rights to the protection of his country of origin in any disputes over the state's eminent domain over the land. This waiver is what is called *Cláusula Calvo*.

Many Americans are very much concerned about the *Cláusula Calvo*, and think that their waiver is tantamount to losing their nationality or losing some right which is sacred to them. This is not the case. In the first place, a foreigner does not lose his nationality but maintains his own citizenship. Second, he is not waiving anything substantial because he is only submitting himself to the jurisdiction of Mexico in any controversy arising from his acquisition of land. I do not doubt that if a Mexican went to the United States and become involved in litigation in connection with a piece of property there, he would submit himself to the jurisdiction of the United States without an express recital. We could not ask our Mexican government to go to Washington to defend us before the American courts which is what the *Calvo* clause was trying to prevent in the reverse situation. Hence, when an American comes to Mexico, invests or acquires property, obtains a Mexican government permit and waives his rights to have his government act for him before Mexican authorities in matters related to his acquisition, he is waiving something which is really theoretical.

As you heard in *Lic. Gutierrez's* speech, we incorporated the *Cláusula Calvo* in our legal institutions because of past experiences. He may not

have mentioned that in around 1836, there was a French intervention—an armed French intervention—in Mexico when a pastryman was ordered to bake some bread or pastries for a Frenchman, and there was a controversy as to the amount and price involved in the transaction. The Frenchman appealed to the French government in order to protect his “interests.” Shortly thereafter, we had the French navy in Veracruz trying to recover the “right amount” in Mexico. Incidents such as this taught us a lesson. We decided that all foreigners who come to Mexico to invest, engage in business or to apply for a mining concession cannot do so without a waiver.

On the other hand, if a foreigner wishes to become a citizen of Mexico nothing would prevent him from doing so if he complies with the immigration requirements. When a person becomes an immigrant—either an *inmigrante* or *inmigrado*—he must remain in the country nine months out of the year in order to maintain his status. He can leave the country at different times, but not for more than three months during the calendar year. His fulfillment of this obligation cannot be easily avoided because every time he leaves the country, his exit and re-entrance are recorded. When the first year is over, the records are checked and if he has been out of Mexico for longer than the allowed period of time, the government will not renew his permit. The next year, he still has to maintain his presence for that same period of time. During the remaining three years, he must not be out of the country for more than 18 months, and once he becomes a citizen, he cannot remain out of the country for more than two consecutive years. Only as a Mexican can one own real property in the forbidden zone.

QUESTIONS AND ANSWERS

Question: What arrangement exists for holding title to property by two or more people?

Lic. Lozano: There are no restrictions on such an arrangement. We have to guide our drafting of the specific agreement and conveyance by the civil code of the respective states. The rights that are given to any two people, two spouses, of any two Mexicans are the same as are given to foreigners. There is no distinction there. Of course, a foreign person cannot own land in the forbidden zone, and this applies as well to a husband and wife together.

Prof. Eckhardt: What are the rights of land acquisition of a person born in Mexico of foreign parents?

Lic. Lozano: When a child is born in Mexico, land can be put in his name so long as he remains a Mexican citizen. He does not have to be the child of Mexican parents because a child born in Mexico is considered to be of Mexican nationality by birth regardless of the citizenship of his parents. When he becomes of age, he will have to choose whether or not to maintain his Mexican citizenship. If he chooses his foreign citizenship, he will have

to dispose of his Mexican property in order to comply with the Mexican Constitution.

Prof. Kozolchyk: A question has been submitted as to whether options to purchase real estate are recognizable and recordable in Mexico as they are in the United States?

Lic. Estrella: An option to acquire real estate cannot be recorded in Mexico. The option, even though it might be validly entered into by the parties, would have no effect upon third party rights because only rights in rem can be recorded in the land registry. The option to acquire or to sell which is known in Mexican law as a promise to sell (*promesa de venta*), entails a personal obligation which is an obligation "to do something." In Mexican law as well as in French law, obligations, from the standpoint of specific performance, are classified as either "to do something," or "to give something." Obligations "to do" under Mexican law are not subject to specific performance and since an option is an obligation to do one's only right upon breach of the option would be an action for damages or on extra-contractual (tort) liability, as indicated by the articles of the civil code.

Mitchell New Delman: I think that one way of getting around this particular problem would be to write into a contract that, although not specifically enforceable for the conveyance of the land, the buyer could enforce a right to liquidated damages against the defaulting seller.

Prof. Kozolchyk: Mr. Delman suggested that it was advisable, and I agree with him, to insert a liquidated damages clause to try to perform the same function as specific performance. One should keep in mind that the Mexican civil code establishes limits upon the amount that may be exacted as liquidated damages, and it may not exceed the amount of the principal obligation.

Lic. Lozano: Before we go further, I would like to make one comment about options. While they cannot be registered in the case of general real estate transactions, an option relating to a mining concession is subject to registration and serves as notice to third parties. The party who obtains the option and secures its registration can compel the other party to comply with the contract.

Philip Robbins: Since article 27 of the Mexican Constitution excludes foreigners from acquiring legal title over real estate in the forbidden zone are there legal methods whereby foreigners can acquire the use or beneficial ownership of land in this zone?

Lic. Lozano: The two common methods which are permitted by Mexican law for accomplishing this purpose are the trust (*fideicomiso*) and the lease with an option to renew. Both of these methods are generally restricted to real estate which will be used for private residential purposes, but can be used for some commercial property such as tourist businesses.

The *fideicomiso* is a transaction which is very similar to the trust in American law, and whose characteristics will be described later by Lic. Rivera. Unquestionably, a foreigner may be the beneficiary of the trust and have possession of the land. Legal title is held by the trustee, which must be a Mexican bank. Title can be transferred only to a person entitled by Mexican law to hold title. The approval of the Foreign Ministry is required for the creation of the trust. The Foreign Ministry will generally not approve a trust for more than ten years, but the trust may be renewed at the end of the ten years and thus may last indefinitely.

The second method is the lease for a period of less than 10 years, with an option to renew. Mexican law considers that a lease for ten years or more is the equivalent of an acquisition of real estate and therefore precluded in the forbidden zone by article 27.

Mr. Robbins: Is the option to renew the lease after ten years valid and enforceable in Mexico?

Lic. Lozano: I am not aware of any case where a lessor has been allowed to refuse to honor the option to renew the lease based upon any claim that the option arrangement violates the Mexican Constitution. The courts would probably conclude that the lessor, having been a party to the original contract, has no right to raise such a defense. Furthermore, the option can be considered apart from the original 10-year lease and enforced as a separate contract.

Mr. Robbins: Reference has been made to the use of a double corporation for permitting the acquisition of real estate in the forbidden zone by foreigners. Is this a method that is being commonly used?

Lic. Lozano: This arrangement has been used to enable foreigners to acquire control of real estate in the forbidden zone. It consists of the formation of a Mexican corporation with a charter that permits foreign ownership of its stock and also permits the corporation to acquire an interest in a corporation which is 100 percent Mexican held and which owns or may acquire real estate in the prohibited zone. The Foreign Ministry must approve such charter provisions, and it is not certain whether or not such approval will continue to be given.

Prof. Kozolchyk: Can an entirely foreign corporation obtain leases, with a definite extension, on real property in the forbidden zone?

Lic. Lozano: This is a very interesting point. I don't see any problem insofar as a lease is concerned, but I am not sure that such a corporation could go any further. If the foreign corporation has foreign and Mexican stockholders, it is deemed to be a Mexican corporation. This corporation could even go so far as buying the stock in another Mexican corporation which is formed exclusively of Mexican citizens and which owns land in the restricted zone. In other words, imagine two corporations. Corporation A must be formed exclusively by Mexican citizens because of the fact that it

owns land in the forbidden zone. A second corporation with some foreign stockholders may lease land from Corporation *A* for a period of not more than ten years with an option to renew for another ten years. Corporation *B* is allowed to purchase stock in Corporation *A*. Mexican law considers the second corporation a legal Mexican entity pursuant to Article 5 of the Law of Nationalization and Naturalization. It is a Mexican entity and, therefore may own stock in another corporation. Thus, in addition to the lease, a foreign corporation can have certain control over the Mexican corporation by acquiring some of its stock.

It must be remembered that permission must be obtained for a foreign individual or corporation to utilize either method for the control or use of real property in the forbidden zone. And while such permission is usually granted it is occasionally denied.

Prof. Eckhardt: Would it be possible for the government, at the time for renewal of a lease, to revoke a permit that was previously granted?

Lic. Lozano: That is possible but unlikely. If you are establishing your business through a generally accepted practice, you have asked the government about it, and you are dealing openly with the government on that basis, they probably will not question its continuance. I have asked the same questions of the government and have received written answers from it that support my position.

With regard to the double corporation device, the theory is that the second corporation—the one which has foreign stockholders—is a legal Mexican entity and that is what counts. If there were only foreigners, it would not be so. So, for practical purposes, the use of the device complies with the constitution, and with the regulatory laws.

Question: From your experience, when you have exercised these ten year options have they been granted, and is it necessary to notify the government and obtain its approval before you exercise the option?

Lic. Lozano: At the inception of the agreement, of course, you have to ask permission. Afterward, you need not, so why open yourself to an unnecessary investigation?

Mr. Robbins: Can foreigners acquire the ownership of land by accepting the transfer of bearer stock from a Mexican corporation which has acquired land in the forbidden zone?

Lic. Lozano: Since an individual foreigner cannot be a stockholder in a Mexican corporation which owns land in the forbidden zone, such an arrangement would be a subterfuge to evade the prohibitions of article 27. No doubt such arrangements have existed in the past and continue to exist. It must be pointed out, however, that the foreigner would have no standing to enforce any of his rights in a Mexican court. It must also be noted that when Mexican nominees are designated to vote the stock, the possibility arises that the nominees might take advantage of the foreigner and claim to be the owners of the stock.

Question: Can a foreigner acquire title to land in the forbidden zone by inheritance?

Mitchell New Delman: The answer is yes. The law provides that if one acquires land in the forbidden zone by inheritance, he need not go immediately to the Ministry of Foreign Relations to get a permit to hold that land. By law, one has five years to dispose of such land. The five-year period can be extended if good cause can be shown why the holdings cannot be liquidated within that period. Similarly, a foreigner can lend money and hold a mortgage on property in the forbidden zone and foreclose that mortgage and hold that property for at least five years under the same conditions. A showing of good cause, for example, would be that you have not been able to sell the land to recoup your investment, plus interests and costs, within the five-year period. You would then probably be allowed to hold the land for a reasonable additional period until you are able to recoup your loss by way of mortgage.

Question: To what extent, if at all, can the application for permits to acquire property be facilitated by the use of gratuities, and what is the scope of administrative discretion?

Lic. Lozano: I do not think you can use gratuities. The Ministry of Foreign Relations has a very capable legal department. They know how to apply the law. Of course, they have a certain margin of discretion, but I have never used that method, and I do not think that any reputable lawyer in Mexico would either. As a matter of fact, in order to get permits, we merely hire the services of a correspondent in Mexico City. We may pay him 30 or 40 pesos to get such a permit, and generally, it is obtained within a few days or maybe two or three weeks.

Question: Since there are some difficulties with the use of options, their recordability and their effect on third parties, can one use escrow arrangements to insure simultaneous payment of the purchase price in exchange for the transfer of title to the property? In light of the fact that only banks in Mexico can act as fiduciary agents, how does escrow operate in Mexico?

Prof. Kozolchyk: Since only banks may act as fiduciaries or trustees in Mexico, their services are frequently enlisted in escrow transactions. The fact that only banks can act as fiduciaries seems to have made them unusually cautious in their discharge of fiduciary duties. This attitude is responsible for the very literal and restrictive reading of trust or escrow forms or conditions. The approach is, as a rule, more rigid than you would find in the United States.

Question: What is the legal status of Mexican corporations which purport to sell club memberships and as an incident of membership hold out to foreigners the possibility of ownership of land or of use of land in Mexico?

Lic. Lozano: We have to distinguish between the club and the cor-

poration. A corporation cannot function merely as a club. The Mexican business corporation is like a corporation in the United States. It may, as a sideline, organize a club which could furnish facilities to those who incidentally are stockholders of the corporation. But it would be a mistake for American corporations to make a public statement that members of these clubs are going to get a 99-year lease on land. This is not legal and it is a case where the government may step in and take action. These corporations are misrepresenting the facts, not only in Mexico but in the United States. I think they should be penalized in the United States as they may well be in Mexico.

Question: If a foreigner, through the use of any of the various devices, controls a residence in the forbidden zone, is there any restriction on renting the property?

Lic. Lozano: That depends upon which device was used to obtain the house in the forbidden zone. If the foreigner establishes a corporation in Mexico to control the house, it can be rented with the Mexican corporation as lessor. If the house is acquired through a trust agreement and a foreigner is authorized to use the house, he will be allowed to have the house for his personal use only, and he will not be allowed to rent it.