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*“INTERNATIONAL INVESTMENTS IN MEXICAN REAL  
ESTATE”*

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## **I. Ownership Structure**

- A. Foreign Investment/Exchange Restrictions and/or Governmental Filings.  
[Discuss any restrictions or any approval or notification requirements or any restrictions on foreign ownership of real estate, etc.]

### **1. ACQUISITION OF LAND BY FOREIGNERS IN THE RESTRICTED ZONE IN MEXICO**

**SINCE THE TARGET PROPERTY IS LOCATED WITHIN THE SO-CALLED “RESTRICTED ZONE”, NOTE SHOULD BE TAKEN OF THE FOREGOING:**

#### **1.1 ANALYSIS OF THE APPLICABLE RESTRICTIONS AND THE NEW FOREIGN INVESTMENT LAW**

##### **1.1.1 APPLICABLE RESTRICTIONS**

**ARTICLE 27 OF THE MEXICAN CONSTITUTION DISCUSSES THE OWNERSHIP OF LAND AND WATER. ARTICLE 27 GRANTS THE OWNERSHIP OF THE LAND AND WATER WITHIN THE NATIONAL TERRITORY TO THE MEXICAN NATION, AND PROVIDES THAT THE NATION WILL HAVE THE POWER TO TRANSFER OWNERSHIP RIGHTS TO THESE PROPERTIES TO PRIVATE INDIVIDUALS, THEREBY CREATING PRIVATE PROPERTY. THUS, OWNERSHIP OF LAND DOES NOT GRANT THE OWNER A FULL “FEE SIMPLE ABSOLUTE” TITLE AS IS ACCEPTED IN COMMON LAW COUNTRIES. ONLY THE STATE HAS SUCH RIGHTS. THUS OWNERSHIP IS LIMITED.**

**SECTION I OF ARTICLE 27 GRANTS THE RIGHT TO ACQUIRE THE DOMINION OF LAND AND WATER ONLY TO MEXICAN INDIVIDUALS AND COMPANIES. IT ALSO GRANTS TO THE STATE THE DISCRETIONARY POWER TO GRANT THE SAME RIGHT TO FOREIGNERS, SUBJECT TO THE CONDITION THAT FOREIGNERS AGREE WITH THE MINISTRY OF FOREIGN AFFAIRS TO CONSIDER THEMSELVES MEXICAN NATIONALS AND NOT TO INVOKE THE PROTECTION OF THEIR HOME GOVERNMENTS WITH RESPECT TO THE PROPERTY ACQUIRED. IF THIS COVENANT IS BREACHED, ALL RIGHTS TO THE PROPERTY WILL REVERT TO THE MEXICAN NATION. MOREOVER, THIS SECTION PROHIBITS FOREIGNERS FROM ACQUIRING DIRECT OWNERSHIP OVER LAND AND WATER LOCATED WITHIN 100 KILOMETERS WIDE FROM**

**THE NATIONAL BORDER AND 50 KILOMETERS WIDE FROM THE COASTAL SHORES (THE “PROHIBITED” OR “RESTRICTED ZONE”).**

### **1.1.2 NEW FOREIGN INVESTMENT LAW**

**THE NEW FOREIGN INVESTMENT LAW OF 1993 (“FIL”) REVOKED PREVIOUS DECREES AND REGULATIONS GOVERNING FOREIGN INVESTMENT IN MEXICO. HOWEVER, IT DID NOT ATTEMPT TO AMEND OR MODIFY ARTICLE 27 OF THE CONSTITUTION REGARDING THE ACQUISITION OF LAND BY FOREIGNERS IN THE RESTRICTED ZONE. NEVERTHELESS, PURSUANT TO THE NEW FIL, FOREIGN OWNERSHIP IN THE RESTRICTED ZONE IS AVAILABLE IN THE FOLLOWING CASES:**

- 1. IF ACQUIRED FOR NONRESIDENTIAL PURPOSES (I.E., INDUSTRIAL, COMMERCIAL, OR TOURISM ACTIVITIES), THROUGH PARTICIPATION IN A MEXICAN COMPANY. ACQUISITION MUST BE RECORDED WITH THE MINISTRY OF FOREIGN AFFAIRS.**
- 2. IF ACQUIRED FOR RESIDENTIAL PURPOSES, THROUGH A TRUST. THE MINISTRY OF FOREIGN AFFAIRS MUST AUTHORIZE ACQUISITION.**

**IN ORDER TO ESTABLISH A TRUST, PRIOR AUTHORIZATION FROM THE MINISTRY OF FOREIGN AFFAIRS IN MEXICO MUST BE OBTAINED. SUCH AUTHORIZATION GRANTS TO THE BENEFICIARY OF THE TRUST THE RIGHT TO THE USE AND ENJOYMENT OF THE LAND. THIS INCLUDES ANY BENEFIT THAT MAY RESULT FROM THE OPERATION AND EXPLOITATION OF IT. THE TRUST AGREEMENT MUST BE IN WRITING AND BE RECORDED BEFORE THE PUBLIC REGISTRY OF PROPERTY.**

**THE TRUST ARRANGEMENT IN MEXICO INVOLVES A FINANCIAL INSTITUTION ACTING AS TRUSTEE WITH RESPECT TO CERTAIN PROPERTY INTERESTS. ONLY MEXICAN BANKING INSTITUTIONS AUTHORIZED AND REGULATED UNDER MEXICAN BANKING LAWS CAN SERVE AS TRUSTEES. THE TRUSTEE HOLDS TITLE TO THE PROPERTY FOR THE BENEFICIARY OF THE TRUST, WHO RETAINS THE ECONOMIC BENEFITS ARISING OUT OF THE PROPERTY. AS TRUSTEE, THE MEXICAN BANK ACTS ON BEHALF OF THE FOREIGN BENEFICIARY IN TRANSACTIONS INVOLVING THE PROPERTY HELD IN TRUST. HOWEVER, THE BENEFICIARY RETAINS THE USE AND CONTROL OF THE PROPERTY AND, EXCEPT FOR DIRECT ACQUISITIONS, MAKES THE INVESTMENT DECISIONS WITH RESPECT TO THE SAME. THIS INCLUDES THE DECISION TO TRANSFER SUCH PROPERTY INTEREST TO ANOTHER FOREIGN OR DOMESTIC PURCHASER.**

**PREVIOUSLY, THE MAXIMUM TERM OF A TRUST WAS 30 YEARS. AT EXPIRATION, THE FOREIGNER HAD TO TRANSFER ITS INTEREST IN THE LAND TO A QUALIFIED PERSON, PRESUMABLY A MEXICAN NATIONAL OR A**

**FOREIGNER WITH THE PERMISSION OF THE MINISTRY OF FOREIGN AFFAIRS. THE ORIGINAL 30-YEAR PERIODS NEVER EXPIRED SINCE THE NEW FIL HAS EXTENDED THIS TERM TO 50 YEARS, WHICH MAY IN TURN BE RENEWED UPON FURTHER REQUEST. RENEWAL MUST BE REQUESTED 90 WORKING DAYS PRIOR TO ITS EXPIRATION AND IS SUBJECT TO COMPLIANCE WITH CERTAIN REQUIREMENTS. RENEWAL IS NOT A ONE-TIME EVENT. IT MAY BE RENEWED FOR AS MANY TIMES AS REQUESTED. ON THIS ISSUE, WE HAVE OBTAINED AN OFFICIAL OPINION FROM THE NATIONAL FOREIGN INVESTMENT COMMISSION.**

## **II. Lending.**

- A. Financing sources to be considered. [Discuss possible sources both private and governmental, including certain governmental incentives which may be available for foreign investments.]

**PRIVATE – TO COLLATERALIZED  
INTER-COMPANY – BEST APPROACH  
GOVERNMENTAL – DIFFICULT TO OBTAIN, NEED GOVERNMENT BACK UP**

**AS TO TRANSFER COSTS, INCLUDING RECORDING FEES AND REAL ESTATE TRANSFER TAXES, THERE EXISTS THE POSSIBILITY OF REDUCING THESE COSTS SUBSTANTIALLY BY FOLLOWING A PROCESS PROVIDED FOR IN STATE LAWS, IF AVAILABLE, WHICH SOME STATE GOVERNMENTS HAVE CREATED TO PROMOTE AND FOSTER INVESTMENT IN THE REGION (I.E., “*LEY DE FOMENTO ECONÓMICO DEL ESTADO DE BAJA CALIFORNIA SUR*”).**

- B. Governmental restrictions on financing. [Discuss any foreign exchange regulations concerning financing.]

**NO FOREIGN EXCHANGE REGULATIONS EXCEPT FOR THAT CONTAINED IN THE MEXICAN MONETARY LAW, WHICH PROVIDES FOR PAYMENT OF DEBTS IN MEXICO IN MEXICAN PESOS, EVEN WHEN PAYMENT IN FOREIGN CURRENCY MAY BE LEGALLY AGREED. IN THE LATTER CASE, PAYMENT WILL BE MADE AT THE APPLICABLE EXCHANGE RATE ON THE DAY OF PAYMENT, ACCORDING TO THAT PUBLISHED IN THE MEXICAN OFFICIAL GAZETTE.**

- C. Mortgage/Collateral issues. [Discuss the customary forms of collateral used to secure financing in the relevant jurisdiction.]

**THERE ARE TWO MAIN FORMS OF COLLATERAL ON REAL ESTATE.**

**1. MORTGAGE (“*HIPOTECA*”). THE MOST WIDELY USED SECURITY DEVISE IN MEXICO IS THE MORTGAGE. IN FACT, MORTGAGES ARE MOST POPULAR AMONG DOMESTIC AND FOREIGN BANKS. THEY EXTEND TO THE NATURAL**

**ACCESSIONS OF THE MORTGAGED PROPERTY, ANY IMPROVEMENTS AND FIXTURES, PERSONAL PROPERTY PERMANENTLY ATTACHED TO THE PROPERTY WHICH CANNOT BE SEPARATED THERE FROM WITHOUT DAMAGING IT, NEW BUILDINGS CONSTRUCTED BY THE OWNER OF THE MORTGAGED LAND AND ADDITIONS TO THE MORTGAGED BUILDINGS. THE PRACTICAL, BUT CRITICAL DISADVANTAGE TO THIS FORM OF COLLATERAL IS THAT THE BORROWER IS THE OWNER OF THE PROPERTY AND RETAINS TITLE TO IT.**

**THE MORTGAGE HAS TO BE EXECUTED IN A PUBLIC DEED, BEFORE A NOTARY PUBLIC IN MEXICO AND RECORDED WITH THE PUBLIC REGISTRY OF PROPERTY OFFICE WHERE THE LAND IS LOCATED IN ORDER FOR IT TO BE VALID AGAINST THIRD PARTY'S CLAIMS. MORTGAGE RECORDING FEES ARE DETERMINED BY EACH STATE. MOST STATES BASE THE PUBLIC REGISTER'S TAX ON A PERCENTAGE OF THE OFFICIALLY REGISTERED VALUE OF THE PROPERTY. RECORDING FEES, ALONG WITH THE NOTARY'S FEE AND THE STATE TAX ON NOTARY'S SIGNATURE, ARE THE MOST RELEVANT COSTS INCURRED WHEN RECORDING A MORTGAGE. THE AMOUNT OF FEES PAID WILL NOT CAP THE CREDITOR'S RIGHT TO RECOVER ANY AMOUNTS DUE UNDER THE LOAN, EVEN WHEN THE VALUE OF THE PROPERTY HAS INCREASED.**

**IN THE EVENT OF DEFAULT UNDER THE SECURED LOAN, THERE IS A SPECIAL JUDICIAL PROCEDURE TO SELL THE LAND, AND THE COURT DELIVERS THE PROCEEDS OF SUCH SALE TO THE CREDITOR. ALTHOUGH THE PROCEDURE IS INTENDED TO BE EXPEDITIOUS, THERE ARE ALWAYS RISKS INVOLVED IN A JUDICIAL COLLECTION PROCEDURE. FORECLOSURE ON A MORTGAGE IN MEXICO SHOULD NOT TAKE MORE THAN TWO YEARS.**

**NOTE SHOULD BE TAKEN, HOWEVER, THAT SHOULD YOUR BORROWER BECOME INSOLVENT, FORECLOSURE ON YOUR MORTGAGE WILL SUFFER DELAYS. ALTHOUGH INFREQUENTLY TESTED, UNDER THE NEW MEXICAN BANKRUPTCY LAWS IT NOW APPEARS THAT IT IS NO LONGER POSSIBLE TO ISOLATE THE MORTGAGED PROPERTY FROM THE ASSETS OF THE BANKRUPTCY. IN ADDITION, NEW LAWS PROVIDE FOR SUSPENSION OF FORECLOSURE PROCEEDINGS ON ANY ASSETS OF THE BANKRUPTCY IF THE DEBTOR HAS ALREADY BEEN DECLARED IN *CONCURSO MERCANTIL*. THIS IS A TERM APPLIED TO DEBTOR BEFORE BEING DECLARED BANKRUPT. SUSPENSION WILL LAST UNTIL AN AGREEMENT TO REPAY THE DEBT IS REACHED BETWEEN DEBTOR AND CREDITOR/S (*ETAPA DE CONCILIACIÓN*). THE *ETAPA DE CONCILIACIÓN* IS AN EFFORT TO AVOID BANKRUPTCY AND MAY LAST A YEAR FROM THE DATE DEBTOR WAS DECLARED IN *CONCURSO MERCANTIL*.**

**IF A CREDITOR ATTEMPTS TO FORECLOSE AFTER DEBTOR IS DECLARED IN *CONCURSO MERCANTIL*, IT WILL NEED TO DO SO AS A CREDITOR AT**

**BANKRUPTCY PROCEEDINGS. IF PROPERLY RECORDED, YOUR MORTGAGE LIEN WILL TAKE PRIORITY OVER ALL OTHER CREDITS AT BANKRUPTCY, EXCEPT FOR CERTAIN UNPAID TAXES AND PAST-DUE WAGES FOR THE PREVIOUS TWO YEARS.**

**2. TRUST (“FIDEICOMISO EN GARANTÍA”). THE TRUST IS WIDELY USED FOR MANY DIFFERENT PURPOSES, INCLUDING THAT DESCRIBED IN 1.1.2 ABOVE, AND MAY BE USED AS A VEHICLE TO GUARANTEE DEBTS. PROPERTY AND RIGHTS OF ALL TYPES MAY BE PLACED IN A TRUST AS COLLATERAL. THE GREATEST ADVANTAGE OF A TRUST IS THAT ONCE PROPERTY IS TRANSFERRED INTO THE TRUST, IT IS LEGALLY SEGREGATED FROM THE REST OF THE DEBTOR’S ASSETS. THEREFORE, EVEN WHEN A DEBTOR IS FACING BANKRUPTCY PROCEEDINGS, ALL ASSETS PREVIOUSLY TRANSFERRED INTO THE TRUST WILL BE EXCLUDED FROM THE BANKRUPTCY ESTATE. LIKewise, ANY LIENS FOR UNPAID TAXES AND PAST DUE WAGES OF THE DEBTOR WILL NOT BE PAID OUT OF THE TRUST ASSETS.**

**IN THIS CASE, THE DEBTOR CONVEYS THE LAND TO A TRUST CREATED AT A MEXICAN BANKING INSTITUTION, WHICH WILL ACT AS TRUSTEE FOR THE BENEFIT OF THE CREDITOR. WE ALWAYS ADVISE OUR CLIENTS TO CONSIDER ITS USE, SINCE WE DEEM IT AS AN EFFICIENT MEANS OF FORECLOSING ON COLLATERAL WITHOUT THE NEED OF SUING IN COURT, SINCE IN THE EVENT OF A DEFAULT UNDER THE SECURED LOAN, THE TRUSTEE BANK MAY SELL THE LAND PRIVATELY BY INCORPORATING CERTAIN FORECLOSURE PROCEDURES IN THE TRUST AGREEMENT.**

**NOTE THAT MEXICAN LAW MUST GOVERN TRUSTS. ALSO, TRUSTS AFFECTING REAL PROPERTY MUST BE RECORDED AT THE PUBLIC REGISTRY OF PROPERTY. RECORDING PREVENTS A THIRD PARTY FROM CLAIMING TO HAVE ACTED AS A BONA FIDE PARTY WITHOUT KNOWLEDGE OF THE RECORDED ITEM.**

**TRUSTEE FEES ARE USUALLY FIXED UPON A PERCENTAGE OVER THE AMOUNT OF THE NEGOTIATION, WHICH MAY RANGE FROM 1% TO 2%. HOWEVER, AS COMPETITION HAS INCREASED AMONG TRUSTEES, THEIR FEES ARE NOW PERMITTED TO BE NEGOTIATED SUBSTANTIALLY DOWN. REGISTRATION AND NOTARIES FEES ARE FIXED AND ARE BASED ON PRE-DETERMINED RATES.**

### **III. Due Diligence**

#### **A. Due Diligence Priorities.**

**TIME INTENSIVE ISSUES WHICH REQUIRE A LONGER START UP TIME:**

**1. WATER RIGHTS –WATER AVAILABILITY-COMPLIANCE OF CONCESSION TERMS, LOCAL WATER AUTHORITY, NO WATER, NO PURCHASE / NO PROJECT).**

**2. BEACH FRONT CONCESSIONS (FEDERAL MARITIME ZONE) VALID FOR A FIFTEEN YEARS PERIOD, IS PAYMENT OF ANY DUES ON THE CONCESSION CURRENT, IF SOON TO END, IS THERE A POSSIBILITY OF RENEWAL? IF NONE, ARE THERE ANY OTHER PARTIES THAT MAY HAVE CLAIMED IT ALREADY OR THAT IF CLAIMED, WOULD HAVE PRIORITY RIGHTS OVER THE TARGET RESORT (ART. 20 OF THE GENERAL LAW ON NATIONAL PROPERTY-COMPLIANCE OF CONCESSION TERMS).**

**3. TITLE SEARCH / TITLE INSURANCE (3 WEEKS PROCESS). A MUST, NOT TO BE PREPARED SOLELY BY NOTARY OR LOCAL COUNSEL, BUT RATHER BY EXPERTS, SUCH AS A TITLE SEARCH COMPANY, DULY RECOGNIZED BY MOST TITLE INSURANCE COMPANIES IN MEXICO.**

**4. ENVIRONMENTAL AUDIT, MUST CHECK THE YEAR THAT THE TARGET PROPERTY WAS CONSTRUCTED. (POOR COMPLIANCE IN GENERAL IN MEXICO). INCREASED SURVEILLANCE BY ENVIRONMENTAL AUTHORITIES. LIABILITY BY PURCHASER, EQUAL TO THAT OF SELLER. A MUST, WITH ENVIRONMENTAL AUDITORS. VERY FEW SPECIALISTS IN MEXICO. MUST CHECK PRIOR EXPERIENCE AND BACKGROUND BEFORE HIRING.**

**5. LABOR: VERY SENSITIVE AND IMPORTANT. MEXICAN LABOR LAWS EMPLOYEE FRIENDLY, NEED TO CHECK COLLECTIVE BARGAINING AGREEMENT'S BENEFITS AND RIGHTS FOR UNIONIZED EMPLOYEES. NEED TO CHECK PRIOR HISTORY OF INCREASED BENEFITS ALONG DIFFERENT RENEWALS. NEED TO CHECK IF FRIENDLY UNION TO HOSPITALITY INDUSTRY IN THE REGION WHERE TARGET PROPERTY IS LOCATED. DEAL BREAKER. NEED TO MAKE SURE THAT UNION IS AWARE OF TRANSACTION AND WILLING TO ABIDE BY IT, WITHOUT RISK OF STRIKE – NEED TO CHECK INDIVIDUAL LABOR AGREEMENTS AS WELL. SEVERANCE OBLIGATIONS MAY BE TOO HIGH. NEED TO NEGOTIATE INDEMNITY PROVISIONS WITH SELLER. NEED TO CHECK IF EMPLOYER SUBSTITUTION WILL OPERATE.**

**6. HOTEL OPERATOR – NEED TO MAKE SURE THAT THERE ARE NO MATERIAL OBLIGATIONS FOR TERMINATION AND IF SO, OBTAIN ALL INDEMNITIES FROM SELLER. VERY IMPORTANT AND RELATED ROLE WITH UNION. NEED TO INVOLVE PRIOR OPERATOR IN NEGOTIATION WITH UNION.**

**7. DENSITY, ZONING – NEED TO CHECK THAT ZONING FOR RESORT IS ADEQUATE. SHOULD THERE BE ANY EXPANSION PLANS BY CLIENT NEED TO CHECK DENSITY RULES. IF PART OF A CONDOMINIUM DEVELOPMENT, NEED TO CHECK INTERNAL REGULATIONS REGARDING DESIGN AND ARCHITECTURAL COMMITTEE.**

- C. Experts to be Retained. At the outset, local counsel needs to assist client in identifying those experts/technical support (environmental, water, zoning, market feasibility, etc.) which it will need to think about employing. Local counsel needs to identify as well if there are any locality specific studies, i.e. geological if the buildings were constructed on the hillside, etc.]

**A MUST IN MEXICO TO BE RETAINED: SURVEYOR, ENVIRONMENTAL, ENGINEER'S AUDIT, HOTEL OPERATOR INVOLVEMENT, APPRAISER, LOCAL MIDDLE MAN TO EXPEDITE PROCESSES BEFORE LOCAL STATE AND MUNICIPAL AUTHORITIES. OTHERWISE THE PROCESS MAY BECOME TO EXPENSIVE AND SLOW.**

**III. Title**

- A. Method for confirming vesting of Title. Local counsel needs to help client to clearly understand how title matters are confirmed in Mexico.

**IN MEXICO, VESTING OF TITLE NEEDS TO BE CONFIRMED THROUGH THE PHYSICAL INSPECTION OF A CERTIFIED COPY OF THE TITLE DEED. A PUBLIC SEARCH AT THE LOCAL REGISTRY OF PUBLIC PROPERTY IS THEN CARRIED OUT. ANY LIENS AND ENCUMBRANCES WILL APPEAR IN SUCH RECORDS. RECORDS ARE KEPT IN DIFFERENT BOOKS, WHICH ARE PAGE NUMBERED AND SEPARATED INTO DIFFERENT VOLUMES. ANY SUCH INFORMATION NEEDS TO BE LATER CONFIRMED BY THE TITLE SEARCH COMPANY. SHOULD CHAIN OF TITLE APPEAR TO BE INTERRUPTED OR NOT CLEAR ENOUGH FROM EXISTING RECORDS, FURTHER RESEARCH NEEDS TO BE CARRIED OUT TO DETERMINE IF THERE IS A FATAL PROBLEM WITH TITLE ON ALL OR PART OF THE PROPERTY WHERE TARGET RESORT IS LOCATED.**

- B. Resolution of Title Matters/Defects. Should title issues become apparent from the results of the title search report, local counsel needs to explain client if there is any possibility to resolve them and, if so, how to go about resolving them.

**IF THE ISSUE ABOUT TITLE INVOLVES CORRECTIONS OF METES AND BOUNDS, THIS PROBLEM IS USUALLY SOLVED BY REQUESTING CORRECTIONS TO BE MADE AT THE REGISTRY OF PUBLIC PROPERTY IF, AND ONLY IF, THESE ARE PREVIOUSLY AGREED IN WRITING WITH OWNER OF NEIGHBORING LAND. IF NOT, JUDICIAL ACTION WILL NEED TO TAKE PLACE. ANY JUDICIAL ACTION MAY TAKE A LONG PERIOD OF TIME TO BE SOLVED.**

**DEPENDING ON THE SIZE OF THE PROBLEM, CLIENT NEEDS TO TAKE AN INFORMED DECISION AS TO WHETHER CONTINUE OR NOT WITH THE ACQUISITION OF THE TARGET PROPERTY. MOST RECOMMENDED ACTION BY LOCAL COUNSEL SHOULD BE TO SETTLE WITH THE NEIGHBORING LAND WHICH CONFLICTS WITH THE PROPERTY WHERE THE TARGET RESORT IS LOCATED.**

- C. Accessibility of Title Insurance. Local Counsel, and in particular that which advises foreign investment used to acquire title insurance, should be able to discuss what form of title insurance is available in Mexico.

**WITH THE SIGNATURE OF NAFTA, THE FLOW OF INVESTMENT FUNDS FROM US AND CANADA INTO THE MEXICAN REAL ESTATE MARKETS DEMANDED THE FINANCIAL STRUCTURES TO BE IN PLACE IN ORDER TO FURNISH LONG TERM MORTGAGE FUNDS INTO REAL ESTATE DEVELOPMENTS UNDER THE SAME FAMILIAR STRUCTURE TO THE USA CAPITAL MARKETS. TITLE INSURANCE OPERATES NOT AS A REPLACEMENT BUT AS A SUPPLEMENT ADDITION TO THE EXISTING SYSTEM. THE ELEMENT OF RISK CONTROL IS NOW IN PLACE THROUGH TITLE INSURANCE POLICIES. TITLE INSURANCE COMPANIES AS STEWART TITLE INSURANCE AND FIRST AMERICAN TITLE SERVICES DE MEXICO, OFFER OWNER AND MORTGAGEE POLICIES ADAPTED FROM THE AMERICAN LAND TITLE ASSOCIATION (“ALTA”) POLICY FORMS INSURING COMMERCIAL AND RESIDENTIAL PROPERTIES THROUGHOUT MEXICO, INCLUDING BEACHFRONT AND BORDER PROPERTIES. POLICIES CAN BE ISSUED IN EITHER US DOLLARS OR MEXICAN PESOS AND CAN BE WRITTEN TO INSURE ANY RECOGNIZED LAND INTEREST IN MEXICO INCLUDING DIRECT OWNERSHIP, LEASEHOLD AND TRUST OR BENEFICIAL OWNERSHIP. BASIC COVERAGE PROVIDES A PURCHASER/LESSEE OF REAL PROPERTY, OR A LENDER SECURED BY REAL PROPERTY, PROTECTION AGAINST LOSS IN THE EVENT THAT TITLE TO THE PROPERTY IS ENCUMBERED OR DEFEATED BY THE INTEREST OF THIRD PARTIES NOT OTHERWISE DISCLOSED IN THE POLICY. AMONG THE RISKS AGAINST WHICH THE INSURED IS PROTECTED ARE THE FOLLOWING:**

- A) MORTGAGES;
- B) MECHANIC’S AND /OR TAX LIENS;
- C) EASEMENTS;
- D) CONTRACTUAL OBLIGATIONS RESTRICTING THE USE OF THE PROPERTY;
- OR
- E) ADVERSE POSSESSIONS BY A THIRD PARTY.

**APPROXIMATE COST: .0065% ON THE TOTAL TRANSACTION AMOUNT.**

- D. Survey Availability. [Discuss whether surveys or equivalent are available and the requirements.]

**SAME AS IN U.S. IT IS AN ADDITIONAL TOOL DURING TITLE SEARCH. NECESSARY SO TO SPOT ANY PROBLEMS WITH METES AND BOUNDS AND/OR CONFIRM INFORMATION AVAILABLE AT PUBLIC REGISTRY OFFICE WHERE TARGET RESORT IS LOCATED.**

**IV. Review of Specific Issues re Real Estate Assets.**

- A. Water. If the target resort is located within a dry region, local counsel needs to make sure that water availability for the resort is there for the long run. Particularly, when the target resort includes a golf course and/or other type of amenities that require constant irrigation.

**LOCAL COUNSEL NEEDS TO REVIEW, AS PART OF DUE DILIGENCE, WHAT TYPE OF ARRANGEMENT IS THERE WITH THE LOCAL WATER UTILITIES COMPANY. THE LOCAL WATER UTILITIES COMPANY NEEDS TO HAVE A CNA (NATIONAL COMMISSION ON WATER) CONCESSION– NATIONAL GRANTOR OF WATER USE CONCESSIONS. AVAILABLE WATER DERIVING FROM A WATER SUPPLY AGREEMENT WITH THE LOCAL WATER UTILITIES COMPANY NEEDS TO DERIVE FROM THE FEDERAL CONCESSION.**

**LOCAL PUBLIC WATER UTILITY COMPANY – MUNICIPAL IN CHARACTER, TITLE HOLDER OF CONCESSION. LICENSOR OF WATER USE RIGHTS. EXCLUSIVITY – NON EXCLUSIVITY. NEED TO MAKE SURE THAT THE WATER SUPPLY AGREEMENTS ARE IN GOOD SHAPE AND ORDER, AND THAT THEY GRANT LEGAL CERTAINTY TO THE NEW OWNER OF THE RESORT, BOTH IN WATER REQUIRED AMOUNTS AND PERIOD OF TIME.**

**CONCESSION ADEQUACY OF WATER  
DUE DILIGENCE**

**WATER RIGHTS AGREEMENT – VERIFY INTERNAL AUTHORIZATIONS AND PROCEDURES ARE FOLLOWED AND COMPLIED WITH SO TO AVOID ANY ARGUMENTS BY UPCOMING MUNICIPAL ADMINISTRATIONS THAT THE AGREEMENTS WERE WRONGLY AND/OR ILLEGALLY GRANTED TO THE RESORT.**

**DISCUSS ALTERNATIVES SHOULD THERE BE NO AVAILABILITY OF ENOUGH WATER SUPPLY FROM THE LOCAL WATER UTILITIES COMPANY– DESALINATION PLANT.**

- B. Use Restrictions. Should there be any extension plans by the client aiming to purchase the target resort, confirmation of zoning and density availability becomes imperative, both from a governmental and private (for the case of a condominium) standpoint.

**ZONING – COMMERCIAL – HOTEL – ETC. THE BROADER LAND USE RIGHTS, THE BETTER: STATE EXAMPLE OF INTEGRAL TOURIST DEVELOPMENT (“ITD”) CONCEPT, IN SAN JOSÉ DEL CABO, STATE OF BAJA CALIFORNIA.**

**FOR A DEVELOPMENT TO BE CONSIDERED AN ITD, IT NEEDS TO INCLUDE HOTEL, CONDOMINIUM AND/OR SINGLE FAMILY LOTS, SHOPPING AND SERVICES CENTERS, GOLF COURSES AND/OR A MARINA, BE LOCATED IN A MINIMUM SURFACE OF 150 HECTARES (I.E., 1,500,000 SQ. METERS), WITH A MINIMUM BEACHFRONT OF 800 LINEAL METERS, DEDICATING 20% OF THIS FRONTLINE TO GREEN OR NON CONSTRUCTED AREAS AND/OR GOLF COURSE AND/OR WATER STREAMS, AS WELL AS A MINIMUM OF 800 EMPLOYMENT'S AS A MINIMUM. VERIFY DURING DUE DILIGENCE THAT THE TARGET RESORT'S CURRENT USE IS CONSISTENT WITH THE ZONING RESTRICTIONS.**

**DENSITY – FOR EACH MUNICIPALITY OF REGIONAL IMPORTANCE, THERE WILL BE AN URBAN DEVELOPMENT PLAN FOR THE CITY. LOCAL COUNSEL NEEDS TO CONFIRM IF THERE ARE ANY LIMITS ON CONSTRUCTION ON THE RESORT. GENERALLY SPEAKING, MAXIMUM DENSITIES ARE PROVIDED IN SUCH PLANS, WHICH THRESHOLDS DEPEND ON VARIOUS FACTORS, SUCH AS EXISTING LANDSCAPE AND VIEWS.**

**GENERALLY , WE CAN TALK ABOUT TWO TYPE OF DENSITY**

**MEASUREMENTS: LAND OCCUPATION COEFFICIENT: .4 (I.E., 40% OF TOTAL SURFACE AREA AS GROUND LEVELS)**

**LAND USE COEFFICIENT: .8 (I.E., 80% OF TOTAL SURFACE AREA, INCLUDING GROUND LEVELS AND UP)**

**IN CASE THAT THE TARGET RESORT FALLS WITHIN A MASTER DEVELOPMENT, THAT INCLUDES A CONDOMINIUM, LOCAL COUNSEL NEEDS TO VERIFY THAT THE TARGET RESORT'S MASTER DEVELOPMENT PLAT FALLS WITHIN BOTH CATEGORIES SO TO BE ABLE TO CONSTRUCT ANY ADDITIONAL AMENITIES AND/OR BUILDINGS.**

**DISCUSS INTERNAL MAXIMUM DENSITIES ESTABLISHED BY DESIGN GUIDELINES, WHICH MAY BE BELOW THOSE PROVIDED IN THE URBAN DEVELOPMENT PLAN. INTERNAL DENSITIES MAY BE MORE RESTRICTIVE BUT MAY NOT BE ABOVE THE MAXIMUM'S ESTABLISHED BY THE LOCAL GOVERNMENT'S DENSITY THRESHOLDS. IF SO, NEED TO CONFIRM IF APPROVAL ON EXPANSION PLANS ARE ALREADY OBTAINED FROM THE MASTER CONDOMINIUM ASSOCIATION MEETING. IF DENSITY IS MET, OBTAINING OF BUILDING LICENSES SHOULD NOT BE A PROBLEM.**

## **V. Operational Issues.**

- A. Labor Issues. Local Counsel needs to be able to discuss with client any union employee or employee termination issues as well as local labor climate.

**TERMINATION OR RENEGOTIATION – EMPLOYER SUBSTITUTION: CLIENTS TEND TO THINK THAT A PURCHASE OF THE ASSETS, RATHER THAN A PURCHASE OF THE COMPANY'S STOCK, AVOIDS AND/OR MINIMIZES LABOR LIABILITIES. UNDER MEXICAN LAW, THIS IS ABSOLUTELY UNTRUE. IF THE**

**CLIENT DECIDES TO PURCHASE ALL OF THE RESORT'S ASSETS INSTEAD OF A STOCK PURCHASE OF THE DIFFERENT ENTITIES OWNING THE RESORT, THEREBY SELLING THE RESORT'S ONGOING BUSINESS, THIS WOULD ENTAIL THE CONCEPT OF "EMPLOYER SUBSTITUTION" UNDER MEXICAN LABOR LAW. THE IMMEDIATE CONSEQUENCE IS THAT THE PURCHASER OF THE BUSINESS WILL BECOME LIABLE WITH SELLER FOR ALL LABOR COMPENSATIONS AND OBLIGATIONS FOR A PERIOD OF SIX MONTHS, COUNTED AS OF THE DATE OF NOTIFICATION OF THE SUBSTITUTION TO THE EMPLOYEES OR THE UNION. AFTER THE SIX-MONTH PERIOD, ONLY THE NEW EMPLOYER WILL BE LIABLE. AN AGREEMENT MAY BE REACHED TO SUCH EFFECT LIMITING LIABILITY ONLY TO MATTERS ARISING SIX MONTHS BEFORE THE EMPLOYER SUBSTITUTION.**

**ALTERNATIVES: UNION LEADERS – TERMINATION COSTS – TYPICALLY THROUGH DISCOUNT OF PURCHASE PRICE (ABSORBED BY SELLER – VERY HIGH – INVOLVE COST OF TERMINATING THROUGH SEVERANCE PAYMENT (STATUTORY REQUIREMENT CALLS FOR THREE MONTHS' SALARY PLUS 20 DAYS' PAY FOR EACH YEAR OF SERVICE. UNDER USUAL CIRCUMSTANCE, IN THE EVENT OF TERMINATION OF A UNION EMPLOYEE, THE UNION WILL MOST LIKELY MAKE A CLAIM ON BEHALF OF SUCH EMPLOYEE WITH THE LOCAL LABOR COURTS. THE CLAIM WILL PROVIDE THE AMOUNT OF SEVERANCE PAY THE UNION THINKS THE EMPLOYER OWES THE EMPLOYEE. THE COURTS HAVE TRADITIONALLY BEEN EXTREMELY EMPLOYEE FRIENDLY, AND THE BURDEN OF PROOF WILL BE ON THE EMPLOYER TO PROVE OTHERWISE. THE RESULTING AMOUNT WILL BE IN ADDITION TO THE MANDATORY SENIORITY PREMIUM (MORE THAN 15 YEARS OF SENIORITY EQUALS 12 DAYS PAY FOR EACH YEAR OF SERVICE, CALCULATED BASED UPON THE EMPLOYEE'S ACTUAL WAGE. FOR PURPOSES OF THIS CALCULATION AND EVEN IF HIGHER, EMPLOYEE'S ACTUAL WAGE SHALL BE CAPPED TO A MAXIMUM EQUIVALENT OF 200% THE CURRENT MINIMUM WAGE FOR THE APPLICABLE REGION).**

**DISCUSS WITH CLIENT RESULTS OF DUE DILIGENCE REVIEW TO COLLECTIVE BARGAINING AGREEMENT. TYPICAL ENVIRONMENT.**

B. Existing Contracts. [Discuss how to deal with existing contracts.]

**CONFIRM WHICH CONTRACTS ARE ASSIGNABLE AND WHICH ARE NOT. ASSESS IMPLICATIONS OF HONORING CONTRACTS WHICH MAY NOT BE TERMINATED. ASSESS TERMINATION OF THOSE CONTRACTS AND CONSEQUENCES INVOLVED.**

C. Review of any Pending Obligations. [Review any on-going claims or litigation, any outstanding balance under existing contracts, etc.]

**PART OF DUE DILIGENCE. UNLESS CLAIMS EXIST THAT MAY MATERIALLY AFFECT THE ONGOING BUSINESS OF SELLER, ANY PENDING OBLIGATIONS SHOULD NOT BE CONSIDERED AS A MATERIAL IMPEDIMENT TO CLOSE ON THE DEAL.**

- D. Management Contract Negotiations. [Discuss any issues related to the termination of the existing management agreement and negotiation of a new one with the New Operator.]

**NEW OPERATOR'S INVOLVEMENT. EQUITY PARTICIPANT VS. NON EQUITY PARTICIPATION. IDENTIFY LIABILITIES.**

- E. Trademark Issues. [Discuss any issues related to assignment of trademark and registration requirements.]

**DUE DILIGENCE. REVIEW OF ALL EXISTING TRADEMARK REGISTRATIONS. VALID FOR A RENEWABLE PERIOD OF TEN YEARS (FROM THE DATE ON WHICH THE REQUEST FOR REGISTRATION WAS FILED WITH THE MEXICAN INSTITUTE OF INDUSTRIAL PROPERTY) VERIFY EXISTENCE OF ANY LICENSING. ASSIGNMENT OF TRADEMARKS. NEED TO REGISTER THOSE.**

- F. Assignment of Personal Property. [Discuss any issues related to assignment of personal property, including any tax issues.]

**PART OF DISCUSSION OF ASSET VS. STOCK PURCHASE. LIST OF INVENTORY AND INVOICES ARE ENDORSED IN FAVOR OF BUYER.**

**ASSETS.- THE CHIEF US AND MEXICAN TAX BENEFIT OF PURCHASING ASSETS IS THAT THE BASIS OF DEPRECIABLE AND AMORTIZABLE ASSETS IS STEPPED UP TO THE PURCHASE PRICE, ALLOWING THE BUYER A GREATER DEPRECIATION ALLOWANCE THAN OTHERWISE WOULD BE AVAILABLE.**

**STOCK.- THE CHIEF US TAX BENEFIT OF PURCHASING STOCK IS THAT THE US OWNER WILL ENJOY THE US TAX BENEFITS OF OPERATING THE MEXICAN BUSINESS AS A CORPORATION WITHOUT THE TAX COST THAT MAY APPLY WHEN ASSETS ARE PURCHASED AND THEN TRANSFERRED TO A MEXICAN CORPORATION.**

- B. Tax Considerations. [Discuss initial, acquisition and on-going considerations, including repatriation issues.]

**TAX LIABILITIES ARE FOUND IN THE FISCAL CODE.**

**1. REAL ESTATE ACQUISITION TAX: CHARGED ON THE ACQUISITION OF BOTH LAND AND CONSTRUCTIONS AND IS PAYABLE BY INDIVIDUALS**

**AND COMPANIES WHO BECOME THE OWNERS OF PROPERTIES, WHETHER BY PURCHASE, DONATION, INHERITANCE, CONTRIBUTION, MERGER, LIQUIDATION, IN TRUST, ETC. THE SELLER OR TRANSFEROR IS HELD TO BE JOINTLY LIABLE FOR THE PAYMENT OF THE TAX. THE CURRENT TAX RATE IS 2% APPLIED TO THE BASE THAT RESULTS FROM SUBTRACTING AN AMOUNT EQUIVALENT TO TEN TIMES THE YEARLY MINIMUM WAGE IN THE FEDERAL DISTRICT FROM THE APPRAISAL VALUE OF THE REAL ESTATE – FEDERAL OR STATE TAX. ONLY ONE IS PAID.**

**2. VAT: SALE OR TRANSFER OF LAND OR RESIDENTIAL PROPERTY DOES NOT GENERATE THIS TAX. HOWEVER, THE SALE OF COMMERCIAL REAL ESTATE DOES CARRY SUCH A TAX. THE APPLICABLE RATE IS 15% ON MOST CASES AND 10% ON BORDERING STATES, SUCH AS THE STATE OF BAJA CALIFORNIA.**

**3. CAPITAL GAINS TAX: FLAT RATE OF \*32% ON OFFICIAL SALES PRICE. NOT EXISTING IN MEXICO. TREATED AS NORMAL INCOME. THE GAIN FROM THE SALE OF REAL PROPERTY IS DEEMED TO BE NORMAL INCOME. BUYER MAY BE HELD LIABLE FOR SUCH TAX IF SELLERS FISCAL LIABILITY IS NOT TAKEN INTO CONSIDERATION. PROPERTY MAY EVEN BE EMBARGOED BY THE TAX AUTHORITIES TO RECOVER DELINQUENT TAXES. TO DETERMINE ACTUAL GAIN, THE FOLLOWING ITEMS SHOULD BE DEDUCTED FROM THE OFFICIAL SALES PRICE: (1) ORIGINAL INVESTMENT, DULY ACTUALIZED (DIVIDE NATIONAL CONSUMER INDEX FOR THE MONTH OF SALE BY THE NATIONAL CONSUMER INDEX FOR THE MONTH OF ACQUISITION, (2) MODIFICATIONS AND IMPROVEMENTS, (3) COMMISSIONS PAID TO ANY REAL ESTATE BROKER, (4) TOTAL COST OF EXPENSES AND FEES PAID TO THE NOTARY PUBLIC AT THE TIME OR ORIGINALLY ACQUIRING THE PROPERTY.**

C. Corporate Liability Considerations. [Discuss various forms of corporate entities available which may create less exposure; also, discuss any need for local directors and initial capitalization requirements.]

**A U.S. OWNER OF A MEXICAN BUSINESS CAN CLAIM MEXICAN LOSSES ON ITS U.S. INCOME TAX RETURN ONLY IF THE MEXICAN BUSINESS IS OPERATED AS A BRANCH, AS A PARTNERSHIP, OR AS A CORPORATION THAT JOINS IN THE CONSOLIDATED RETURN OF THE U.S. CORPORATE OWNER UNDER THE LIMITED EXCEPTION TO THE GENERAL RULE THAT ONLY U.S. CORPORATIONS MAY JOIN IN THE RETURN.**

**S.A. DE C.V. (LIMITED LIABILITY COMPANY). UNLIMITED SHAREHOLDERS – PUBLIC COMPANY, \$5,000 US**

**S. DE R.L. DE C.V. (LIMITED LIABILITY TREATED AS PARTNERSHIP IN THE U.S.) – PASS THROUGH ENTITY. LIMITED TO 50 PARTNERS.**

**DISCUSS SOLE ADMINISTRATOR VS. BOARD. \$300 US**

**MEXICAN LAW ALSO RECOGNIZES PARTNERSHIPS ANALOGOUS TO THE US GENERAL PARTNERSHIP (*SOCIEDAD EN NOMBRE COLECTIVO*) AND LIMITED PARTNERSHIP (*SOCIEDAD EN COMANDITA*). AN *ASOCIACION EN PARTICIPACIÓN* IS A JOINT VENTURE THAT IS NOT REGARDED UNDER MEXICAN LAW AS GIVING RISE TO A BUSINESS ENTITY SEPARATE FROM THE PARTNERS. THE MEXICAN BRANCH OF A NON-MEXICAN CORPORATION IS REFERRED TO AS A *SUCURSAL*.**