

TAKING CONTROL OF TRUST FEES

From Vallarta Voice Magazine, April 2002

By David William Connell

Over the years I have been contacted by many foreigners who are frustrated with the fees they have to pay to the bank acting as their trustee. Unfortunately, upon reviewing their trust agreements (escrituras) I have to inform them that when their trust was set up they agreed to pay the fees the bank charges and also authorized the bank to be able to unilaterally modify these fees. By the time people contact me they are already so angry with their bank they want nothing further to do with them. In these cases the only way out is to transfer the property to a new trust, which means paying expensive closing costs and taxes. How do you avoid this? If you have a trust already set up, you may want to renegotiate its terms. If you are just setting up your trust, then you need to watch out for the boilerplate agreements.

The procedure for purchasing property in Mexico is very foreign to what most Americans and Canadians are used to. People who are not familiar with a real estate transaction in Mexico usually try and stay on top of what is going on so that their purchase does not become one of the many horror stories they have heard of. They get wrapped up in the details of "closing" on the property and often fail to really understand the trust agreement that they are entering into with the bank. The foreigner gets wrapped up in checking to see if the title to the property is clear, if the property taxes are paid, if the electrical, phone and water bills have been paid up to date, if they have their finances in order to make a cash purchase, what will their annual expenses be, does the property have any structural, plumbing or electrical problems, can title insurance be acquired and just basically trying to understand a foreign way of transferring title to real property. On top of all this, throw in a foreign language and you have a lot of bases to cover to make sure title gets transferred correctly into your name.

Once you get all of the above in order, you move to closing. Documents are signed, payments are made and the parties extend congratulations on the purchase and sale. You have just closed on your new vacation dream home or property, congratulations! Oh but wait, what you have also just done is agreed to the bank's boilerplate agreement and this agreement was designed by some very experienced attorneys that work for the bank. As you can imagine, this agreement is written extremely in favor of the bank. This bank now holds title to your property and this boilerplate agreement sets down the rules and regulations governing your relationship with your trustee/bank.

I have worked with most of the banks that set up trusts for acquiring property in Mexico's restricted zone. Some of the things that you will find in all of their boilerplate agreements are the following:

- 1.- The bank has the authority to modify, whenever it deems necessary, the annual fees it charges for the administration of your trust. Annual fees are paid either based on a percentage of the value of the property or a fixed dollar amount. If your annual fees are set as a percentage of the value of the property, the bank authorizes itself to re-appraise your property whenever it sees fit and adjust your annual fees accordingly. I recommend that you make sure your trust does not use the percentage method to determine the annual administrative fees.

Make sure your annual administration is set in dollars and that it can only increase if 1) You are in agreement, or 2) In accordance with inflation of the United States of America. Many times banks will want to set the fees in dollars and then establish that they can increase in accordance with inflation of Mexico. Do not let them get away with this. If you are using dollars, the inflation should be set to United States inflation. If they want to use the inflation of Mexico, well than they should set the annual administration fees in pesos. Most banks will not want to set fees in pesos because if the pesos devaluates, which it often does, they lose big.

2.- The bank can charges late interest or fines for not paying your administration fees on time. I have seen agreements that charge late interest as high as 3% a month, that is 36% a year!!! What is worse is the bank has no obligation to notify you when payments are due and where they should be paid. Often times you will go to your bank to make your administration payment and the teller or bank manager has no idea what you want to pay or how to do it. This means that you spend your vacation time in banks and on the phone. To avoid this make sure the account information where you have to deposit the fees is clear. Also make sure you know the dates when you have to make payments and most important, make sure that the bank charges NO LATE INTEREST OR FINES unless they notify you fees are overdue and where you can deposit them in order to avoid interest and fines.

3.-The bank will set fees for signing powers of attorney and the sale of the property. These fees usually seem responsible; however what many people don't see is that the bank has the authority to charge more for what they consider "unusual circumstances". From my experience it seems that the bank finds "unusual circumstances" in just about every sale of property or power of attorney they have to sign. An example of this was a power of attorney a client of mine recently needed to defend himself against a legal claim made by the environmental protection agency. The trust document said that the bank could charge \$ 300 dollars for granting powers of attorney. The bank charged \$ 650 dollars and stated that there was "unusual circumstance". If my client did not pay the \$ 650 dollars the bank would not sign the power of attorney and he would loose the legal battle with the environmental protection agency by default. You need to make sure the amounts the bank can charge for signing powers of attorney or the sale of the property are clearly established.

4.- The bank has the authority to determine what fees will be charged for any other types of activities they have to be involved in, such as reviewing documents, authorizing federal zone permits, authorizing mortgages, etc. Do not give this power to the bank. Set a fixed price for reviewing and signing documents other than powers of attorney or the sale of the property. I usually establish a charge of \$300 dollars.

5.- The bank can refrain from signing documents if fees and fines or late interest are not paid. This type of disposition goes completely against the concept of having a fiduciary or trustee responsibility, however it is in just about every boilerplate agreement and the bank always uses this type of policy. This type of disposition should only be allowed regarding the sale of the property held in trust, other than that, it should be taken out of the agreement.

When you close on a property you do so before a notary. The notary charges fees to set up the trust and have it registered. In almost all cases the notary will use a boilerplate agreement given to him by the bank acting as trustee and his fees do not include negotiating with the bank the necessary modifications to the banks boilerplate agreement. To make modification to the boilerplate, you either need to do it yourself or hire someone to do it for you. Spending a little before you sign the agreement will save you a lot in the future. You may also want to ask the notary what extra fees he will charge you to handle this negotiation (he may not even charge you). Make sure you get in writing the modifications that will be made.

If you have already signed the trust agreement before a notary and are unhappy about what the bank is charging, you need to determine whether negotiating modifications to the existing agreement are feasible. You need to either personally contact the bank or have an attorney contact the bank and determine what needs to be done to modify the agreement. You

also need to determine if the cost of the negotiation and modifications will be more than they are worth in the long run. I recommend that you pay an attorney or someone familiar with trusts to contact the bank and determine 1) The possibility of modifying the trust and 2) An accurate estimate of costs to make the modifications. Make sure you get the estimate in writing and that it covers all costs and fees. Modifications to existing trusts are difficult but not impossible. These modifications need to be dealt with on an individual basis and only after having read and understood the terms of the existing agreement.

The bank has a fiduciary responsibility with you and they charge for these services. Do not let them give you a boilerplate agreement which authorizes them to determine, at their own free will what these fees will be. If you have already signed an agreement which does allow them to charge whatever they see fit, you may want to negotiate a modification and put a stop to increasing fees.

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