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A General Overview of Cuban Real Estate Investment Laws

By Rolando Anillo-Badia

When examining the Cuban real estate legislation, it is clear that the Cuban legislature only conceived the possibility of doing business with the Cuban State. This is made clear by the Cuban Civil Code (Law No. 59/87) which provides that “the real estate and facilities belonging to the Cuban State may not be transferred to natural or juridical persons”.

Despite the above, the need for attracting foreign capital for Cuban real estate investments required additional guarantees to foreign investors. As a result, the Cuban National Assembly of Popular Power amended the 1976 Socialist Constitution of Cuba in 1992.

Modifications were introduced to the 1976 Cuban Constitution which represented the derogation of such limitation from the 1976 Constitution and from the Civil Code. For example, Article 15 of the amended Constitution allows the State to transfer property rights, in exceptional cases, for the development of the country. The transfer of property rights requires, however, requires approval by the Council of Ministers. Article 15 also states that “the transfer of property rights to state enterprises and other entities authorized to fulfill this objective will be prescribed by law”.

Furthermore, Article 23 of the Cuban Constitution, as then amended, states: “The State recognizes the right to legal ownership of joint ventures, domestic companies and economic associations which are created as prescribed by law”. Article 23 also provides that “the use, enjoyment and disposal of the assets

belonging to the former mentioned entities are ruled by what the Law and treaties established, as well as by their statutes and regulations”.

Cuban Foreign Investment Act – Real Estate Investments

The foregoing Cuban laws, as amended, created favorable conditions for foreign investments in Cuban real estate. Article 10 of the Cuban Foreign Investment Act (Law No. 77) of 1995 states that “foreign investments may be authorized in all sectors, excluding health and education for the population and the armed forces institutions, with the exception of the latter’s commercial system”.

Chapter 6 of Law 77 specifically deals with real estate investments. Articles 16, 17 and 18 of Law 77 define the scope of real estate investments, including ownership and other property rights. According to Law 77, foreign investors may purchase primary residences, vacation homes, offices for their companies and develop real estate projects in the area of tourism.

Article 18 of Law 77 explains that the conditions and terms of real estate transfers to foreign investors are determined in the “**authorization**” and pursuant to the current legislation.

The required “authorization” is defined in Law 77 as the “document issued by the Executive Committee of the Council of Ministers (“CECM”) or a government commission”. Article 21 (f) of such law establishes that the CECM has the exclusive power to authorize “investments that include the transfer of state-owned property or of other state-owned property rights”.

Real Estate as a Cuban Contribution to a Joint Venture

Law 77 also considers real estate as possible Cuban contribution to a joint venture between a foreign entity and a Cuban entity. Article 19 (d) of Law 77 includes as contributions to the investment: “property rights over personal property and over real estate property, as well as other property rights over those assets, including usufruct and surface rights”.

As such, the Cuban party in a joint venture may include land, buildings, **usufruct rights** and **surface rights** as part of his/her contribution to the joint venture.

Right of Usufruct in Cuban Legislation

According to Cuban Civil Code (Law No. 59/87), the right of usufruct gives the right to the free enjoyment of the property of another, with the obligation to preserve its form and substance, unless the title constituting it or the law provides otherwise. The rights and obligations of the usufruct holder (usufructuary) are determined by the title document of usufruct.

The usufructuary is obligated to use the property that is the object of the usufruct in accordance with its purpose, and may make such improvements, facilities or installations necessary for its adequate maintenance, conservation and enjoyment. Article 210 of the Cuban Civil Code establishes that “the right of usufruct is nontransferable and may be encumbered, unless the title provides otherwise”.

Article 211 of the Cuban Civil Code prescribes that “the State may grant in usufruct state-owned property to individuals or corporations in the cases and with the formalities provided under applicable law. When granting the right of usufruct, the State may establish conditions different from those indicated in the Cuban Civil Code as long as they do not contravene the nature of the usufruct as an institution”.

As established in Articles 15 and 23 of the Cuban Constitution, the Cuban State may authorize Cuban entities to contribute the right of usufruct to the joint venture as long as the contribution meets the economic objective of the State.

According to such code, usufruct in favor of individuals may not exceed their lifetime. Usufruct granted in favor of corporations (including joint ventures) may not exceed the term of 25 years; which term may be extended by an equal term at the request of the usufructuary made prior to its expiration date.

Surface Rights in Cuban Legislation

According to article 218 of the Cuban Civil Code: “The State may also grant to natural or legal persons surface rights over state-owned lands for the construction of housing or to carry out other construction. Surface rights may also be granted in order to use the land for other specifically determined activities. Surface rights may not be granted over lands under private ownership. Surface rights may be granted by onerous or gratuitous title”.

Surface rights may be granted for a term not exceeding 50 years and the surface right may be extended for half of its original term, at the request of the holder of the surface rights made before the date of the expiration. Surface rights are transferable, except when the law or the title document provides otherwise.

It is also worth noting that the holder of a surface right becomes the owner of whatever is built on the land. Specifically, Article 225 of such code indicates that when the surface right is extinguished (ended), the improvements or facilities built on the land would be reversed in favor of the State who is the owner of the land.

The surface rights given to the Cuban partner, that is to say, the Cuban party in a joint venture, may also represent a capital contribution to the joint venture, but if the surface right is given directly to the joint venture, it will have to pay the value or price of the surface right to the Cuban State.

Cuban Real Estate Complementary Laws

The initial demand for Cuban real estate investments exceeded expectations and required additional changes to the Cuban real estate legislation. As a result, the Cuban Council of State approved several laws from 1998 to 2007. The new regulations included: Decree-Law No. 185/98 (“Cuban Property Registry Law”), Decree-law No. 214/2000 (“Structuring of Mortgages”), and Decree-Law No. 233/03 (“Modified Cuban Housing Law”). As a complementary regulation, the Cuban Ministry of Justice (“MINJUS”) approved Resolution No. 114/07 (“Procedures of the Cuban Property Registry”).

Cuban Property Registry

Cuba inherited from Spain one of the most efficient registry systems in the world, the Spanish system; Cuba’s decision of institutionalizing the property registry system guarantees the chain in title and the recognition of all the property rights that affect all Cubans and foreign investors.

The Cuban Registry provides transparency to the real estate investment process by keeping records of all real estate transactions. The Registry also provides additional guarantees to the foreign investors and to prior owners of Cuban real estate (Americans and Cuban nationals) whose properties have been affected by prior expropriations or confiscations.

Currently, interested parties may be able to search in the Registry the following documents: 1) declarations of expropriations and confiscations of properties in

favor of the Cuban State, 2) transfers of state owned-properties to Cuban companies, 3) joint ventures or individuals (foreign or nationals), 4) rights of usufruct, surface rights, leasing agreements or other real estate contracts, 5) warranty deeds, 6) notary documents, 7) judicial decisions affecting a real estate property and 8) recorded mortgages or other recorded encumbrances, assessments and declarations.

Decree-Law No. 185/98 modified Law No. 65/88 and designated the MINJUS as the state entity in charge of implementing the regulations of the Cuban Property Registry. As a result, the MINJUS approved Resolution No. 114/07 which provides the rules and procedures of the Cuban Property Registry (the “Registry”).

According to the MINJUS Resolution No. 114/07, the following documents must be recorded: 1) new transfers of title or property rights, 2) prior transfers of property or titles to recognize the rights of the current title holder, 3) new construction, and 4) real estate properties that constitute capital contributions to joint ventures.

The Registry shall be made public by way of the issuance of informative notes, the issuance of certifications, and the direct search of the recording documents in the Registry.

The Registry is a government agency with the unique function of keeping records of legal documents affecting property rights. The Registrar is a public officer in charge of the Registry.

The real estate recording process starts with a request to the Registrar. The Registrar examines the documents to determine if the request includes the documents contemplated in Article 4 of Resolution No. 114/2007 or if the request includes titles or other legal documents enumerated in Article 5 of same Resolution.

The Registrar may inquire about additional documents to support the request. According to Articles 14.1 and 25 of Resolution 114/2007, the Registrar shall examine the documents for errors or omissions.

The Registrar may suspend the recording of the documents until the errors have been corrected. The Registrar may also deny the recording when there is an illegality or the title contains defects. As such, the Registrar, essentially, acts as a title examiner.

Decree-Law No. 114/2007 also contemplates an administrative procedure against the Registrar's decisions before the Director of the Provincial Justice, a Cuban government agency. There is also a subsequent right to appeal an adverse decision of the Director through an administrative process pursuant the Cuban Civil Procedure Law ("Law No. 7 of 1977").

Currently, the MINJUS has been involved in creating the legal formalities to reorganize the real estate market in Cuba. Such legal formalities have been focused on four main areas:

1. Legalization of real estate properties in favor of the Cuban State which has been stagnated since the 1960s causing a loss of the chain titles.
2. Registration of all the properties owned by the State in the Cuban Property Registry.
3. Registration of the property rights granted in favor of Cuban entities including usufructs, surface rights and concessions.
4. Registration of property rights granted in favor of joint ventures, including foreign investors.

Cuban Mortgage Legislation

The revival of the real estate mortgage as a vehicle for the development of the Cuban real estate market is a pending issue in the opening of Cuban real estate investments to foreign investors.

The laws promulgated after the Cuban Revolution of 1959 almost eliminated the mortgage institution from the Cuban legislation. As a result, the Cuban Civil Code of 1987 only recognized the ship and aircraft mortgage institution. The old and obsolete Spanish Mortgage Law of 1893, which is the only existing mortgage law in Cuba, is practically a dead letter.

After the promulgation of Law No. 77/95 (Cuban Foreign Investment Law), the foreign investors demanded more flexibility in the real estate investment process.

At the same time, real estate lenders demanded more guarantees and security to finance real estate projects. As a result, the Cuban Council of State approved the Decree-Law 214/2000 which brought to life the possibility of filing mortgages in Cuba. It is worth noting that one of the purposes of the Decree-Law No. 214/2000 was to allow foreign financial institutions to finance real estate investments in Cuba.

The Cuban legislator interprets the mortgage as a legal contract and applies the article 312 of the Cuban Civil Code (Law No. 59/87) to classify the mortgage contract as a real estate contract of guaranty which is unilateral, onerous, accessory and formal. In addition, the mortgage is a property lien that needs to be recorded in the property registry to offer protection, guaranty and security to the mortgage holder.

Decree-Law No. 214/2000, known as the Cuban Structuring Mortgage Law, recognizes the mortgage institution as a guaranty to the fulfillment of the contractual obligations and the payment of obligations and debts. Cuba limited the capacity to mortgage real estate properties to corporations or other economic entities registered in Cuba. According to Law No. 77/95, all the companies created under that law are considered Cuban corporations regardless of the nationality of its shareholders.

Article 2 of such Decree-Law prescribes that the legal regime of mortgages in Cuba is based on Mortgage Law of 1893, which is still in effect, and its complementary regulations. The “old” Spanish Mortgage Law acquired validity in the Cuban foreign investment strategy.

It is clear that the purpose of passing Decree-Law No. 214/2000 was aimed at promoting financing from foreigners. However, Cuban financial institutions or mixed financial entities (joint ventures) are not excluded from financing real estate properties in Cuba.

The first special provision of Decree-Law No. 214/2000 prescribes that any filling of a mortgage in Cuba requires prior and express authorization of the Cuban Executive Committee of the Council of Ministers (“CECM”).

The second special provision of the Decree-Law No. 214/2000 prescribes that the Cuban State has a preference right to acquire mortgage titles by paying its value in the event the mortgage holder, lender or intermediary decides to sell, assign or transfer the mortgages. As a result, the Cuban State reserves its right of first refusal and option to purchase mortgages. If the Cuban law provides that the State has a preferential acquisition right, it is understood that such right includes both the right of pre-emption and the right of retraction.

The right of pre-emption is defined in the Cuban Civil Code as the right to acquire an asset for an agreed price or the legal price, as the case may be, in preference to another acquirer, whenever the owner wishes to dispose of same. In order to allow the person holding such right to exercise it, the vendor shall have the obligation to inform holder of the terms and conditions of the intended sale.

The right of retraction is defined in the Cuban Civil Code as the right to acquire an asset sold, in subrogation of the purchaser, by reimbursement of the purchase price, contractual expenses and any other useful and necessary expenses, including those made in the asset itself.

According to the Cuban Civil Code, the right of retraction may not be exercised by a person that, having been notified of the proposed sale, did not exercise the right of pre-emption.

In a case where the transfer of an immovable property right requires the prior authorization of the State and, at the same time, the State is granted a right of pre-emption with respect to such property right, the term to exercise such right is calculated from the moment that authorization request has been filed.

The third special provision of the Decree-Law No. 214/2000 indicates that the solution of disputes derived from the registration or execution of any mortgage in Cuba is determined in accordance with the Cuban Civil Procedure Law (“Law 7/77”). The Economic Chamber of Cuban Popular Tribunal has jurisdiction over any mortgage dispute related to foreign investment companies as prescribed in Decree-Law 223/2001 (“Jurisdiction of the Economic Chamber of the Provincial Popular Tribunals in Cuba”). Such Decree-Law was later replaced by Decree-Law 241 of 2006 (Modified Cuban Civil Procedure Law).

Headline News On Cuba

Cubans allowed to build their own homes

Facing intense demand for housing, the Cuban government is granting permits that let Cubans build homes with their own resources. In Cuba, where the state runs the economy, home building until now has been a government affair.

Cuba, with 11.2 million people, has a severe housing shortage aggravated by three hurricanes that tore through the island two years ago. These hurricanes damaged half a million homes and caused 10 billion dollars in damage.

According to government figures more than half a million homes are needed. The Cuban government announced in 2006 a goal of building 100,000 new homes a year, a target that eventually was cut in half.

Last year Raul Castro authorized Cubans to "build your homes with whatever you can." Cuba's Housing Institute has started granting "self-effort" building permits. The permits are to build new homes, or expand or repair existing homes.

More than 80 percent of Cubans are homeowners, but by law cannot sell their homes directly. They can, however, swap them under a government system called the permuta (exchange in civil law).

A look at conduits for trade with Cuba

In an article published by El Nuevo Dia de Puerto Rico and reproduced in The Miami Herald by Renato Perez on April 27, 2010, Joaquin F. Monserrate, Political and Economic Counselor at the U.S. Interests Section in Cuba, said that "Cuba could open to business a lot earlier than it could become democratic. "In fact, that's a big possibility", he said.

Although "opportunities [for trade] are very limited today, everything points to the fact that, from one moment to another, more profound changes will occur. The big question is when. Truth is, I don't know. Nobody knows", he said.

According to the article, the U.S. State Department official addressed an audience of businessmen in Puerto Rico and encouraged them to "look for experiences that will help you penetrate into Cuba and to explore the Dominican Republic market because it will be useful for you".

Monserrate also cautioned the businessmen that "Cuba has an extremely leonine and unattractive investment climate." "The government is always the majority partner and takes a lion's share of the profits, even though it contributes little to the business", he explained.

Cuba OKs residential projects for tourism; move may mean creation of resort villas

Cuba approved new real estate developments aimed at attracting foreign investment in tourism projects like marinas and golf courses, including from the United States if Washington reverses its embargo on the island.

Tourism Minister Manuel Marrero announced on May 4, 2010 that the government adopted "a policy of real estate development linked to tourism" as part of the strategy to boost such investment.

Cuba has approved construction of residential projects linked to resorts, the tourism minister said, possibly opening the door for villas that could one day ring oceanfront golf courses and other vacation getaways.

Long-Term Leases / Surface Rights

Cuba prohibits foreign ownership of Cuban real estate, so golf course developers have requested that they be given long-term leases for their projects.

The Cuban government permitted the construction of a handful of condominiums in association with foreign companies at the end of the 1990s, most of which were sold or rented to foreigners.

Dozens of luxury hotels also have been built in joint ventures with international hotel chains.

A huge marina is being built at Varadero with the hope that US sailors will one day make the 90-mile (144 km) trip from Florida to Cuba.

Americans are generally banned from visiting Cuba due to the 48-year-old US trade embargo against the island, but legislation is pending in the U.S. Congress to lift the ban. Whether such legislation will ultimately be passed, however, is difficult to determine.

Tourism Minister Manuel Marrero did not offer other details about the new policy, but said the official regulations would be published soon.

The new businesses "will permit the beginning of another stage for development of Cuban tourism ... in areas with tourist potential that still aren't exploited," he said.

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