

“THIRD PARTY ESCROW IN MEXICO IS A MUST”

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As a licensed real estate broker in the state of Texas, and having more than 17 years of practical experience in real property transactions on both sides of the border, I learned a long time ago and have always remembered one thing about our industry. Money, and the possession or deposit of it into “broker escrow accounts,” has historically been the downfall of many competent real estate professionals. Real estate agents and companies have literally gotten “killed” abusing this concept. As licensed practitioners in the United States, we have to complete state-mandated educational requirements and testing competency to obtain a real estate salesman license. At the forefront of any real estate schools education curriculum was the emphatic and stringent requirement that agents cannot and should not “co-mingle” purchasers’ earnest money deposits in broker accounts. If there has ever been one real estate concept that can have catastrophic consequences to all parties involved, it is not handling a purchaser’s deposit in a safe, secure and accountable manner with the implicit understanding that there is a “fiduciary” obligation to safeguard the buyer’s money ... always!

This writer has long said and preached that “if a purchaser is willing to give money to the seller or the agent in a real estate acquisition, be prepared not to get it back!” There can be no truer words to live by in Mexico. Unfortunately, it is a sad reality. Well-buying public, this truism and catastrophic consequence, the unthinkable event, has reared its ugly head in Mexico in 2002. Purchasers in a particular Mexico market – the particular market not being the issue – deposited funds in good faith and entrusted these moneys to the agent’s “broker trust account.” One would think that the term trust would imply some sort of confidence and security in the deposit vehicle, yet in this case, it was an oxymoron. The stark reality is that the money is gone, and it’s a huge amount of money we’re speaking of. The agent is gone as well, having fled Mexico and leaving these unprotected “good faith” buyers to ponder what now. Their sole remedy and recourse to date has been to file complaints with Mexico’s consumer protection agency, “PROFECO.” The likelihood that any of them will recover any of their money is slim and none, and slim already left Mexico!

The alternative to broker escrows or giving money to the seller is to utilize third party escrow accounts. Some Mexican banks will handle deposits for real estate transactions, charging an escrow fee of approximately \$450 to \$500. There are however several drawbacks to Mexican bank escrow accounts. First and foremost is that Mexican banks do not utilize formalized escrow agreements that have been negotiated and executed per mutual agreement between the seller and the buyer and additionally signed with acknowledgement by the bank as agent. Mexican banks simply hold the money until notification to release it. They traditionally do not invest the money into interest bearing accounts for the benefit of the depositor as well. It has also been the practice of the banks to use the funds internally. The end result is that the subsequent refund or transfer of the deposited amount is not readily available nor is it handled in a timely and expeditious manner.

The best and most favorable manner to handle earnest money and escrow deposits involving Mexican real property transactions is with a U.S. title insurance company who has a fiduciary obligation and responsibility as the “escrow agent.” Some agents and developers in Mexico do not like to utilize escrow

accounts in the United States for one simple reason: **they do not control the money!** Understanding that there is a total lack of construction financing in Mexico, an overall level of illiquidity in lending of any type, and the subsequent upfront deposits required by many developers to begin construction notwithstanding, there is still no reason why third party escrows should not be used to protect the foreign buying public. Or for any buyer! The prevailing concept of “passing the money” when the seller and buyer enter into a promissory agreement is antiquated, self-serving, and at best a huge risk for purchasers. As in the United States, consideration or the purchase price due – less any earnest money deposit – should be paid when a buyer is able to receive a protocolized deed by the *notario publico* and the transfer of the real property interest. It should not be when the buyer can get the keys to the condo or “possession” of it.

The ultimate benefit of third party escrow is the basic fact that an escrow agreement exists, fully negotiated and mutually agreed upon between the seller and the buyer. It is a “stand alone” document that instructs the escrow agent precisely in the manner in which the escrowed funds are to be deposited, handled and ultimately disbursed. The escrow agent is bound to the stated terms of the agreement and has a fiduciary obligation to follow the letter of the agreement. It is not subject to interpretation or conjecture, nor is the escrow required to interpret how money will be handled per a purchase contract. Moreover, the escrow deposit can be put in a federally insured depository with the establishment of a money market interest bearing account. The subsequent accrued interest can be designated for the benefit of the seller or the buyer. But at all times, the parties know where the money is. It is verifiable once the account has been opened and it is always referenced directly to a guaranty file as maintained by the escrow agent with full disclosure of all salient facts and account numbers. If a dispute arises between the parties concerning the disposition of the escrowed funds, the escrow agent has the responsibility and obligation to “interplead” the funds with a court of competent jurisdiction. But at no time will the money be released to anyone without the written mutual consent of the parties.

And one last important point. The new buzzword floating around the market suggesting the concept of “bonded escrow accounts” is just that: a buzzword that has no meaning or existence. Title companies may bond an individual that works for the company as a title officer, but they **do not** bond individual depositor accounts. At the end of the day, escrow accounts tied to executed escrow agreements are the most secure, negotiable and protective manner in which to insure the integrity of any purchaser’s deposit.

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