Business Insights: Cuba

Fox Rothschild LLP
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Trademarks in Cuba and the Cohiba and Havana Club Wars

Cuba's demand for trademark protection within a legal framework of fair competition is a public interest of the state as part of its current efforts to transition to a market-oriented economy. Thus, the country has passed advanced intellectual property protection legislation in line with its active participation in the international arena. As a result, trademarks registered in the United States enjoy certain protection in Cuba under its current trademark laws and the international treaties to which Cuba and the United States are both signatories.

Any patents and trademarks can be registered in Cuba today with the Cuban Office of Intellectual Property (OCR). U.S. companies that registered trademarks and patents in Cuba prior to January 1, 1959, retain those rights subject to meeting renewal obligations. Since 1995, U.S. companies wishing to register trademarks and patents in Cuba for the first time or renew their patents and trademarks have been able to do so in Cuba.

However, the Cuban government has threatened to eliminate its support of U.S. trademarks on the island if the U.S. government persists in enforcing certain amendments made during the 1990s to the Cuban Assets Control Regulations (CACR).

This article will examine the general Cuban trademark landscape and the status of two high-profile IP disputes in the United States, involving two of Cuba's most famous products: cigars and rum.

Cuban Trademark Legislation

Decree-Law 68 of May 14, 1983, "Inventions, Scientific Discoveries, Industrial Models, Trademarks and Appellations of Origin," was modified by Decree-Law No. 203 of 1999 due to the accession of Cuba to the World Trade Organization (WTO), and thus to the Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as the TRIPS Agreement.

Decree-Law 203 of 1999, together with successive regulations including Decree-Laws 290 and 291 of 2011, comprise the legal framework of Cuba's trademark laws and regulations, whose main objective is to provide further protection with respect to trademarks and to ban the registration of a sign, mark or trade name that induces the public to error.

Cuba's current legal framework prohibits registration of a sign, mark or trade name that is identical to an earlier trademark registration or pending application for the same products or services. Cuba's laws also follow the principle that industrial property gives the right of exclusivity and exclusion, and that the registration of a trademark gives its owner the right to exclude others from taking a series of actions that interfere with its exclusive right to use the mark. Other criterion is also included as grounds for invalidating the registration of a mark, including acting in bad faith because the trademark used for goods or services is identical or similar to one previously applied for, registered or well-known in other countries. These protections are meant to protect business interests and the risk of confusion of association in consumers.

Key provisions of Cuba's trademark laws, such as provisions for preliminary relief and customs enforcement measures, are intended to bring the country in line with the requirements of the WTO. The preliminary relief to infringement cases may take the form of a temporary restraining order or seizure, including on an ex parte basis. Preliminary relief orders may last up to 20 days. Similarly, preliminary customs injunctive relief is valid for 10 days and, for good cause, may be extended for another 10 days. In both instances, a bond needs to be posted to guarantee any damages in the event the proceedings were not justified. These procedures are similar to those used in most countries to fight piracy. Of course, an applicant or holder seeking to fight piracy would need to institute judicial action. In contrast, under U.S. law, Customs and Border Protection (CBP) is empowered to exclude, and in certain cases, destroy (counterfeit) goods without the need to commence a case in court.

Cuban legislation grants the holder of a trademark a series of rights to act against those who violate the law. The holder can seek the termination of infringing acts,

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compensation for damages, seizure of the proceeds related to the infringement, bans on the import or export of goods, seizure of materials or media related to the infringement, as well as the ownership and delivery of the products, materials or means relating to the offense. A trademark violation conviction will also be published.

The holder can also apply to the court for an order to prevent further infringement, avoiding its consequences, obtaining or preserving evidence or ensuring that the effectiveness of the action requires provisional measures that may be requested before initiating action, together with it or after its inception.

U.S. Laws and Regulations on Cuba's Trademarks

The U.S. government enacted an exception to the 1963 U.S. trade embargo on Cuba in the Cuban Assets Control Regulations (CACR). The CACR was amended in 1995 and again in 1999 for the protection of intellectual property, including trademarks, patents, commercial names and copyrights in Cuba belonging to U.S. individuals or corporations.

The 1999 amendments, contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Omnibus Act), have been controversial in Cuba. There are three primary elements of the 1999 amendments, which have two key effects in aggregate: (1) imposition of a consent requirement on those asserting rights in trademarks or trade names, which are the same or substantially close to that used with confiscated assets; and (2) the removal of these situations from judicial oversight. More specifically:

- §211(a)(1) of the Omnibus Act — Consent

Section (a)(1) contains the requirement that the original owner or bona fide successor-in-interest of a confiscated mark of trade name consent to further mark or name activity mainly by prohibiting any "transactions" or "payments," the latter a requirement for most U.S. Patent and Trademark Office (USPTO) procedural actions.

- §211(a)(2) of the Omnibus Act Foreclosing judicial enforcement of registration rights

  Subsection 211(a)(2) contains the first of two restrictions on the judiciary but limits its application to a defined class. The text provides that: "No U.S. court shall recognize, enforce or otherwise validate any assertion of rights by a designated national based on common law rights or registration obtained under such section 515.527 of such a confiscated mark, trade name, or commercial name."

- §211(b) of the Omnibus Act— Judicial consideration of treaty rights foreclosed

  Section 211(b) of the Omnibus Act limits the ability of U.S. courts to utilize §44 via the following language:

  "No U.S. court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interest under sections 44 (b) or (e) of the Trademark Act of 1946 (15 U.S.C. 1126 (b) or (e)) for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name or commercial name, or the bona fide successor-in-interest has expressly consented."

Examples of Cuban Intellectual Property Disputes

Two key intellectual property disputes involving Cuban brands in the United States involve the country's famous cigars and rum.

Cohiba Cigars Dispute

General Cigar, a U.S. company, registered the Cohiba trademark for cigars in 1995. Empresa Cubana del Tabaco, dba Cubatabaco, a Cuban company,

sued in federal court, claiming superior rights to the name Cohiba under § 44(b) of the Lanham Act, which recognizes well-known marks. The theory was that the mark was famous in Cuba, the fame extended to the United States and the fame preceded the date of first use of the mark by the U.S. user, Culbro, a subsidiary of General Cigar. The district court agreed with the plaintiff and recognized that the well-known trademark doctrine applied to this case. The Second Circuit reversed the decision on the grounds that the Cuban embargo barred Cuban firms from acquiring trademark rights in the United States through the well-known trademark doctrine. It further ruled that the same regulations prevent Cubatabaco from seeking cancellation of General Cigar's trademark registrations but left it to the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office (Board) to determine the preclusive effect of the Second Circuit's decision. In 2013, the Board denied Cubatabaco's petition to cancel General Cigar's registration after determining that Cubatabaco lacked standing.

On June 4, 2014, the Federal circuit reversed the Board's decision (Empresa Cubana del Tabaco v. Gen. Cigar Co., 753 F.3d 1270). It held that Cubatabaco does have standing to seek cancellation of General Cigar's registrations that block Cubatabaco's ability to register the Cohiba mark.

In the most recent development, on October 31, 2014, General Cigar filed a petition for writ of certiorati seeking to have the U.S. Supreme Court answer the question of whether the CACR can bar Cubatabaco from obtaining cancellation of the Cohiba trademarks held by General Cigar and whether the issue of preclusion bars Cubatabaco from

seeking administrative cancellation of the trademarks registered by General Cigar. If certiorati is denied, the way would be paved for Cubatabaco to go back to the Board and request resumption of the cancellation actions it started against General Cigar years ago. As of this writing, General Cigar's registration is still in effect on the records of the USPTO, although under challenge by Cubatabaco, and Cubatabaco's application for the mark is suspended pending disposition of the cancellation petition.

Rum Dispute

The Havana Club mark for rum was owned by the Cuban family Arechabala in Cuba. The family also owned a U.S. registration, but that was allowed to lapse in the 1970s. The Arechabala family's property was expropriated by the Cuban government after the Cuban Revolution of 1959. The Arechabalas left Cuba subsequent to the revolution and assigned all their rights in Havana Club for rum worldwide to Bacardi in the 1990s, which started to make rum in the Bahamas.

After the expropriation, the Cuban government began production on a type of Havana Club rum in Cuba and entered into a joint-venture agreement with Pernod Ricard, who registered the mark with the PTO in 1978.

In 1996, the Cuban embargo went into effect, requiring the PTO to not enforce trademark rights in the United States if the trademark was used in connection with a business or asset confiscated by the Cuban government, unless the original owner of the mark provided consent.

The U.S. courts held that Pernod Ricard could not renew or enforce its trademark rights in the United States for the Havana Club mark for rum because of the Cuban embargo. The U.S. Supreme Court refused to hear the appeal and after a 17-year legal battle, Pernod Ricard changed the trademark to Havanista. Bacardi successfully lobbied Congress for passage of the so-called Bacardi Bill (Section 211 of the U.S. Omnibus Appropriations Act of 1998), which forbids the registration or enforcement of a trademark in the United States that is the same as or similar to one used in connection with a business or assets that were confiscated. As a result, Pernod Ricard was ultimately prevented from U.S. registration of the Havana Club trademark in the PTO.

The Cuban embargo has been challenged at the WTO, which found the Cuban embargo in violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) because it discriminates against Cuban owners. The United States has been granted time to change its regulations to be consistent with TRIPS and to apply it to all citizens, not just Cuban citizens. However, the regulations have not yet been changed.

Can Individuals in the United States Invest in Cuba Today?

As Cuba opens the country for foreign investment and as U.S. interest in playing a role in Cuba grows, some Cuban experts assert that despite the U.S. embargo, an investment in Cuba is not necessarily off-limits to U.S. businesses or individuals. But there are cautions and legalities of which potential investors should be mindful.

The 49/49 Rule

Under current U.S. law, a U.S. person is prohibited from directly engaging in a commercial activity in or with Cuba or from taking any ownership interest in any property in which Cuba or a Cuban national has an interest. However, under the so called 49/49 Rule, a U.S. person may make an investment in a non-Cuban foreign entity that engages in commercial dealings in or with Cuba if:

(1) the foreign entity is not controlled by U.S. persons; and

(2) a majority of the revenues of the foreign company are not derived from Cuba.

The legal basis for the 49/49 Rule originates with a letter from the Department of the Treasury in response to an inquiry by John S. Kavulich, II on March 4, 1994 ("the 1994 opinion"), in which Kavulich sought guidance regarding permissible investments in Cuba by U.S. persons.

The 1994 opinion letter is signed by Richard Newcomb, ex-Director of the

Department of the Treasury's Office of Foreign Assets Control (OFAC). In the letter, Newcomb writes:

"A U.S. company or individual may make a secondary market investment in a third country company doing business in Cuba provided that the investment does not result in control in fact of the company by the U.S. investor. A secondary market investment that falls short of a controlling interest is not prohibited."

The 1994 opinion letter also states that acquiring control of a company that has ongoing business dealings with Cuba would require a license from OFAC, and "injecting capital into a company in a manner supporting its Cuban transactions is prohibited to persons subject to the jurisdiction of the United States unless those transactions are authorized by OFAC or are exempt from regulation." Therefore, a U.S. person may not make even a minority non-controlling investment in a company if the investment will be used to support the company's Cuban business.

To determine whether the 1994 opinion represents current thinking at OFAC, we have spoken with OFAC's officers. Noting all of the caveats that attach to advisory opinions, they said the 1994 opinion continues to reflect OFAC's current thinking.

Although the 1994 opinion letter addresses the general conditions necessary to satisfy the 49/49 Rule, it fails to establish a fixed-line rule on what constitutes "control" or a "majority of revenues." These determinations are made on a case-by-case basis by OFAC. Thus, advisory opinions are fact-specific, do not have precedential value and cannot be relied upon by anyone other than the person who requested the opinion. Nevertheless, advisory opinions can provide guidance on OFAC enforcement policy, and reliance upon an advisory opinion is a mitigating factor in the event of an enforcement action.

The first test is "control." There is presently no definition in U.S. law or regulations for the meaning of "to own or control" a company that engages in commercial activities with Cuba, although OFAC generally presumes "ownership" means "100 percent ownership" and "control" means "50 percent or more ownership." There is also no measure on what constitutes "control in fact," and OFAC has been hesitant to provide one. For example, according to OFAC staff, a presumption of control where the ownership share is 50 percent could be rebutted based on a variety of other facts. On the other hand, an ownership interest of something less than 50 percent could be held to be "control in fact" and therefore impermissible. OFAC staff advised that most investments fall into two categories: (1) investments involving a five to 10 percent ownership interest, which it considers overly cautious by investors and is therefore a feasible investment without a specific OFAC approval; and (2) investments involving a 40 to 45 percent ownership interest, which it deems to be investors who "walk the fine line."

The second test is "majority of revenues." Neither U.S. regulations nor OFAC opinions have defined or clarified what constitutes a "majority of revenues" for these purposes, but OFAC staff explained that the inquiry in the current regulatory environment is more aptly stated as whether a "predominant amount of revenues" of the foreign entity are generated from commercial activities with or within Cuba. There is no strict test for a "predominant amount of revenues," although OFAC generally presumes that revenues of 50 percent or more comprise a "predominant amount of revenues." However, OFAC staff advised that OFAC would consider arguments that revenues of 50 percent do not constitute a "predominant amount of revenues," depending on other factors relating to the nature of the business activities.

Absent OFAC approval, a person subject to U.S. jurisdiction would be barred from acquiring control-in-fact of a company that does business in Cuba unless the Cuban trade is terminated. A U.S. person therefore cannot attain a controlling interest in a third-country company as long as the third-country company conducts unauthorized business in Cuba at any level. For example, from 1995 until 1998, Genoa-based Costa Crociere operated the Costa Playa cruise ship, which visited the Republic of Cuba, and a subsidiary of Costa Crociere developed and managed the $11 million passenger ship facility at the Port of Havana. In 1997, Carnival Corporation acquired majority ownership and control in Costa Crociere. The following year, OFAC required Carnival Corporation to cease both the operation of the Costa Playa to the Republic of Cuba and the management of the passenger ship facility.

Investments by U.S. Persons in Foreign Companies Involved in Cuba

Generally, if the conditions of the 49/49 Rule are satisfied, a U.S. person may invest in non-Cuban foreign entities that engage in commercial activities in or with Cuba without express approval from the U.S. government. OFAC does not specifically address licensing requirements for limited investment by a person in a

foreign entity that engages in commercial activity in or with Cuba. To date, OFAC has not adopted any official policy statements or guidance on this issue. However, while such investments are not prohibited per se, the only way to receive absolute comfort regarding an investment's compliance with OFAC would be to submit a formal inquiry to OFAC. OFAC would request full corporate documentation on the investors and entities involved in order to determine: (1) whether a license would be required and (2) whether OFAC would issue one.

Presidential Authority To License Transactions in Confiscated Cuban Properties

The Helms-Burton Act (the Act) codified the Cuban Assets Control Regulations (CACR) as it existed in March 1996, authorizing the Secretary of Treasury to exercise licensing authority to support Cuban economic growth, economic independence from the government and re-establishing U.S. property rights. In fact, since Congress codified the Cuba sanctions in 1996, Presidents Clinton, Bush and Obama have each exercised this authority to ease the scope of restrictions applicable to Cuba, without action or approval by Congress.

These are the statutory and regulatory provisions supporting the President's authority to modify the Cuba sanctions regarding transactions in confiscated properties:

- Section 515.201 of CACR that was in effect in March 1996 prohibits dealings in property in which Cuba or Cuban nationals have an interest but explicitly references the authority of the Secretary of Treasury to establish exceptions to the prohibitions by means of regulations, rulings, instructions, licenses or otherwise.
- Section 103 of the Act prohibits U.S. persons and agencies from knowingly making a loan, extending credit or providing other financing for the purpose of financing transactions involving property confiscated by the Cuban government, with an exception only for financing by a U.S. national owning a claim to the property in connection with a transaction permitted under U.S. law.
- Section 515.208 of the CACR implements Section 103 of the Act.

The absence of explicit statutory or regulatory provisions regarding owners of claims suggests that Congress did not intend to prohibit the executive branch from issuing general or specific licenses to authorize transactions between claimants and Cuba when such licenses are deemed to be appropriate and consistent with U.S. policies.

Consistent with the relevant statutory authorities and restrictions, as well as statutory statements of U.S. policy objectives, the president arguably has sufficient legal authority to modify Section 515.208 of CACR by licensing the following transactions by owners of claims:

- Negotiate lease-license agreements with foreign companies using confiscated properties in Cuba;
- Negotiate a compensation schedule with the foreign entities and the Cuban government;
- Negotiate restitution of properties and transferring of title; and
- Permit direct or indirect investments in confiscated properties to improve the value of the claims.

The U.S. State Department has determined that a claimant entering into an agreement for use of a confiscated property by a third non-U.S. party does not constitute "trafficking" under the Act. The term "trafficking" does not apply when U.S. nationals authorize other parties to make use of confiscated property for which they have claims.

Claimants and potential defendants could utilize this provision to settle their claims, and it would permit the defendants to continue activities in Cuba without further hindrance from the former owners. This process has been applied in at least one instance: the case of ITT's claims against the Italian telecommunications firm Stet in connection with Stet's investment in the Cuban telephone company, confiscated from ITT in the early days of the Cuban Revolution. In July 1997, the U.S. State Department approved the agreement and said it constituted a major step toward the enforcement of the Act, reinforced the principle of respect for the property rights of U.S. citizens and would serve as a disincentive to other foreign firms currently operating in or considering investment in confiscated U.S. property in Cuba without authorization of the U.S. claimant.

Precedents also exist of licenses granted by OFAC to visit confiscated properties in Cuba and to negotiate compensation with the Cuban government and the current foreign company dealing business in Cuba.

Conclusions

OFAC does not prohibit a U.S. business or individual subject to U.S. law from making a secondary investment in a non-Cuban foreign entity that has commercial dealings in Cuba provided the investment complies with the 49/49 Rule. A claimant may also be able to finance or invest in his or her own confiscated property and negotiate a compensation for the expropriation in compliance with the CACR. However, a specific license and approval from OFAC may be required depending on the facts of any particular transaction. It is recommended that U.S. persons seeking to invest in foreign entities that engage in commercial dealings with Cuba should first carefully review the rules and policies promulgated by OFAC and seek the advice of legal counsel before making such investments.

The Impact of the Cuban Foreign Investment Act of 2014 on Foreign Real Estate Investments

Cuba's National Assembly passed the Cuban Foreign Investment Act of 2014 earlier this year, authorizing foreign investment in all sectors other than health and education for its population and military institutions (with the exception of the military commercial system). Chapter 6 of the Act permits foreign investors to acquire ownership and other property rights over Cuban real estate. Specifically, Article 17 authorizes real estate investments and permits the ownership of real estate or other property rights, but such investments must be made by joint venture, international economic association agreement or totally owned foreign capital company. Investments can be for housing and buildings for private or tourist related purposes, housing or offices of foreign persons or real estate development for tourism purposes.

Real Estate as a Cuban Contribution to a Joint Venture

The law also contemplates the possibility of real estate as a contribution to a joint venture agreement between a foreign entity and a Cuban entity. Article 18.1(d) includes as contributions to capital, property rights over movable and immovable properties and other property rights thereon, including usufruct and surface rights.

The Cuban party's contribution to the joint venture may be in the form of land, buildings, usufruct rights (the right to use the property for a certain period of time) and surface rights.

Usufruct Rights in Cuban Legislation

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

The usufructuary is obligated to use the property 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 the right of usufruct is nontransferable and may be encumbered, unless the title provides otherwise.

Article 211 of Cuban Civil Code prescribes that the Cuban State may grant an usufruct state-owned property to individuals or corporations with the formalities provided under applicable law. When granting the right, 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.

The Cuban State may authorize Cuban entities to contribute with the right of usufruct to the joint venture as long as the contribution meets the economic objectives of the state.

According to such code, a 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, but that term may be extended by an equal term at the request of the usufructuary made prior to its expiration date.

The consequence is that at the end of the usufruct, all of the improvements stay in the property without any compensation.

Surface Rights in Cuban Legislation

According to Article 218 of the Cuban Civil Code, the state may grant to natural or juridical persons surface rights over state-owned lands for the construction of housing or to carry out other types of construction. Surface rights may also be granted in order to use the land for other specifically determined activities, but they may not be granted over lands considered personal property (e.g., residences).

Surface rights may be granted gratuitously or in exchange for consideration. It is worth noting that the holder of a surface right becomes the owner of whatever is built on the land. However, Article 225 of such Code indicates that when the surface right terminates, the improvements or facilities built on the land revert in favor of the Cuban State, which is the owner of the land.

The surface rights given to the Cuban partner, i.e., the Cuban party in a joint venture, may also represent a capital contribution, but if the surface right is given by the Cuban State directly to the joint venture, the joint venture will have to pay the value of the surface right to the Cuban State.

The state may grant surface rights to foreign developers to expand and facilitate the process by which foreign investors can promote international tourism, and the state provides legal certainty and guarantees to foreign investors in the Cuban real estate transactions. Pursuant to these modifications, the state can now grant surface rights for a period of up to 99 years, and if the rights were previously

granted for a shorter period of time, the period could be extended to 99 years at the request of the holder of the right. In addition, the state may grant perpetual surface rights over state-owned land, prior payment of the value or price of the right, to Cuban companies or Cuban entities for the construction of tourism homes or apartments. Previously, surface rights could only be granted for a term not exceeding 50 years and could 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.

Cuban Laws Impacting Real Estate

After the promulgation of a prior Cuban Foreign Investment Act, 1995 (Law 77/1995), the demand for Cuban real estate investments exceeded the initial expectations of the state and required additional changes to the Cuban real estate legal regime. As a result, the Cuban Council of state approved several laws during the period from 1998 to 2007.

Cuban Property Registry

Cuba inherited from its Spanish colonizers a highly efficient property registry system. Cuba's decision to institutionalize that property registry system promises to guarantee 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 records to foreign investors and prior owners of Cuban real estate (Americans and Cuban exiles) whose properties have been affected by prior expropriations or confiscations.

Currently, interested parties may be able to search the registry for the following documents:

- Declarations of expropriations and confiscations of properties in favor of the Cuban State
- Transfers of state-owned-properties to Cuban companies
- Joint ventures or individuals (foreign or nationals)
- Rights of usufruct, surface rights, leasing agreements or other real estate contracts
- Warranty deeds
- Notary documents
- Judicial decisions affecting a real estate property
- Recorded mortgages or other recorded encumbrances, assessments and declarations

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 to foreign investors.

The laws promulgated after the Cuban Revolution of 1959 limited and almost eliminated the mortgage institution from the Cuban legislation. As a result, the Cuban Civil Code of 1987 only recognizes 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 the above mentioned Law No. 7711995, 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 brought to life the possibility of executing and recording mortgages in Cuba. It is worth noting that one of the purposes of Decree Law No. 214/2000 was to allow foreign financial institutions the possibility of financing real estate investments in Cuba.

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 ability to mortgage real estate properties only to corporations or other economic entities registered in Cuba. According to Cuban law, all companies created in Cuba 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 the still-in-force Mortgage Law of 1893 and its complementary regulations. The "old" Spanish Mortgage Law acquired validity in the new Cuban foreign investment strategy.

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

It should be noted that the first special provision of Decree Law No. 214/2000 demands 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 establishes 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 of retraction. According to the Cuban Civil Code, the right of retraction may not be exercised by a person who, having been notified of the proposed sale, did not exercise the right of pre-emption.

In case where the transfer of a real estate 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 indicates that the solution of disputes derived from the registration or execution of any mortgage in Cuba are determined in accordance with the Cuban Civil Procedure Law (the LPCALE or 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 Tribunals of Popular Power in Cuba). Such Decree Law was later replaced by Decree Law 241 of 2006 (Modified Cuban Civil Procedure Law).

Conclusions

Cuban foreign investment legislation provides that foreign investors may acquire ownership and other property rights over Cuban real estate. However, there is still a lack of a comprehensive Cuban real state law addressing condominium, cooperative (co-ops), timeshares, residential mortgages, liens, titles and other property issues.

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