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NAFTA and Real Estate

By Judon Fambrough

The 1994 North American Free Trade Agreement (NAFTA) was enacted to increase the free flow and exchange of commerce by eliminating trade barriers between the United States and its neighbors, Canada and Mexico. Many viewed the treaty as a mechanism to foster a freer flow of goods, but the treaty also addresses cross-border services provided by licensed professionals.

Some Texas real estate licensees believe that they may practice real estate in Mexico and Canada by virtue of NAFTA and vice versa. In part, they argue that the treaty is the supreme law of the land. Any barriers placed on the practice of real estate by the respective countries or states violate the treaty.

Treaties are agreements or contracts between two or more nations or sovereigns. They are created by agents appointed for this purpose and are sanctioned by each nation's supreme powers.

The U.S. Constitution specifically empowers the President, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur. States are prohibited from entering treaties, alliances or confederations with foreign nations. Without the consent of Congress, states are prohibited from entering pacts with other states to prevent breaking up or weakening the union as a whole.

Treaties may encompass any concern within the international domain. However, a treaty may not be inconsistent with the U.S. form of government, may not interfere with the relations between the states and the United States nor contradict the federal Constitution.

Acts of Congress are the supreme law of the land. Treaties maintain the same status when made under the authority of the United States.

When the terms of treaties contradict state law, the treaties prevail. As supreme law of the land, treaties supersede conflicting provisions in state constitutions and statutes. This is true regardless of whether the state provisions were passed before or after the enactment of the treaty.

Courts are directed, though, to avoid overriding state laws or impairing rights arising under them when possible. Only when the language of the treaty clearly intends to accomplish a national policy are state laws subordinated.

Treaties are classified as either executory or self-executing. An executory treaty requires the enactment of legislation before becoming law. Self-executing treaties become operative without the aid of legislation. They are the equivalent of an act of Congress.

When interpreting treaties, the courts give words their natural and ordinary meaning. When treaties are executed in two languages, both versions are viewed as originals. Both are intended by the contracting powers to have identical meaning. Thus, a construction must harmonize the two languages.

As noted, NAFTA specifically addresses reciprocal recognition of licensed professionals. "Cross-Border Trade in Services" addresses measures adopted or maintained by the three countries regarding services (Chapter 12). In particular, "Licensing and Certification" attempts to eliminate any unnecessary barriers to the licensing or certification of another country's nationals (Article 1210). To do this, each country is directed to ensure that the licensing and certification requirements:

- are based on objective criteria such as competency and ability to provide the service,
- are not more burdensome than necessary to ensure the quality of service and
- do not constitute a disguised restriction on cross-border service providers.

Within two years of the effective date of the treaty, each party must eliminate any citizenship or permanent residency requirements for the licensing or certification of another's professional service providers.

The term *professional services*, as defined by the treaty, means services requiring specialized post-secondary education or equivalent training or experience; it also embodies where the right to practice (render the service) is granted or restricted by a country. Texas real estate licensees qualify as professional service providers under the definition.

NAFTA focuses on the standards for reciprocal recognition of cross-border professional service providers (Annex 1210.5). The treaty provides that each country shall encourage the relevant bodies of its respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers. The recommendations are submitted to the Free Trade Commission, which is composed of cabinet-level representatives.

The standards and criteria should be based on the following factors:

- education—accreditation of schools or academic programs;
- examinations—qualifying examinations for licensing, including alternative methods of assessment, such as oral examinations and interviews;
- experience—length and nature of experience required for licensing;

- conduct and ethics—standards of professional conduct and the nature of disciplinary action for nonconformity with those standards;
- professional development and re-certification—continuing education and ongoing requirements to maintain professional certification;
- scope of practice—extent of, or limitations on, permissible activities;
- local knowledge—requirements for knowledge of such matters as local laws, regulations, language, geography or climate; and
- consumer protection—alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers.

The trade commission reviews the recommendations and determines their consistency with the treaty. Based on the review, each party encourages its respective competent authorities, (states, provinces and territories), where appropriate, to implement the recommendations within a mutually agreed upon time.

In the meantime, each country is to encourage its relevant territorial agencies to develop procedures for the *temporary licensing* of another country's professional service providers. For example, the treaty mandates procedures and guidelines for the temporary licensing of engineers within one year.

Establishing mutual reciprocal standards for recognizing real estate professionals will not be easy. The practice of real estate in the United States and Canada is governed on the state or provincial-territorial level, respectively. In Texas, for example, the Texas Real Estate Commission oversees the licensing of real estate practitioners. No national real estate license exists in Canada or the United States.

In Mexico, the practice of real estate is administered on the federal level. To practice real estate, one must become a member of the Asociación Mexicana de Profesionales Inmobiliarios, A.C. (better known as AMPI). To join, the candidate must demonstrate both an understanding of the Spanish language and knowledge of the real estate laws of Mexico. Also, the person must be known among the membership and have an ethical, trustworthy reputation. Membership in AMPI entitles one to practice real estate in the 31 states of Mexico and its federal district.

Another problem in the United States, and possibly Canada, is that the practice of real estate may be administered on two tiers. For example, in Texas, a licensee must first become a salesperson and then a broker. Colorado recognizes no real estate salespersons, only brokers.

John M. Stone, CCIM, CPM, CIPS, of Dallas and Texarkana, has extensive knowledge of the practice of real estate in the United States, Canada and Mexico. He is a member of AMPI and served three years on the Commercial Investment Committee of the Canadian Real Estate Association (counterpart to the National Association of Realtors [NAR]). He has been asked by NAR to serve on its NAFTA task force to implement reciprocal standards for recognition and licensing of cross-border real estate professionals.

Stone envisions using certain national real estate designations as the threshold for reciprocal recognition. Using national advanced real estate designations has several advantages. It avoids creating unfamiliar guidelines that may be confusing, expensive and time-consuming to draft and implement. It is also expedient, following the precedents established for lawyers, CPAs and insurance brokers under those professional models for licensing and standards.

Likewise, the program takes advantage of the two sets of standards—those required for national designations and those listed earlier by NAFTA for the reciprocal recognition of licensed professionals. The credibility of the designations would be enhanced by the accord.

“Best of all,” says Stone, “the standards force all practitioners in North America to speak the same language in real estate matters regardless of nationality or native tongue. Currently, Spanish, French and English are the three most common languages in the three countries. Real estate has its own language regardless of one's native tongue.”

Currently, the most widely recognized and accepted national designations for commercial-investment real estate include:

- Accredited Land Consultant (ALC) by the Realtors Land Institute,
- Member Appraisal Institute (MAI) by the Appraisal Institute,
- Society of Industrial and Office Realtors (SIOR) by the Society of the same name,
- Counselors in Real Estate (CRE) by the American Society of Real Estate Counselors,
- Certified Property Managers (CPM) by the Institute of Real Estate Management and
- Certified Commercial Investment Member (CCIM) by the Commercial Investment Real Estate Institute.

The most widely recognized and accepted designations for residential real estate include:

- Certified Residential Specialist (CRS) by the Residential Council of NAR,
- Certified Real Estate Brokerage Manager (CRB) by the Brokers Council of NAR and
- Leadership Training Institute Graduate (LTG) by the Women's Council of Realtors.

The most widely recognized national designation for **both** residential **and** commercial-investment real estate is the Certified International Property Specialist (CIPS) by the International Section of NAR.

Other national designations exist. Stone says only these, however, merit cross-border recognition under NAFTA. If others are recognized, he feels that the issuing organization, institute, society or council should be a part of NAR. Currently, the MAI designation is the only one on the list not affiliated with NAR.

Stone believes the Graduate Realtors Institute (GRI) designation would not qualify. Its purpose is to help graduates acquire skills necessary for more advanced real estate designations.

Stone proposes that anyone with one of these national designations be qualified for licensing in the desired jurisdiction of NAFTA. This means that a Texas licensee having one or more of these designations would be eligible to meet the ordinary licensing requirements of the provinces in Canada or to become a member of AMPI in Mexico.

Other reasonable qualifying criteria may be imposed. The designations would not **make** the designee a member or licensee in the jurisdiction. They would merely qualify the designee for membership or licensure.

Under his proposal, designees receiving cross-border recognition to practice real estate would carry two photograph identification cards. One would be issued by the organization, institute, society or council granting the national designation; the other by the NAFTA jurisdiction approving their right to practice real estate.

“The procedure accomplishes two goals,” says Stone. “It encourages real estate professionals to obtain an advanced real estate designation to practice internationally. Also, it elevates the competency of real estate professionals.”

This is but one alternative. Regardless of what is proposed, one thing is clear. Standards for the cross-border practice of both commercial-investment and residential real estate need to be enacted according to NAFTA's guidelines.

Stone says real estate practitioners need to formulate practical standards that are fair and respond to all constituencies. Likewise, the Association of Real Estate Licensing Law Officials (ARELLO) should cooperate with practitioners in the development. The interaction ensures the use of common-sense procedures that are fair to real estate consumers and practitioners.

"If real estate practitioners do not take the initiative to provide input, they may be entrusting their fate to standards imposed by a court decree," he says.

The treaty directs the Free Trade Commission to periodically review the implementation of the standards (the reciprocal recognition of licensed professionals) at least once every three years. NAFTA has been in effect three years as of January 1, 1997. It is unclear if the Free Trade Commission has reviewed the standard during this time.

Presently, the greatest real estate opportunities in Mexico rest in commercial real estate, not residential. In particular, the demands for high-quality office, retail and industrial space

as well as coastal resorts are at an all-time high, according to Stone.

However, the demand for real estate in all sectors should rise with the implementation of NAFTA's provisions, giving U.S. lenders an opportunity to acquire or cooperate with Canadian and Mexican lenders and begin new operations. NAFTA ends a 50-year prohibition of foreign bank ownership in Mexico. Nonbank U.S. real estate lenders are already expanding real estate financing in Mexico.

Developing mutually acceptable standards consistent with NAFTA's guidelines allowing real estate professionals to practice in each country will require years of hard work. After the development of standards, the governments within each country must review, ratify and incorporate the standards into their laws. ☐

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