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# Creating collateral in Mexico

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Over the last two decades, Mexico has tendered an important amount of financing projects that have required all types of collateral structures, requiring the market to adapt and create more innovative ways of securing financing. In this article we will examine how collateral over Mexican assets can be created to secure any and all types of financings.

## General security

A *fideicomiso de garantía* (guarantee or security trust) is generally used when the financing scope requires the creation of a general security agreement encompassing all or a substantial part of the relevant assets. However, depending on the nature or characteristics of the relevant assets, it may be necessary to enter into ancillary security agreements for specific assets (e.g., shares or equity of the project company or companies).

Generally speaking, under a *fideicomiso* the security providers acting as settlors (*fideicomitentes*) will transfer title of assets (e.g., land, plants, collection rights, contracts, shares or equity, etc.) to a trustee (*fiduciario*), which must be a Mexican bank or financial institution authorised to act as trustee under Mexican law, with the purpose of securing payment and performance of the relevant secured obligations in favour of the banks or entities granting the relevant financing – the latter being principal beneficiaries (*fideicomisarios*) of the *fideicomiso*. Depending on the type of *fideicomiso* and the assets involved, certain formalities for incorporating, operating and transferring assets to the *fideicomiso* may apply, as well as for perfecting the collateral secured thereby. The *fideicomiso* is widely used and regarded as a security control scheme in Mexican

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financings because it is generally understood to be a bankruptcy remote vehicle.

It is also possible (and common) to use specific security agreements for specific assets, instead of, or in conjunction with, a *fideicomiso*. This generally happens when: (i) using a *fideicomiso* is not viable, advisable or cost-effective from a legal, contractual or business perspective for the particular project being financed; (ii) a *fideicomiso* cannot cover all of the assets intended to comprise the security for the project; or (iii) a number of different assets or security providers participate in granting the relevant security. Among these other forms of security agreements, the most commonly used are the mortgage (*hipoteca*) over real estate and pledges (*prendas*) (with or without transfer of possession, depending on the relevant assets) over shares, movable assets, rights and other benefits. Notwithstanding the foregoing, there can be additional possibilities in specific agreements when structuring specific asset securities.

### Security over real estate

The basic security structures under which security is typically taken over land and real estate assets are the *fideicomiso* and the *hipoteca*, in their various forms.

Chiefly, the procedure to create and perfect a typical *fideicomiso* over real property involves designating the relevant assets to be held in a trust, appointing a trustee, entering into the relevant *fideicomiso* agreement and formalising it before a Mexican notary public, transferring the title of the relevant assets to the trustee (to be held under *propiedad fiduciaria*), and finally, registering the *fideicomiso* at the applicable public registry of property. Additional formalities may or may not be required depending on the assets that shall be held in the corresponding trust (i.e., regulatory permits or contractual consents).

Also, generally speaking, the standard procedure to create a mortgage over land or real estate assets is to enter into a mortgage agreement with the title holder of the relevant asset, and to formalise such a mortgage agreement before a Mexican notary public, and finally, register the mortgage at the applicable public registry of property.

### Security over movable assets

Movable assets (e.g., machinery, equipment, bank accounts, receivables, IP, etc.) are typically secured under a *fideicomiso* structure or a *prenda* with or without transfer of possession, as the transaction or nature of the assets so requires it. The procedure to incorporate and perfect the *fideicomiso* is fundamentally the same as the one described above, but note that because movable assets are involved, the *fideicomiso* would typically be registered at the Sole Registry of Movable Securities (*Registro Único de Garantías Mobiliarias*).



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The general procedure to create and perfect a pledge without transfer of possession involves identifying the assets subject to the pledge, entering into a pledge without a transfer of possession agreement and formalising this agreement before a Mexican notary public, and electronically registering the pledge at the Sole Registry of Movable Security. On the other hand, a pledge with transfer of possession will be only be perfected after the assets subject thereof are held by the corresponding pledgee.

Just as with the *fideicomiso*, additional formalities may or may not be required, depending on the nature or status of the assets to be held in trust (i.e., regulatory permits or contractual consents).

### Security over shares

Next, the standard procedure to create a security over shares can be done by means of a *fideicomiso* or, as in the case of movable assets, by means of a *prenda*.

In the case of a security over shares done through a *fideicomiso*, the title of the shares/equity and of the relevant certificates (if applicable) must be transferred to the trust.

Since the capital stock of Mexican entities (with the exception of the recently created *sociedad por acciones simplificada*) must be held by at least two shareholders or partners, it is important that at least one share of equity participation is left outside of the trust (i.e., pledged separately), otherwise the trust would be considered as having a sole shareholder or partner, and certain adverse legal consequences may arise.

On the other hand, regular *prendas* over shares are generally documented through a share pledge agreement, and the relevant share certificates are endorsed (*endoso en garantía*) in favour of, and delivered to, the taker of the security (pledgee).

In any case, both trusts and share/equity pledges must be registered at the issuer's registry book.

### Enforcement of security

Enforcement and foreclosure procedures will depend on the type of security interest and the collateral being enforced. In most of these procedures, there can be special and other blocking procedures that can directly impact the timing and cost of enforcement.

Foreclosure of a mortgage or a regular pledge will typically require a summary judicial procedure that would ultimately result in public auctions to sell (or transfer) the collateral as payment to the lenders.

For non-possessory pledges and guarantee trusts, it is possible to elect for either a judicial or non-judicial enforcement procedure. As for regulatory consents, typically the same consents required for the creation of security will apply to its foreclosure (especially if the receiver or buyer of the assets is not the same entity as that which



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requested the original consent), but in many cases the original consent would cover the ability to foreclose on the assets, subject in some cases to prior notice to the relevant authorities. Also, enforcement can be significantly affected or impacted in case of reorganisations or bankruptcy under applicable law.

## Conclusion

Under Mexican law, securities can be created over any and all type of assets, through diverse mechanisms and structures that have to be taken into consideration in the context of each financing and the specific requirements thereof.

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