

International Comparative Legal Guides



Lending & Secured Finance 2021

A practical cross-border insight into lending and secured finance

Ninth Edition

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Mexico

Gonzalez Calvillo



José Ignacio Rivero Andere



Jacinto Avalos Capin

1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

During the past 12 months, the lending and banking sector in Mexico has been marked by ups and downs due to the COVID-19 pandemic and the protectionist policies implemented by our federal government.

The first half of 2020 saw significant stagnation in banking lending activity, with banks being cautious to grant loans until the fog cleared and the landscape was more visible. Some governmental support (not significant) pushed banks over the hill and got the ball rolling – albeit slowly. The foregoing, paired with the fact that both companies and individuals have sought to maximise liquidity to meet short-term liabilities in these uncertain times, has allowed for a more positive outlook. It should also be noted that Mexican banks must comply with strict capitalisation, liquidity, and indebtedness requirements and, as such, they should be well equipped to withstand the recent turmoil.

The “non-banking” financial sector continued to show growth, given that – as mentioned before – “traditional” banks brought lending activity almost to a halt, and a huge percentage of Mexico’s population does not have access to banks and thus seeks alternative financial services provided by non-banking financial entities. FinTechs have proven to be a great alternative to banks as they allow clients to easily and rapidly access financial services through technological platforms. Banks have identified this and have started to invest heavily in such platforms as well. For instance, 2020 saw a joint venture between Banorte, Mexico’s second largest bank, and Rappi, the first unicorn in LatAm, to create what seeks to be the largest technological bank in our country; we had the honour of counselling Rappi in this landmark transaction.

In the context of the foregoing, we believe that the long-term effects of the pandemic and of the highly criticised policies of our federal administration are yet to be fully seen. Particularly there is concern that delinquency rates will skyrocket as a result of the overall blow to the economy and the significant loss of employment.

It is important to mention that this upcoming June, Mexico will have mid-term elections and, among others, several seats in the federal congress and the senate will be up for grabs. The results of this election could very well mark the future of Mexico and its economy as they will provide for an opportunity to counterbalance the MORENA party, which currently has the presidency and a majority of seats at the federal and the local legislatures.

On a positive note, the USMCA trade agreement is expected to continue increasing economic activity in Mexico across several sectors, and to maintain our country as one of the biggest economic partners of the U.S., which is one of the largest consumer markets in the world. Also, it is expected that the new U.S. President, Joe Biden, will exert pressure to revert many of the protectionist policies of our current government.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Below are some significant lending transactions that have taken place in our jurisdiction in recent years and in which we (Gonzalez Calvillo) have acted as counsel:

- Grupo Resuelve tu Deuda, the first and largest company in the credit repair sector in Mexico, with operations in six countries in Latin America and Europe – in the refinancing of certain financing arrangements granted by Alloy Merchant Finance, a leading cross-border financial company with operations in Mexico and the U.S.
- Rappi México, a leading global technology company with a presence in over 100 cities in Latin America and its subsidiary, Tarjetas del Futuro, the first fully-digital integrated financial company in Mexico, which looks to provide financial services to millions of Mexicans – in the USD\$600 million financing by Grupo Financiero Banorte, S.A.B. de C.V., the second largest financial group in Mexico, with the largest business diversification in the market, to fund the credit origination operations of Tarjetas del Futuro.
- BANOBRAS – in the structuring, negotiations and documentation to provide a USD\$124 million senior secured long-term financing to Gas Natural del Noroeste (GNN); and Gasoducto de Zapotlanejo (GAZA), part of Grupo SIMSA – for the comprehensive refinancing of approximately 30 existing bank credit facilities of GNN and to provide working capital to GNN.
- Rappi México – in the structuring, negotiation and implementation of a joint venture with Grupo Financiero Banorte, S.A.B. de C.V., through a USD\$200 million convertible loan.
- IEnova, as borrower – in a series of independent but correlated green loan certified credit facilities comprising (i) a 15-year USD\$241 million financing granted by U.S. International Development Finance Corporation (DFC – formerly OPIC), and (ii) a USD\$100 million credit facility granted by Japan International Cooperation Agency (JICA), to finance four solar power plants with a total capacity of 376 MW across Mexico.
- Citibank, N.A., as, among others, administrative agent, and UMB Bank, National Association, as security trustee

– in the granting by a group of lenders of a series of loans for a total amount of USD\$285 million, in favour of APR Energy LLC (APR), a worldwide leader in energy solutions.

- HIR Casa – in the structuring and obtainment of a revolving credit facility for an amount of up to Pesos \$1,500 million to finance the granting of additional mortgage loans, through a ground-breaking off-balance fiduciary scheme, supported by mortgage collection rights regarding mortgage facilities previously granted by HIR Casa through its housing auto-financing system.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, both in domestic and cross-border transactions, subject to foreign law. In the event of the latter, certain provisions must be included in the financing documentation to ensure proper enforceability of a judgment in Mexico. These provisions in general refer to choice of law/forum, waiver of certain specific remedies provided under Mexican law and due service of process.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Enforceability of collateral or other guarantees in Mexico may be limited by bankruptcy (*concurso mercantil*), insolvency, dissolution and liquidation, reorganisation, moratorium, labour, and tax, among other laws of general application affecting the rights of creditors and obligations of debtors.

Regarding director liability, directors of a securing company, when assessing and approving a specific transaction, must comply with their statutory duties.

Such duties in private companies, among others, entail that a director must refrain from voting in any meetings on matters in which they have or may have a conflict of interest.

In the case of public companies, directors must meet the duties of loyalty and care. The duty of care consists of directors acting in good faith and in the best interest of the company, while the duty of loyalty consists of (i) maintaining the confidentiality of information received in connection with the performance of a director's duties while such information is not made publicly available, and (ii) abstaining from discussing or voting on matters where a director has a conflict of interest.

2.3 Is lack of corporate power an issue?

Yes. For a Mexican company to secure obligations/grant collateral, its corporate purpose must expressly contemplate such authority. The corporate purpose is included in the bylaws/articles of incorporation. In addition, certain corporate approvals (shareholder or board approvals) must usually be complied with. Finally, the securing company executing (directly or through a joinder agreement) the relevant guarantee/collateral documentation must do so through a duly appointed legal representative with sufficient powers and authorities pursuant to Mexican law. Additional requisites may apply for regulated Mexican securing companies.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

As mentioned above, certain corporate authorisations, including board and/or shareholder approvals, are usually required under the bylaws of the securing company.

Third-party consents may be required depending on the contractual obligations assumed by the securing company; for example, negative covenants under other financing arrangements.

Except for regulated entities, governmental authorisations are not generally required. Notwithstanding the foregoing, depending on the type of collateral being granted, certain formalities and filings with public registries may apply.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Generally, no. However, limitations on the enforceability of a guarantee must be taken into consideration.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No exchange controls apply.

On a separate note, when enforcement of a foreign judgment is sought before a Mexican court, certain requirements (set forth in article 1347-A of the Mexican Commerce Code) need to be met. These requirements are:

- (a) the foreign judgment having to comply with the formalities set forth in the international treaties to which Mexico and the country issuing the judgment is a party;
- (b) the foreign judgment being issued based on an *in rem* action (as opposed to an *in personam* action);
- (c) the judge or court rendering the foreign judgment being competent to hear and judge on the subject matter of the case in accordance with accepted rules of international law that are compatible with Mexican law;
- (d) service of process related to the foreign judgment being carried out personally on the parties or on their duly appointed process agents;
- (e) the foreign judgment being final in the jurisdiction where it was obtained;
- (f) the action in respect of which the foreign judgment was rendered not being the subject matter of a lawsuit among the same parties which is pending before a Mexican court;
- (g) the foreign judgment not contravening Mexican law or public policy (*orden público*); and
- (h) the foreign judgment complying with all necessary requirements to be considered as authentic.

In addition to the foregoing, other Mexican law limitations must be considered in any enforcement procedure, including, among others: (a) the possibility for debtors to discharge their obligations in Mexican Pesos, notwithstanding such obligations being agreed in a foreign currency; (b) the inability of lenders to collect interest-on-interest; (c) the impossibility to waive procedural rights protected under public policy; (d) the impossibility of enforcing claims outside the applicable statutes of limitations; (e) the need for judicial intervention for the taking of possession, entry or removal of property, or similar actions; and (f) the need of Spanish translations of all documents presented to Mexican courts.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

As a general rule and except for public assets (*bienes del dominio público*), collateral may be created over any type of asset, with the most common being pledges (over equity interests or movable assets), security trusts, and mortgages (over real estate).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Except in the case of a security trust agreement (as further detailed below), the use of general security agreements is not a common practice in Mexico, mainly due to the complexity in their enforcement in our jurisdiction. The usual way for creating collateral in Mexico is through the following:

Pledge over equity interests/shares

Equity interests that represent the capital stock of limited liability companies can be granted as collateral to guarantee payment obligations. The same applies for stock representing the capital stock of corporations. To fulfil the requirements set forth in the applicable law and to be consistent with market practice, the pledge agreement must be executed between the lender/security agent, as pledgee, and the borrower/securing company (holder of the issuing entity's equity interests/shares), as pledgor, with the appearance of the issuing entity. The pledge must be registered in the corporate book of the issuing entity.

In case it is deemed convenient for the pledge to have priority over tax credits, the pledge agreement must also be ratified before a Mexican public attester (*fedatario público*) and registered before the Sole Registry of Movable Guarantees (*Registro Único de Garantías Mobiliarias*).

In addition, in the case of corporations, the stock certificates of the issuing company must be delivered and endorsed (*endosados*) in favour of the pledgee.

Finally, a recommended practice is for a power-of-attorney to be granted to the pledgee to exercise the voting powers of the pledged equity interests/shares in the event of a default (stock powers).

Pledge over movable assets

There are two ways to create pledges over movable assets: (a) a regular pledge (possession of the pledged assets is transferred to the pledgee); or (b) a floating/non-possessory pledge (possession of the pledged assets remains with the pledgor), the latter being more common in the implementation of Mexican collateral as it is less intrusive in the operations of the pledgor.

In both cases, a pledge agreement must be executed and thereafter ratified before a Mexican public attester (*fedatario público*). Finally, the agreement must be registered before the Sole Registry of Movable Guarantees (*Registro Único de Garantías Mobiliarias*) in order for the collateral to be publicly registered and thus enforceable *vis-à-vis* third-parties. Also, other consents or registrations may be required depending on the specific collateral and/or grantor (e.g. in the case of pledges over IP, the pledge will need to be registered before the Mexican Institute of Industrial Property).

Mortgage

Mortgages are used to create collateral over real estate (e.g. land, buildings, etc.). Mortgages must be executed in a public instrument before a Mexican notary public. For a mortgage to be effective *vis-à-vis* third-parties, it must be duly registered in the public registry of property corresponding to the collateralised asset's location. Registration fees may vary depending on the secured amount and the Mexican state in which the corresponding asset is located.

Also, there is a form of mortgages known as "industrial mortgages", which allow the creation of a lien over all the assets located in the real estate being mortgaged.

Security trust

This is one of the most flexible structures as it allows for a single structure to be implemented pursuant to which different kinds of assets may be granted as collateral.

Likewise, it may encompass all (or most) of the assets of the grantor. Under this structure, the grantor transfers title of the collateralised assets to a trust (to be managed by a Mexican financial institution as trustee) for the benefit of the secured party. In other words, it has the purpose of securing the relevant payment obligations with the trust assets and of providing a servicing mechanism for the corresponding debt.

The formalities to implement a security trust depend on the assets being contributed thereto as collateral; however, these generally include (i) the implementation of a trust agreement, (ii) the granting/ratification of the agreement before a Mexican notary public, and (iii) filing of the trust with the applicable Mexican authorities/registries, provided that the nature of the filing depends on the type of assets being transferred to the trust (generally speaking, the trust has to be filed with the Sole Registry of Movable Guarantees (*Registro Único de Garantías Mobiliarias*); however, filing with other registries may apply (e.g. real estate assets; public registry of property, IP; Mexican Institute of Industrial Property, etc.)).

The main benefits of a security trust (versus a combination of pledges and mortgages) are: (i) the collateralised assets will generally be bankruptcy remote (except for transfers under claw-back periods), thus protecting the secured party in the event of the grantor's bankruptcy or insolvency; (ii) the secured parties can exert a higher degree of control over the trust assets; and (iii) a non-judicial enforcement procedure may be agreed by the parties to the trust, thus allowing for a more efficient and structured enforcement of the collateral to take place.

That being said, the implementation of a trust agreement will imply a more expensive structure (given the applicable trustee, notarial and registration fees) and will definitely be more intrusive in the day-to-day operations of the borrower/guarantor.

This collateral structure is very common in project finance and is convenient to isolate the collateralised/project assets from the sponsor, and to have a greater control over these assets in an event of default.

Please note that other forms of security are applicable to regulated assets (e.g. airplanes and vessels).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Collateral over real property can be created by means of a mortgage or a security trust governed under Mexican law. Regarding the creation of a security interest over machinery and equipment, this can be done through a pledge, an industrial mortgage, or a security trust.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes. It is important to note that debtors are not required to be notified for the perfection of collateral over receivables to be valid. That said, it is convenient to do so, so that they can acknowledge (i) the existence of the collateral, and (ii) that, in an event of foreclosure, they must pay any amounts under the receivables to the lenders. Otherwise, debtors would be released from their obligations by paying to the pledgor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, traditionally through a pledge. It can also be implemented through a trust agreement.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Security can be taken over shares issued by a Mexican entity through a pledge agreement or a security trust as mentioned before. Note that in the case of security over shares being created through a trust, the relevant shares are transferred to the trust and thus the trustee becomes the actual shareholder/partner of the issuing entity.

It is not possible to create collateral over shares issued by a Mexican entity through foreign documents, due to the fact that such security would be unenforceable in Mexico.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, it can; either through a pledge, an industrial mortgage, or a security trust.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can. However, as mentioned above, the authority to secure third-party obligations should be permitted under the relevant company's corporate purpose.

3.9 What are the notarisations, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

When granting collateral under Mexican law, the participation of a public attestor (notary public or commercial attestor (*corredor público*)) is usually required. The corresponding notarial fees will depend on the type of asset being collateralised and on the total value of the secured obligation. These fees are usually capped but, in some cases, can represent material amounts. These fees will usually be covered by the borrower.

Registration fees are generally required for security granted over real estate. These can be material and are associated with the registration of the collateral before the public registries where the assets are located. In most cases, these registration fees are capped by local authorities, and, in cases where the transaction is associated with benefits for the population or state, special discounts may apply.

Also, registration fees are generally required for security over movable assets. These are not material and are associated with the registration of the collateral before the Sole Registry of Movable Guarantees (*Registro Único de Garantías Mobiliarias*).

Please note that, in addition to the above, in some other cases and with respect to certain local jurisdictions, additional taxes or fees may be required to be paid for the perfection and/or registration of a security. Moreover, other forms of registration could be applicable to regulated assets (e.g. airplanes and vessels).

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The timing and expenses involved in the filing and registration of Mexican collateral can significantly vary on a case-by-case basis but, generally speaking and except for some cases of real state collateral, they should not be material.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

It depends if the collateral or overall financing involves regulated entities/assets. For example, security over permits, concessions, procurement contracts, licences and other regulated assets (such as pipelines, water treatment plants, energy plants, mining properties, highways, airports, and generally public infrastructure), or over companies or entities that use, procure, manage and/or operate such assets, will typically require prior governmental approval to create a security interest over them (or, at best, prior notice to the relevant authorities). If no regulated entities/assets are involved, then no regulatory consents are required. Also note that some types of regulated assets cannot be subject to collateral.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No. The same rules are generally applicable to credit facilities regardless of whether they are revolving or not.

3.13 Are there particular documentary or execution requirements (notarisations, execution under power of attorney, counterparts, deeds)?

Refer to questions 3.2, 3.9 and 3.10 above.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Such prohibitions or restrictions are generally not applicable.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes. It is customary. Depending on the transaction structure, the granting by the corresponding secured parties of a power-of-attorney to the agent to act on their name and on their behalf is advisable.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Mexico.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

For the transfer to be effective, the specific contractual provisions must be reviewed, and the requirements and obligations set forth therein must be met. Also, and except as provided otherwise in the relevant agreement, unless the borrower group is notified of the assignment to Lender B, they would be released of their payment obligations by paying any amounts under the loan to Lender A.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Withholding taxes apply as a general rule to interest payable by borrowers to foreign lenders and Mexican entities that are not banks or financial entities. These may also apply to financial entities but are normally preferential. The foregoing is also applicable to the proceeds of a claim or to the proceeds of an enforcement of security that are destined for payment of amounts other than principal (i.e. interests, commissions or fees). The withholding rate will strictly depend on the type and nationality of the lender, the nature of the transaction itself and the applicability of international treaties regarding double taxation, among others.

Withholding taxes do not apply to Mexican banks and certain types of financial entities. Such entities will calculate and pay their taxes in accordance with applicable Mexican tax laws.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Any tax incentives, privileges, restrictions, fees or exemptions thereof are provided for under specific international treaties entered into by Mexico to avoid double taxation and will depend on their applicability to a specific foreign lender.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

Foreign lenders are required to pay income tax if they have a permanent establishment within the Mexican territory, or when the income comes from sources within the Mexican territory.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

As explained before, there are several costs and fees that will apply when structuring, implementing and perfecting collateral in Mexico.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Yes. Mexican law allows for the parties to contractually agree to governing law and forum in Mexico or abroad, provided that, for this submission to be valid, it must comply with the applicable requirements under Mexican law, including an irrevocable submission to the foreign governing law and courts and a waiver to any other jurisdiction to which the relevant party may be entitled to. Also, a reasonable point of contact must be established with the chosen forum (i.e. to avoid "forum-shopping").

Mexican judicial authorities would enforce a foreign judgment so long as the requirements for such enforcement are met (please refer to question 2.6 above).

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Yes, subject to: (i) the submission to the foreign court being valid (please refer to question 7.1 above); and (ii) the foreign judgment complying with the specific Mexican law-related requirements (please refer to question 2.6 above).

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Timing depends on the circumstances of the particular case, the type of collateral securing the loan, applicable foreign governing laws, and applicable foreign jurisdictions, as well as on its consistency with Mexican law principles.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Yes, there are.

Foreclosure on a mortgage or “regular” pledge (i.e. where possession is effectively transferred to the creditor as the depository) will typically require a summary judicial procedure that would ultimately result in public auctions to sell (or transfer) the collateral with the proceeds being applied as payment to the lenders. For non-possessory pledges and security trusts, it is possible to choose between a judicial and a non-judicial procedure, but in most cases, they also imply public auction procedures.

Regarding regulatory consents, generally, the same consents required for the creation of security will apply to its foreclosure.

In addition, enforcement can be significantly affected or impacted in case of reorganisations or bankruptcy under applicable law.

Finally, foreign lenders may be restricted from owning certain assets (including stock) as result of limitations on foreign investment, or in the case of regulated assets. That said, lenders may foreclose on Mexican collateral looking to sell off the underlying asset to a third party without ever becoming the legal owner thereof.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

Not generally. However, as set forth in question 7.4 above, certain restrictions will apply to foreign lenders looking to foreclose on restricted assets.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. Under Mexico’s Federal Bankruptcy Law (*Ley de Concursos Mercantiles*), as of the date of the bankruptcy judgment and until the end of the reorganisation stage, no claim or foreclosure will be enforceable against a company. A general clawback period of 270 days will apply.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Under Mexican law, courts have a legal binding obligation to recognise arbitration clauses, the contractual submission

of potential controversies to arbitration and lastly the awards issued. The foregoing will be subject to compliance with procedural and formal requirements under the Mexican Constitution, the Mexican Commerce and Civil Codes and applicable international treaties.

In connection with the foregoing, please note that enforcement of an arbitral award may not be granted if, among others: (a) one of the parties to the arbitration agreement did not have adequate or sufficient legal capacity to enter into such arrangement or such arrangement is not valid under the laws chosen by the parties; (b) service of process is not correctly and legally carried out; (c) the award refers to a controversy which, under the terms of the arbitration agreement, was not subject to arbitration or contains a decision that exceeds the terms of such arbitration agreement; (d) the subject matter of the arbitration procedure cannot be arbitrated or the enforcement of the award is contrary to Mexican law or public policy, international treaties or agreements binding upon Mexico; or (e) the award is not final in the jurisdiction where it was obtained.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Mexico’s Federal Bankruptcy Law is the general statute governing reorganisation and bankruptcy proceedings in Mexico. Reorganisation and/or bankruptcy proceedings will directly affect enforcement of a security by a lender depending on the kind of security interest granted to such lender.

Subject to applicable exemptions and specific rights, the aforementioned statute treats a lender secured under a security structure as a secured creditor. There are some important benefits afforded to a secured creditor, generally including priority ranking, continued ordinary interest accrual, loan currency protection and (subject to some exemptions) ability to participate or not in the eventual creditor agreement that concludes the reorganisation procedure. In the event no agreement is reached, and the relevant company becomes bankrupt, secured creditors have the right to foreclose on their security, and they have the same right if such an agreement is validly reached but not signed by the relevant creditor.

It is also important to note that, given that under a security trust structure, title to the assets that form the trust estate is transferred to the relevant trustee and, therefore, subtracted from the estate of the relevant grantor, lenders secured by or through a trust have, through this form of security, a vehicle that is remote to the bankruptcy of the grantor under applicable law. Please note, however, that in recent cases, while this remoteness has been generally accepted by Mexican courts, precautionary measures issued by Mexican courts have temporarily frozen enforcement and foreclosure of assets under trusts on the basis that, among others, the company subject to the reorganisation procedure needs to use such assets for its survival.

8.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

Yes. The Federal Bankruptcy Law and its associated regulations generally provide for a 270-day clawback period to protect creditors from fraudulent conveyance by the company subject to the reorganisation procedure.

Likewise, such statute, subject to exemptions and interpretation, sets forth the following ranking for creditor priority: (a)

singularly privileged creditors (i.e. burial and sickness expenses); (b) secured creditors (those secured with an *in rem* guarantee, such as the pledges and mortgages); (c) specially privileged creditors; and (d) unsecured creditors.

Please note that credits against the asset mass, such as certain tax or labour credits, debts incurred while at the reorganisation process, asset maintenance and other similar costs, may have higher ranking than secured credits and will typically be paid first.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Governmental entities (i.e., the union, states, municipalities, and certain government entities) are not subject to the Federal Bankruptcy Law. That said, governmental entities have implemented trust structures to, among multiple others, guarantee debt instrument offerings and other forms of financing.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes; nevertheless, Mexican law does not allow the actual seizing or taking of possession of assets through out-of-court proceedings; thus such seizure or taking of possession must be undertaken and approved by Mexican courts.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Yes, it is, subject to compliance with certain requirements (please refer to question 7.1 above).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

A waiver of immunity is traditionally valid in Mexico; thus, sovereign immunity is not recognised.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing or other eligibility requirements under Mexican law as a general rule.

11 Other Matters

11.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2020 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020 due to COVID-19 to continue into 2021 and beyond?

Lenders have tried to be more amenable to the use of digital signatures and similar mechanisms and that has provided a new level of efficiency to certain transactions. However, other players like trustees and notary publics are still on the formalistic end and still required "wet-ink" signatures as well as some burdensome requirements.

11.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

No, there are not.



José Ignacio Rivero Andere is managing partner of the firm and has over 15 years of experience providing legal and business advice to domestic and foreign clients in banking and finance, mergers & acquisitions, capital & debt markets, and corporate governance. He has been consistently recognised in his fields of practice by renowned international legal publications including *Chambers and Partners*, *The Legal 500*, *Latin Lawyer 250*, *IFLR1000* and *Best Lawyers*.

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