



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Mexico: Lending & Secured Finance

This country-specific Q&A provides an overview to lending and secured finance laws and regulations that may occur in Mexico.

This Q&A is part of the global guide to Lending & Secured Finance. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/lending-and-secured-finance/>

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1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Generally, lending and other credit-related activities may be conducted by nonregulated business entities in Mexico, whether national or foreign, provided that such activities are executed on a private, noncustomary and nonprofessional basis. Likewise, there are no restrictions to accept, take benefit or execute security interests and collateral in Mexico.

Banking and finance, however, and other professional offering credit services (including active and passive operations) are regulated activities under the Credit Institutions Law of Mexico (LIC). Any lender, Mexican or foreign, who wishes to offer banking and finance services

professionally must request authorization from the National Banking and Securities Commission (CNBV) and Mexico's Central Bank (Banxico) and incorporate, organize and operate itself as a financial institution (commercial or development).

Under Mexican law, a foreign financial institution may open a branch or office of representation to promote services and products of such foreign financial institution. Such branches or offices must obtain prior authorization from CNBV and are regulated under the Rules for Branches and Representative Offices of Foreign Financial Institutions. Moreover, the activities permitted to such branches or offices are expressly limited by LIC and shall not fall within the legal scope of soliciting and deposit monies (captación) or securities brokerage (*intermediación bursátil*).

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

In principle, there are no major restrictions. Mexican financial entities are subject to Regulation 14/2007 issued by Banxico. The general rule is that financial institutions may freely and mutually agree on interest rates applicable to their financing arrangements, provided that financing documents clearly state that there is a single interest rate and a single default rate. Interest rates may vary during the term of a credit facility as long as only one interest rate applies to a specific period of time. Lenders and borrowers may opt for fixed, variable and variable interest rates with a maximum limit.

When interest rate is not agreed by the parties, Mexican law provides for a default legal interest rate. Pursuant to the provisions of the Federal Civil Code (CCF) and the Commerce Code (CC), such default interest rates shall be an annual ordinary interest rate of 9% and an annual default rate of 6%.

Note that under Mexican law, "interest on interest" covenant and clauses would not be enforced. This does not necessarily mean that interest capitalization is prohibited, but it is limited to simple interest and default interest. Mexican courts have held that unreasonably high interest rates may amount to usury and are not enforceable.

3. Are there any laws or regulations relating to the disbursement

of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Parties may denominate loans, disbursements, repayments and fees in Mexican pesos (MXN), U.S. dollars (USD) or any other currency. However, pursuant to the provisions of the Mexican Monetary Law, a debtor (borrower) is entitled to pay and/or satisfy debt obligations by paying in MXN, at the exchange rate applicable to the foreign currency and on the payment date, in the event that such obligation is denominated in any currency other than MXN.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure - and can such security be created under a foreign law governed document?

Yes. Mexican law permits creation of security interests and collateral over any type of rights and asset, provided that such rights and assets are in commerce. Security over real estate property is usually formalized in public deeds and registered in state registries of property and commerce. Security interests created over movable assets are registered with the Registry of Movable Security Interests section (RUG) of the federal Public Registry of Commerce.

The procedure, formalities and registration requirements vary depending on the security interest or guarantee and it can be agreed by the parties that such agreements are governed by a foreign law.

The standard procedure for creating a security interest or guarantee and its registration is as follows: 1) lender determines the security interests or guarantees to be created by borrower and/or guarantors, 2) counsel conducts due diligence and confirms existence of liens, formalities and registration requirements, 3) borrower and/or guarantors produce evidence that the underlying assets are free of liens and that, upon execution, formalization and/or perfection of security documents, security interest or guarantee would constitute a first priority lien or security interest in favor of lender, enforceable in its terms, 4) negotiation and drafting of financing and security documents, 5) execution of financing and security documents,

formalization and satisfaction of conditions precedent, and 6) registration of security interests or guarantees with applicable public registries.

In addition to the above, below please see an overview of the most used legal instruments in order to create security interests and guarantees and their formalities:

a) Pledge

A pledge may be created on movable assets. A standard pledge may be created on a specific type of asset or a specific category or class of assets, provided such assets are determinable (similar to a floating pledge). A pledge agreement must be in writing and depending on the pledged assets, additional actions or formalities may be required to perfect the creation of first priority pledge (i.e., registration of pledge in corporate books and delivery of stock certificates if a pledge is created on shares or other equity interests).

A pledge agreement is usually registered with the RUG.

b) Nonpossessory Pledge

A pledge created on movable assets where the pledgor or a third person maintains possession of the pledge asset. A nonpossessory pledge agreement must be in writing, ratified before a Mexican notary public and registered with the RUG.

c) Trust Agreement (*Fideicomiso*)

A trust agreement creates a trust estate with an authorized financial entity called trustee. Under Mexican law, trust agreements are one of the preferred collateral and security mechanisms of lending institutions. Depending on the structure of a given transaction, trust agreements may serve to capture, regulate and manage cash flows (typically the funds that constitute the source of repayment of a facility) and to keep and maintain secured assets, ranging from shares, collection rights, equipment and real estate property.

There are two types of trusts: an administration trust and a security trust. Typically, the following formalities apply to the execution of trust agreements: 1) in writing; 2) know-your-customer (KYC) approval according with trustee's internal policies; 3) formalized in a public deed when the trust estate includes real estate property; and 4) registration with local Public Property Registry (RPP) and with RUG.

d) Mortgage

A mortgage on real estate property is one of the preferred guarantee of lending institutions in Mexico. A mortgage agreement must be in writing and formalized in a public deed before a Mexican notary public. There a number of documents that a notary public will review before granting a mortgage in a public deed, including property title background documentation and documentation regarding payment of local taxes and fees for local services.

Real estate property is governed by state law in Mexico. Thus, registration requirements of a mortgage in a local RPP vary depending on the location of the property.

5. **Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?**

Yes. Mexican law permits both the creation of security over future assets and for future obligations.

6. **Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?**

Yes. The most frequently used agreement for this type of security is the pledge (prenda), whether simple, floating or nonpossessory.

7. **Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?**

Yes, notarization is a common requirement to formalize and perfect legal documents affecting real estate property. Mexican law requires notarization in order to give perfect or give effect to certain contracts and security interests such as usufructs, rights of way, residential leases (depending on state law) and nonpossessory pledges.

Mexico is a signatory of a number of treaties for international legal cooperation (e.g., the Apostille Convention, Washington Protocol, etc.) and its commercial law is fairly advanced in terms of recognizing, giving effect to, and executing foreign law documents, arbitration clauses and arbitral awards, court orders and judgments.

Execution requirements will vary depending on the jurisdiction or foreign law governing the corresponding legal act. For private documents, a double-column apostilled document usually suffices.

8. Are there any security registration requirements in your jurisdiction?

As mentioned above, security interests and collateral over real estate property are registered with state registries of property and commerce. Security interests on rights and other movable assets are registered with the RUG.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Yes. In general, when structuring a transaction, lenders have to consider, *inter alia*, notary fees (which are legally established; in some jurisdictions notary public fees represent a considerable transaction cost when the value of any involved real estate is high), registration fees (which vary depending on the security interest or guarantee) and periodical trustee fees (*honorarios fiduciarios*) payable during term of trust agreements.

There are not stamp duties in Mexico.

Typically, borrowers are charged with paying for transaction costs.

10. **Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?**

Yes. In accordance with Mexican law, there are no restrictions as to the number of security interests or guarantees that a company (third party) may create or grant in favor of a borrower/debtor, regardless of whether the third party is related or unrelated to such borrower/debtor.

Under Mexican law, there are three main capacities under which a third party can secure a borrower's/debtor's obligations: 1) joint obligor or co-obligor, 2) guarantor and/or 3) *avalista* (a person who signs a promissory note - pagaré - or other negotiable instrument executed by a borrower/debtor, as a guarantor).

Lender's due diligence approach is to confirm that third parties acting as guarantors, co-obligors or *avalistas* are authorized to do so under their organizational documents.

11. **Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?**

Lenders may be exposed to a number of situations when acting in such capacity, depending on the credit structure, the borrower's credit worthiness, sector, industry and/or project.

When structuring a transaction, lenders should take in consideration, inter alia, if the borrower/debtor/guarantor is a Mexican or foreign person (individual or legal entity), in order to determine the documents and information required to accept any security interest or guarantee, the credit worthiness evidenced in a credit report issued by the entities authorized by the competent authorities.

Moreover, in any case, if the borrower/debtor/guarantor is a legal entity, a lender should conduct due diligence on 1) indebtedness, leverage ratios, intercompany arrangements and any other solvency-related relation, and 2) organizational documents and corporate authorization expressly approving the financing transactions and documentation.

In requesting security interests or guarantees from such persons, lenders should be mindful of the importance of timely registration and/or recordation of security interests and guarantees with a state public registries of property and the RUG.

12. **Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?**

No. In general, other than statutory minority rights (applicable in absence of corporate documents governing such rights) there are no restrictions for the provision of guarantees and or security interests when acquiring shares of a company.

Transfer of shares and other equity interests are generally subject to the specific provisions set forth in shareholder agreements, bylaws and other organizational documents. Rights of first refusal, preferential rights, drag-along and tag-along provision are all common in these documents.

13. **Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?**

Yes. Under Mexican law, a lender may also act as administrative and/or collateral agent. In Mexico, the approach of lenders is to appoint a co-lender or a financial entity, foreign or national, as administrative and/or collateral agent. Mexican trustees are less often appointed, unless the transaction involves a security trust (*fideicomiso de garantía*) holding secured assets.

The appointed collateral agent is often authorized to enforce syndicate's rights upon the occurrence of an event of default (EOD) and apply any proceeds.

Mexican law-governed documents usually contain provisions whereby the syndicate grants a commercial agency or power of attorney to the administrative and/or collateral agent.

Syndicates and lead arrangers usually demand the execution of intercreditor agreements.

14. **If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?**

Please see previous answer.

15. **Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?**

Yes, 1) withholding tax arises on interest payments to both domestic and foreign lenders, and 2) proceeds derived from enforcing security or claiming under a guarantee.

16. **If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?**

Mexico is a signatory to a number of double taxation treaties. The standard rate for foreign lenders that are financial institutions is 4.9%. However, treaty-based rates range from 4.9% to 40%, depending on the double taxation treaty and whether Mexican tax law treats a specific jurisdiction as a tax haven.

17. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction (for example, will any income become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction)?

Secured and unsecured loans are not considered taxable income in Mexico. Mexican trusts (*fideicomisos*) are usually transparent for tax purposes with respect to the settlor transferring assets to trust estate.

Mexican financial institutions may be obligated to comply with Foreign Account Tax Compliance Act (FATCA) provisions.

Mexican law offers certain tax incentives for FIBRA (real estate investment trust) investors.

18. Are there any tax incentives available for foreign lenders lending into your jurisdiction?

A Presidential Decree granting a new set of income tax incentives to capital gains and interest derived from corporate bonds became effective on Jan. 9, 2019.

With the aim of incentivizing the corporate bond and private equity markets in Mexico, interest paid to investors abroad and profits realized from the disposition of certain shares by Mexican individuals and non-Mexican tax residents are subject to certain tax incentives.

19. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.

Although no specific financing structure has been historically challenged, tax authorities and tribunals are prone to bring a lack-of-business-purpose argument to challenge structures implemented by taxpayers. Financing structures that have been subject to recent close scrutiny by Mexican tax authorities are those involving financial multipurpose entities (*sociedades*

financieras de objeto múltiple or SOFOM) to reduce withholding tax rates when interests are paid abroad.

20. **Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?**

Yes. Mexican civil and commercial law has a fairly clear legal framework in order to give effect to choice of law provisions and seek transnational legal enforcement locally.

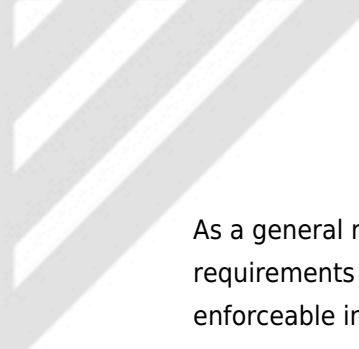
There have been limited cases where Mexican courts have refused to enforce choice of law provisions or foreign law-governed documents on public policy grounds, but the applicable codes and statutes have evolved ever since toward a favorable environment for international private law.

21. **Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?**

Yes, Mexican courts often enforce judgments delivered, and awards rendered, in the U.S. and the U.K.

Yes. Mexico is a member (by accession) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), since April 14, 1971; the federal Commerce Code has incorporated key provision from the main international arbitration conventions.

More generally, to enforce a final judgment delivered in a U.S. or English court, the interested party must file a request for recognition and enforcement before a Mexican court. The Mexican court, after serving the defendant with the filing and having heard the parties, delivers a judgment, granting or denying recognition and enforcement of such foreign judgment.



As a general rule under Mexican law, any foreign judgment must comply with the following requirements pursuant to the provisions of the Federal Code of Civil Procedures, in order to be enforceable in Mexico:

- a) the judgment or decision is in compliance with the legal requirements set forth in the jurisdiction of the court rendering such judgment
- b) the judgment is strictly for the payment of a certain sum of money and has been rendered in an in persona action as opposed to an in rem action;
- c) the judgment or decision was rendered by a competent court with jurisdiction on the subject matter pursuant to accepted rules of international law
- d) service of process in connection with such judgment or decision was made personally on the defendant
- e) such judgment does not contravene public policy in Mexico, international treaties or agreements binding upon Mexico nor generally accepted principles of international law
- f) the procedural provisions under Mexican law, applicable to the enforcement of foreign judgments, are complied with (including the issuance of a letter rogatory by the competent authority of the jurisdiction requesting enforcement of such judgment and any legalization or certification of such judgment as authentic by the corresponding authorities of such jurisdiction in accordance with the laws thereof)
- g) such judgment is final in the jurisdiction where it was obtained
- h) the action in respect of which such judgment is rendered is not the subject matter of a pending lawsuit among the same parties before a Mexican court
- i) the foreign courts of the jurisdiction requesting enforcement in Mexico would enforce final judgments issued by the federal or state courts of Mexico as a matter of reciprocity

Lenders should also note that all documents filed or produced before a Mexican court must be translated into the Spanish language.

Regarding orders from certain authorities or bodies, their enforcement or applicability would depend on the international treaties subscribed by the Mexican State and subject to the reciprocal relationship between both countries.

22. **What (briefly) is the insolvency process in your jurisdiction?**

In Mexico, the insolvency process is a federal judicial procedure to which companies turn to engage in negotiations with their creditors upon the occurrence of an insolvency event. If the federal insolvency court admits an insolvency claim, the debtor's debt service is suspended and the court appoints a receiver whose function is to manage the operations of the debtor while it negotiates the restructure debt and/or reorganize its operations.

During the commercial insolvency process, the debtor is still able to continue the course of its business and operations, as its operating flows are positive. Therefore, and in order to avoid further damage to the value of the debtor, the debtor continues to operate during a period of insolvency. If the agreement is reached, the creditors waive some part of the overdue debts and the latter emerges from the insolvency proceeding owing less.

In the event that the desired agreement is not reached during the stipulated period, the debtor enters into a bankruptcy process in which its assets are liquidated in order to make payments to the creditors until they are exhausted. The priority of creditors in a bankruptcy is established in the Bankruptcy Law.

23. **What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?**

The insolvency process has impact on the ability of a lender (creditor) to enforce its rights and collect any payment from its debtor. In this regard and in accordance with *Ley de Concursos Mercantiles* (LCM), creditors of a bankrupted company or individual have preference based on a marshalling set forth in such law, and the creditor's seniority to determine the payment preference will be based on the type of credit and/or the collateral securing such credit.

Also, in case of an insolvency process of any debtor, unsecured obligations in foreign currency

must be converted into Mexican currency at the rate of exchange in force on the date of the respective court's judgment and then converted into inflation indexed units on the same date.

24. Please comment on transactions voidable upon insolvency.

The Bankruptcy Law does provide for a clawback period applicable to fraudulent, voidable transactions in the context of a bankruptcy procedure. The clawback period is 270 calendar days prior to the date of the judgment declaring a bankruptcy. The clawback period may be extended to 540 calendar days with respect to a creditor that 1) is a subordinated creditors, 2) is a parent company (*sociedad controladora*), or 3) is an individual, or part of group of persons, with decision-making power with respect to the debtor (50% or more of voting rights of debtor's capital stock, entitled to appoint the majority of board member or with actual power to take fundamental decisions).

25. Is set off recognised on insolvency?

Yes, under the Bankruptcy Law set-off is permitted upon delivery of the court's judgment and provided it was agreed among debtor and qualified creditors under the corresponding settlement agreements.

26. Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?

Yes, under the Bankruptcy Law set-off is permitted upon delivery of the court's judgment and provided it was agreed among debtor and qualified creditors under the corresponding settlement agreements.

27. Are there any impending reforms in your jurisdiction which will

make lending into your jurisdiction easier or harder for foreign lenders?

No.

However, Mexico's government is under a new administration as of December 2018 and the president's political party has a majority in federal Congress and most state congresses. This means that foreign lenders and investors should expect dynamic legislative action in the country in the short term and midterm. This means foreign lenders will have to seek legal advice constantly if they wish to do business in Mexico.

28. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

As of the fourth quarter of 2018, the lending market was dominated by financial institutions (traditional bank debt and capital markets) with approximately 60% of the market, whereas development banks' share was approximately 9% and alternative financial entities was approximately 6.5%.