

## Lending and taking security in Mexico: overview

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A Q&A guide to finance in Mexico. The Q&A gives a high level overview of the lending market, taking security over assets, special purpose vehicles in secured lending, quasi-security, guarantees, and loan agreements. It covers creation and registration requirements for security interests; problem assets over which security is difficult to grant; risk areas for lenders; structuring of debt agreements; enforcement of security interests and borrower insolvency; cross-border issues on loans; taxes; and proposals for reform.

This article is part of the global guide to finance. For a full list of contents visit [www.practicallaw.com/finance-guide](http://www.practicallaw.com/finance-guide).

*Andrés Nieto Sánchez de Tagle, de Von Wobeser y Sierra*

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## Overview of the lending market

### 1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

Mexico implemented financial reforms in 2014 with the aim of:

- Increasing competition in the financial sector.
- Promoting credit through development banks.
- Expanding credit through private financial institutions.
- Maintaining a solid and prudent financial system.

## Forms of security over assets

### Real estate

### 2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

### Real estate

Mexican law defines real estate to include (*Article 750, Federal Civil Code*):

- Land and any constructions attached to it.
- The accessories hanging from trees and plants.
- Everything attached to real estate fixed to the real estate itself or any additional building or object attached to it.
- Statues, reliefs, paintings or other objects of decoration, hung in buildings.
- Machines, instruments or utensils used directly and exclusively for the industry or exploitation of the property.
- Electrical devices and accessories attached to the land or to the buildings by their owner, unless agreed otherwise.
- Dykes and constructions that, even if floating, are intended to remain at a fixed point in a river, lake or coast.
- The real rights over real estate.

## Common forms of security

The most common forms of security granted over real state are the:

- **Mortgage.** A mortgage is a security interest granted over assets that are not delivered to the creditor, and that give the creditor the right (in case of default of the secured obligation) to be paid from the value of the asset.

- **Guarantee trust.** This is a contract under which a person transfers to a trustee the ownership or title of one or more assets or rights in order to secure the obligations of a settlor in favour of a third party.

## Formalities

The following formalities must be complied with:

- Any mortgage or trust agreement must be in writing and the signatures formalised before a public notary. It must also be registered in the public registry of property of the state where the real estate is located.
- Depending on the value of the real estate, the mortgage agreement must be formalised in a public instrument before a public notary.
- In a guarantee trust, the security must be registered with the public registry of property on the corresponding real estate record.

## Tangible movable property

**3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?**

## Tangible movable property

Movable property is, by its nature, any asset that can be moved from one place to another, or that moves on its own or as a result of external force.

The law also determines that obligations, rights, actions or amounts due are also considered to be movable property.

Legal actions that any partner has in associations or corporations are also considered movable property.

## Common forms of security

The most common form of security over movable property is a pledge. Under a pledge, a creditor acquires the right over a debtor's asset to secure compliance with an obligation. If the obligation is not complied with, the creditor can sell the asset to recover the funds loaned.

## Formalities

A pledge or trust agreement granted over movable property must be in writing and registered with the federal personal property collateral registry (*Registro Único de Garantías Mobiliarias*).

## Financial instruments

**4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?**

## Financial instruments

The following financial instruments can have security granted over them:

- Shares.
- Partnership interests.
- Obligations.
- Bonds.

- Options.
- Certificates.
- Promissory notes.
- Bills of exchange.
- Other negotiable instruments that can be circulated in the securities markets that are issued in a series or in bulk and represent the capital stock of an entity, a pro rata share of an asset or the participation in a collective credit or any individual credit right.

## Common forms of security

The most common form of security is a pledge. *See Question 3, Common forms of security.*

## Formalities

Any agreement must be in writing and the lender must open an account with an institution and deposit the securities in it. There is no need to register a pledge.

## Claims and receivables

**5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?**

## Claims and receivables

The most common types of claims and accounts receivable are:

- The rights a company has over merchandise sold on credit.
- The provision of services.
- Commission for loans or for any other concept including those owed by clients, short or long-term accounts receivable, employees and other debtors.

## Common forms of security

The most common forms of security are:

- **Pledge.** This is where a creditor acquires a right over a debtor's receivables to ensure compliance with an obligation.
- **Guarantee trust.** This is a contract under which a person transfers to a trustee the ownership or title of one or more assets or rights in order to secure the obligations of a settlor in favour of the creditor.

## Formalities

Any pledge or trust agreement must be in writing and registered with the federal personal property collateral registry (*Registro Único de Garantías Mobiliarias*).

## Cash deposits

**6. What are the most common forms of security over cash deposits? How are they created and perfected?****Common forms of security**

This type of security is not used very often. A pledge created over money must be in writing and ownership will be understood to be transferred, so in the event of default the creditor will conserve the property as payment for the obligations of the debtor.

**Formalities**

A pledge over cash must be perfected using a written agreement to create the pledge.

**Intellectual property****7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?****Intellectual property**

Patents, trade marks, copyright and designs can all be granted as security, as well as any other intellectual property right (*Article 355, section I, General Law of Negotiable Instruments and Credit Operations*).

**Common forms of security**

The most common form of security granted over intellectual property rights is the pledge.

**Formalities**

The following formalities apply:

- Any pledge must be in writing and registered with the federal personal property collateral registry (*Registro Único de Garantías Mobiliarias*).
- It must also be registered with the Mexican industrial property institute (*Instituto Mexicano de la Propiedad Industrial*).
- The pledge agreement must be formalised before a public notary in a public instrument.

**Problem assets****8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?****Future assets**

A loan can be secured using present or future movable property without transferring possession from the debtor (*Article 355, section I, General Law of Negotiable Instruments and Credit Operations*).

**Fungible assets**

Fungible assets can be pledged and the pledge will continue even when the instruments or assets are substituted by others of the same kind. It can be agreed that ownership is transferred to the creditor, who will remain obliged restore to the debtor other assets or instruments of the same kind. This agreement must be in writing.

**Other assets**

Securities or negotiable instruments that are subject to a public offer or that are negotiated in the stock exchange can be guaranteed by financial institutions. There are companies that will guarantee its payment in case of a breach of the issuer.

## Release of security over assets

### 9. How are common forms of security released? Are any formalities required?

If the principal obligation is terminated, the security is released since it is an accessory agreement. The formalities needed to cancel it will depend on each of the forms of security.

- **Federal personal property collateral registry** (*Registro Único de Garantías Mobiliarias*). The creditor must cancel the registration in the system once the secured obligations are paid.
- **Public registry of property**. The creditor must request cancellation of the registration once the secured obligations are paid.
- **Mexican industrial property institute** (*Instituto Mexicano de la Propiedad Industrial*). Cancellation of the registered pledge agreement must be requested.
- **Guarantee trust**. The beneficiary must request the trustee to release the assets or rights granted as security once the obligations are complied with.

## Special purpose vehicles (SPVs) in secured lending

### 10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

It is common in financial transactions to grant a pledge over the shares of special purpose vehicles (SPVs) instead of granting security over each of the assets owned by the SPV. There is also a special type of security that can be granted in favour of banks that is granted over the entire company, including real estate and movable property.

## Quasi-security

### 11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

#### Sale and leaseback

A financial lease is the instrument through which a company (the financial lessor), agrees to buy a good in order to grant its use to another person (financial lessee), during a mandatory term. The lessee in turn is obliged to pay rent, which the parties can establish from the beginning, provided it is sufficient to cover the purchase value of the asset and any applicable accessory expenses.

The financial lessee is obliged to select one of the following options at the end of the mandatory term:

- Extend its term.
- Buy the good at a reduced price.
- Sell the good to a third party and receive part of its price.

Some of the risks associated with a financial lease are the following:

- The financial lessee does not acquire ownership of the asset until it exercises its purchase option. The asset continues to belong to the leasing financial entity but the financial lessee assumes all the risks for its loss or damage.

- The financial lease agreement is irrevocable unless agreed otherwise with the lending entity. Any such agreement often involves a high cost for early termination.

## Factoring

Financial factoring is a mechanism by which a company accelerates the recovery of its receivables portfolio by selling its invoices and credit rights to a financial institution or individuals. The agreement may or may not guarantee the debtors' payment obligations.

Depending on the obligations that the financial institution or individual acquires, the risks the factoring company assume include:

- The entire risk of not being able to collect from the debtor.
- The credit risk.
- The exchange rate risk, if the invoice is in a foreign currency.

## Hire purchase

A conditional sale agreement is an agreement through which the seller reserves ownership of the asset sold until the entire price is received (normally deferred). The seller does not transfer ownership of the good, but only its possession while it receives payments in instalments.

One of its primary effects is that failure to pay the price will result in termination of the sale and the seller can take back the asset.

## Retention of title

This involves a sale subject to the condition precedent that the buyer pays all the amounts into which the price is divided. Only when the debt is cancelled will the buyer be considered the owner of the movable property or real estate.

While the buyer has the thing in his possession, he cannot make use of it as he wishes without permission from the seller and he takes on the risks of its loss or any damage. If the thing is never materially transferred, the risks continue to be borne by the seller as the owner.

## Other structures

A bond is a contract through which a guarantor agrees with a creditor to pay the debtor if the creditor fails to do so.

A surety agreement is a consensual agreement between a guarantor and a creditor. It is an accessory contract, running alongside a principal contract or obligation that the surety guarantees. A guarantee contract is executed between the surety company (which guarantees compliance with the obligation assumed by the obligor (the debtor)) and the beneficiary (the creditor).

## Guarantees

### 12. Are guarantees commonly used in your jurisdiction? How are they created?

Guarantees to secure compliance with obligations are commonly used in Mexico in all types of transactions. They are created when a guarantor commits a specific asset or his own money to comply with a contractual obligation taken on by the debtor.

There are some formalities required depending on the type of guarantee. Some must be registered in the public registry of property, or the federal personal property collateral registry (*Registro Único de Garantías Mobiliarias*) or be executed before a public notary.

## Risk areas for lenders

### 13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

## Financial assistance

Publicly listed companies can acquire shares or negotiable instruments representing their capital stock. Entities controlled by a publicly listed company cannot acquire (directly or indirectly) shares representing the capital stock of the publicly listed company to which they are linked, or negotiable instruments that represent such stock.

This is also applicable to the acquisition or sale of derivatives or options that have as their underlying asset, shares representing the capital stock of the company.

In addition, general corporate law provides a limitation for private companies to acquire their own shares, unless they are acquired by through a judicial procedure in terms of payment.

## Corporate benefit

The sole administrators, or board of directors of a company, are obliged to act according to the interests of the company (*Article 156, General Business Organisations Law*).

If transactions arise that are harmful to the interests of the company, this should be pointed out to the administrators, who must abstain from deliberation and resolution. Any administrator who violates this provision will be responsible for any damage and loss caused to the company.

## Loans to directors

It is prohibited for publicly traded companies to execute transactions with related parties (including their directors) for up to 35% of its capital worth (*Mexican Securities Act*).

There are companies that exist whose corporate purpose is to grant loans to their administrators or partners, such as credit unions or savings and loan co-operatives.

## Usury

The courts in Mexico have penalised contracts with exorbitant interest rates and granted the affected party the possibility to claim an equitable reduction of the interest rate set in the loan agreement.

## Others

Not applicable.

### 14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

No. If a borrower uses funds granted by a lender to violate environmental laws, the borrower can be sanctioned under the Federal Environmental Liability Law. The lender will not be liable for the borrower's actions.

## Structuring the priority of debts

### 15. What methods of subordination are there?

#### Contractual subordination

A creditor can validly agree to subordinate the payment of its debt, but it is not common. Usually creditors with subordinated debt receive higher interest rates from debtors and, in case of bankruptcy, subordinated creditors will be paid before the shareholders of a company.

#### Structural subordination

It is possible to structure the order of payments between different types of creditors. Bankruptcy creditors will be paid in the following order (*Federal Commercial Insolvency Law*):

- Singularly privileged creditors.
- Secured creditors.
- Creditors with special privilege.
- Unsecured creditors.
- Subordinated creditors.
- Shareholders.

The Financial Institutions Law expressly provides the possibility for banks to issue subordinated debt. In bankruptcy, the holders of this debt will be paid after the other creditors and before the shareholders.

### Inter-creditor arrangements

Inter-creditor agreements are usually used in bankruptcy cases. Inter-creditor agreements are payment plans based on the viability of a company and that look for continuity of the company's activities.

- An inter-creditor agreement is executed by creditors and usually includes:
- A preference in the order of payments according to each type of creditor.
- Extensions to the terms of loans.
- Debt reductions.

### Debt trading and transfer mechanisms

**16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?**

Debt trading is usually done through factoring agreements. Financial factoring is a mechanism by which a company accelerates the recovery of its receivables portfolio by selling its invoices and credit rights to a financial institution or individuals. The agreement may or may not guarantee the debtors' payment obligations.

### Agent and trust concepts

**17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?**

The agent concept is used in syndicated loan transactions where there is a community of interest among different lending banks. The banks unite severally and entrust the handling of the credit granted jointly to an agent bank, which is responsible for relations between the lenders and the borrower. Although it is not expressly regulated by Mexican law, the concept of the agent in a syndicated loan agreement is valid and recognised by Mexican courts, even when the loan agreement is executed in another country.

Mexican law also recognises the function of a common representative in debt securities issued for a large number of investors through a public offer. The common representative represents all the holders and acts on their behalf.

**18. Is the trust concept recognised in your jurisdiction?**

Under a trust agreement, a settlor transfers ownership or title to assets or rights to a trustee for it to accomplish the purposes established in the agreement for the benefit of the beneficiaries. A trust can be executed by a borrower (as settlor), for the benefit of the lender (as the beneficiary) to secure payment of its obligation from the assets of the trust.

A trustee will have all the rights and actions that are required to fulfil the trust agreement. A trust executed under the law of another country will be recognised by Mexican courts.

## Enforcement of security interests and borrower insolvency

### 19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

A lender can enforce its guarantee in the event of any default by the debtor. A company has failed to comply with its payment obligations when (*Articles 10 and 11, Federal Commercial Insolvency Law*):

- A seizure is imposed due to default on an obligation and there are no or insufficient assets to cover it.
- It defaults in its payment obligations to two or more different creditors.
- There is no-one left in charge of management or operation of the company able to meet its obligations.
- It resorts to ruinous, fraudulent or fictitious practices in order to meet or cease to meet its obligations.
- It fails to comply with monetary obligations contained in an agreement executed with its creditors to prevent bankruptcy.

## Methods of enforcement

### 20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

All types of security interests can be enforced for non-compliance with any of the guaranteed obligations. The primary types of guarantees are the following:

- Mortgage.
- Pledge.
- Guarantee trust.
- Surety agreement.

Depending on each type of security, the creditor usually only needs the following in order to exercise its rights under the security interest:

- Documentation agreeing to the credit conditions.
- The security agreement.
- Documents or information proving the debtor's default.

They can be enforced in court, and some can be enforced out-of-court using the procedure provided in the agreement that creates the collateral. This makes it easier to sell the assets granted as collateral and make the payment of the obligations of the debtor.

## Rescue, reorganisation and insolvency

### 21. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction?

**How do they affect a lender's rights to enforce its loan, guarantee or security?**

Rescue and reorganisation procedures are provided in the Federal Commercial Insolvency Law. They are not only used for leading to insolvency, there are also prior procedures and measures for reaching agreements between a debtor and its creditors before bankruptcy.

Conciliation comes before insolvency. During this stage, an agreement with creditors can be reached. A conciliator mediates between the parties in order to reach an agreement and then each creditor must accept it.

The effect it will have on the rights of a creditor will depend on the terms of the agreement such as:

- Debt reductions.
- Form of payment.
- Term extensions.
- Priority of payment among the creditors.

**22. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?**

The primary objective of initiating a commercial insolvency proceeding is preservation of the company through a conciliation agreement. If this is impossible, the company's assets will be sold to cover its debts.

The secured creditors who do not sign the agreement can enforce their guarantees. Creditors will be classified into the following categories, according to the nature of their credits and guarantees:

- Singularly privileged creditors.
- Secured creditors.
- Creditors with special privilege.
- Unsecured creditors.
- Subordinated creditors.
- Shareholders.

**23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?**

Transactions entered into 270 days before the date of the decision declaring the commercial insolvency can be declared void.

These transactions can include:

- Gratuitous acts (those without consideration).
- Acts and transfers in which the debtor pays consideration obviously above market value or receives consideration obviously below it.
- Transactions executed by the debtor in which terms or conditions are agreed that are significantly different from the conditions or customs prevailing in the market at the time.
- Forgiveness of a debt by the debtor.
- Payment by the debtor of obligations not yet due.
- Any discount made from its own business assets by the debtor after the date of insolvency.

**24. In what order are creditors paid on the borrower's insolvency?**

The following are unsecured priority claims that will be paid in the order indicated and before any of the other creditors:

- Wages and indemnities owed to workers for the year before the insolvency decision.
- Expenses incurred in the administration of the estate.
- Anyone contracted to pay normal expenses for the security of the assets of the estate.
- Expenses resulting from judicial or extra-judicial procedures for the benefit of the estate.
- The fees of the bankruptcy auditor, conciliator and receiver, and any expenses they may have incurred.

Any employee or tax claims different from the wage claims in the first point above will be paid after singularly privileged creditors. The unsecured debts will be paid pro rata. Creditors of any other rank will not be paid until all of the above have been cleared.

Other creditors are classified for payment in the following order, according to the nature of their credit:

- Singularly privileged creditors.
- Secured creditors.
- Creditors with special privilege.
- Unsecured creditors.
- Subordinated creditors.
- Shareholders.

**Cross-border issues on loans****25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders?**

There is a restriction on loans granted in a foreign currency under Mexican law.

Payment obligations in a foreign currency undertaken inside or outside Mexico to be complied with in Mexico, must be paid in the equivalent Mexican currency, at the exchange rate in effect published by the central bank on the date of payment (*Article 8, Monetary Law*).

**26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?**

There are no exchange controls under Mexican law.

However, payment obligations in a foreign currency undertaken inside or outside Mexico to be complied with in Mexico, must be paid in the equivalent Mexican currency, at the exchange rate in effect published by the central bank on the date of payment (*Article 8, Monetary Law*).

**Taxes and fees on loans, guarantees and security interests****27. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?**

## Documentary taxes

There are no documentary taxes in Mexico.

## Registration fees

The cost of registration of real estate assets granted as a guarantee will depend on which state the asset is located in.

## Notaries' fees

Notary fees depend on the value of the assets over which the guarantee is being granted.

### 28. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

One way to decrease the cost of taxes in Mexico is by enforcing international double taxation treaties, where applicable.

## Reform

### 29. Are there any proposals for reform?

A commercial and financial reform was approved last year and there are no additional proposals to modify the current law.

## Online resources

### House of Representatives

**W** [www.diputados.gob.mx/LeyesBiblio/index.htm](http://www.diputados.gob.mx/LeyesBiblio/index.htm)

**Description.** This is the website of the Mexican House of Representatives.

### Government and Congress

**W** [www.ordenjuridico.gob.mx](http://www.ordenjuridico.gob.mx)

**Description.** This is the website of the Mexican Government and Congress.

## Contributor profile

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#### Recent transactions

- Representing Anheuser-Bush InBev in the US\$20.1 billion acquisition of Grupo Modelo.
- Advising BMW Financial Services Mexico in structuring their credit facility agreements with main distributors in Mexico.
- Representing Mitsubishi Power Systems Americas Inc. in a buy-out acquisition of a JV entity in Mexico.
- Advising Canadian New Gold Inc. in its private offering (in reliance on Rule 144A and Regulations S) of US\$300 million aggregate principal amount of 7.0% Senior Notes.

#### Resource information

**Resource ID:** 1-500-9764

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**Products:** Finance Global Guide, PLC Cross-border, PLC UK Corporate, PLC UK Finance, PLC UK Law Department, PLC UK Tax, PLC US Finance, PLC US Law Department

**Series:** Country Q&A

#### Related content

##### Topics

Cross-border: Finance (<http://uk.practicallaw.com/topic7-200-1612>)

Security and Quasi Security (<http://uk.practicallaw.com/topic6-103-1106>)

##### Articles

Common forms of security and required formalities: real estate (<http://uk.practicallaw.com/topic0-511-6788>)

Common forms of security and required formalities: tangible movable property (excluding ships and aircraft) (<http://uk.practicallaw.com/topic3-517-2985>)

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Commercial real estate in Mexico: overview (<http://uk.practicallaw.com/topic3-503-7624>)

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Restructuring and insolvency in Mexico: overview (<http://uk.practicallaw.com/topic8-502-0292>)

Structured lending and securitisation in Mexico: overview (<http://uk.practicallaw.com/topic9-500-8379>)

Tax on corporate lending and bond issues in Mexico: overview (<http://uk.practicallaw.com/topic7-520-6403>)

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