

Mexico – Secured Lending Amendments

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Introduction

The Mexican Congress approved a Bill of Amendments to a number of financial and commercial statutory provisions dealing with the creation of liens to secure contractual obligations¹.

The amendments (the “**Amendments**”) are intended to make the creation of security interests easier and to generally improve the position of secured creditors. The stated purpose of such measures is to incentivize the granting of credit backed by assets located within Mexican territory or otherwise subject to Mexican laws. The Amendments became effective on June 14, 2003 and are not applicable to debts existing before such date.

1. Pledgor-in-Possession Pledge (*Prenda sin Transmisión de Posesión*)

This security arrangement was included in the Law on Negotiable Instruments and Credit Operations (*Ley de Títulos y Operaciones de Crédito*) (“LTOC”) in the year 2000 to permit debtors to pledge assets while maintaining such assets in their possession. The traditional pledge whereby the assets pledged are generally required to be delivered to the creditor continues to be a security device regulated under the LTOC.

The Amendments eliminate any possibility that the assets pledged under the pledgor-in-possession pledge (*prenda sin transmisión de posesión*) remain under the possession of the creditor to avoid any ambiguity with the traditional pledge.

¹ The Bill of Amendments amended the Law of Negotiable Instruments and Credit Operations (*Ley General de Títulos y Operaciones de Crédito*), the Commerce Code (*Código de Comercio*), the Credit Institutions Law (*Ley de Instituciones de Crédito*), the Securities Market Law (*Ley del Mercado de Valores*), the General Law of Insurance and Mutual Companies (*Ley General de Instituciones y Sociedades Mutualistas de Seguros*), the Federal Surety Law (*Ley Federal de Instituciones de Fianzas*), and the General Law on Ancillary Credit Organizations and Activities (*Ley General de Organizaciones y Actividades Auxiliares de Crédito*).

One of the key Amendments is the elimination of the statutory deficiency waiver provision, commonly referred to as the "Barzon Clause", that had mandatorily applied to the pledgor-in-possession pledge. Pursuant to the mandatory deficiency waiver, a creditor secured by means of a pledgor-in-possession pledge would not have recourse against the debtor or any guarantor to recover the balance of the secured obligations outstanding (if any) after application of the proceeds of the sale of the collateral upon foreclosure. Under the Amendments, creditors secured by means of a pledgor-in possession pledge would have full recourse to the debtor and any guarantor to recover the balance of the secured obligations outstanding (if any) after application of the proceeds of the sale of the collateral upon foreclosure. The Amendments limit the right of the debtor to transfer the assets pledged to third parties under a pledgor-in-possession pledge without the prior consent of the creditor.

2. Trusts

The Amendment modified some of the general rules applicable to trusts. The Amendments further clarify that under a trust, the settlor (*fideicomitente*) transfers to a trustee (*fiduciario*) ownership of the tangible and/or intangible assets that will form the trust estate. This is important specially to permit tailor-made foreclosure mechanisms (See Section 4 below) and, to further ascertain that the trust estate is bankruptcy remote, *vis-à-vis*, the settlor. The Amendments now require the consent of the trust company to terminate any trust.

3. Guaranty Trust (*Fideicomiso de Garantía*)

This security arrangement was included in the LTOC in the year 2000 to permit debtors to transfer tangible and intangible assets to a trust to secure certain obligations.

One of the key Amendments is the elimination of the statutory deficiency waiver provision, commonly referred to as the "Barzon Clause", that had mandatorily applied to the guaranty trust (*fideicomiso de garantía*). Pursuant to the mandatory deficiency waiver, a creditor secured by means of a guaranty trust would not have recourse against the debtor or any guarantor to recover the balance of the secured obligations outstanding (if any) after application of the proceeds of the sale of the collateral upon foreclosure. Under the Amendments, creditors secured by means of a guaranty trust would have full recourse to the debtor and any guarantor to recover the balance of the secured obligations outstanding (if any) after application of the proceeds of the sale of the collateral upon foreclosure.

4. Foreclosure Rules

Another amendment is the possibility for the creditor on the one hand, and the debtor or guarantor posting collateral under a pledgor-in possession pledge or guaranty trust, on the other hand, to contractually establish their own tailor-made rules of foreclosure, including (within reasonable due process confines) out-of-court foreclosure.

5. Duration of Trusts

It is also noteworthy that the maximum duration generally applicable to trusts, including guaranty trusts, was extended by virtue of the Amendments from thirty to fifty years' time.

6. Assets Subject to Collateral Pool

Generally, the Amendments address other matters pertaining to after-acquired assets subject to the collateral pool and the disposition and transformation of assets while subject to a pledgor-in-possession pledge or guaranty trust. The Amendments also attempt to streamline judicial foreclosure proceedings pertaining to these security arrangements.

7. Caución Bursátil

On a different subject, the Amendments also modify the current rules governing another type of security device designed to create a lien on publicly traded securities, known as *caución bursátil*. Pursuant to the Amendments, the *caución bursátil* now permits to transfer ownership of the securities subject to the lien to the creditor who in such case shall have the obligation to return same to the debtor.

8. Jurisdiction

The Amendments now provide that where the Commerce Code (*Código de Comercio*) is silent, the Federal Code of Civil Proceedings (*Código Federal de Procedimientos Civiles*) must be applied. Before the amendments, the local laws were applicable to fill voids of the Code of Commerce. The Amendments now require more

focus on the jurisdiction clause to avoid, among others, that a favorable court decision obtained in a cross-border transaction may become unenforceable.

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