

Real Estate

Contributing editor
Joseph Philip Forte



2017

GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Real Estate 2017

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Preface

Real Estate 2017

Tenth edition

Getting the Deal Through is delighted to publish the tenth edition of *Real Estate*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Mexico, Monaco and Nigeria, plus a revised global overview.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Joseph Philip Forte of Kelley Drye and Warren LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2016

Mexico

Luis González, Juan Carlos Izaza, Carlos Ugalde and Rodrigo Martinez

SOLCARGO (Solórzano, Carvajal, González y Pérez-Correa, SC)

General

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

Mexico has a civil law system. Thus, under the Mexican legal system, a party can obtain an order to prevent an action in the form of an interdict, suspension of the contested act or precautionary measures, which are analogous to the injunction in our legal system. Such measures may freeze the action to avoid further damage or loss.

Parol evidence does not exist in our legal system, but oral contracts are foreseen in Mexican legislation.

2 Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The Mexican system for registration is the Public Registry of Property and Commerce, managed by the local government authority, in charge of registration of real estate ownership, transfers of real estate, liens and encumbrances and other relevant notes on the title of the property, among other things.

Depending on the local regulations, such registration may have constitutive or declarative effects; declarative means registration makes the transfer enforceable against third parties; transfer is perfected by the execution of the sale contract. An exception is the state of Quintana Roo.

Registration does guarantee title and priority in relation to third parties, for example, when an owner transfers real state to more than one purchaser, the recognised sale will be the first registered in the Public Registry, and in this case the subsequent purchasers are deemed bona fide buyers; however, the purchaser is protected by a statutory indemnity, through which the purchaser may be entitled to receive damages and compensation for loss of profit from the seller.

3 Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Legal requirements vary depending on local regulations, local codes or regulations that have their own restrictions or mandatory requirements for registration. Some standard requirements are:

- public deed of the sale agreement (fees depend on the amount of the transaction);
- evidence of payment of the income tax derived from the transaction;
- evidence of payment of the services bills of the real state (water, real state tax, etc);
- certificate of non-encumbrance; and
- payment of the registration fees.

Notary fees, costs, and taxes in connection with the sale are normally paid by the purchaser or as agreed by the parties, except for the income tax, which is paid by seller. Notary fees can be minimised on specific

dates by using a programme called *jornada notarial*, and taxes can also be minimised pursuant to some specific cases in tax laws.

4 Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction?

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Pursuant to the Mexican Constitution and Foreign Investment Law, there are some restrictions imposed on non-resident entities and foreign individuals on acquiring real estate; there are no restrictions on leasing real estate.

Foreigners may obtain a permit from the Ministry of Foreign Affairs to acquire real estate properties in the Mexican jurisdiction outside the restricted zone, which is a strip of land 100km wide along Mexican land borders or 50km wide along Mexican coastlines.

Only resident entities may acquire real estate in the restricted zone (such entities may include foreign investment in equity), plus foreign individuals, as set forth below:

- If the acquisition of real estate is for non-residential purposes, a written notice addressed to the Ministry of Foreign Affairs regarding the acquisition will be sufficient.
- If the acquisition of real estate is for residential purposes, the entity or the foreigner may not be able to acquire such property, thus the acquisition can be done through a trust held by a financial institution as trustee and the owner of the real estate, where the company or the foreigner may act as beneficiary.

Business freedom for foreign investors is restricted as the Mexican government regulates foreign investment at several levels.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Pursuant to Mexican law, payment obligations in a foreign currency undertaken inside or outside 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.

Regarding the repatriation of profits and capital, Mexican law does not establish exchange control provisions or specific regulations on the repatriation of profits to its home or any other jurisdiction.

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Owners, tenants or lenders may be subject to liability derived from any damage caused by their acts or negligence. In addition, all owners shall provide documents certifying legal and legitimate ownership of real estate, or otherwise they would be liable to any third party making a claim on the ownership of the real estate.

Any owner, tenant or lender that causes environmental damage can face administrative, civil and criminal liability. In this regard, fault liability is the general standard; however, in relation to real estate, strict liability applies only in cases involving hazardous waste and material and high-risk activities. Note that all environmental damage follows the real estate in case of any transfer of ownership of the real state, thus causing liability to subsequent owners and tenants.

There is no concept of tort liability under Mexican law. However, a 2014 judgement of the Supreme Court established liability for civil wrongdoing of a hotel for a short circuit that caused the death of a child. The intention of this judgment was to implement civil wrongdoing criteria to be applied as precedents in future cases.

7 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Owners responsible for high-risk activity are legally required to obtain environmental risk insurance. Likewise, developers of projects requiring environmental impact authorisations must obtain insurance in the following cases:

- if there is a risk of releasing polluting substances into the environment;
- when the projects are located near endangered species; and
- when the projects are located within natural protected areas.

8 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Pursuant to Mexican law, the applicable jurisdiction is the one governing in the place where the real estate is located.

9 Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The applicable civil or commercial courts, depending on the nature of the controversy or the transaction, if chosen initially by the parties to the agreement, depend on the location of the real estate. Any party with legitimate interest can file a claim before the corresponding authorities; parties with equal actions may file a claim jointly; to initiate an action it is not necessary that all parties be present.

Notices to parties out of the jurisdiction of the court are made via warrants if made within Mexico; if the notices are made in a foreign country, such notices are made via letters rogatory. All notices during a procedure shall be made through a judicial authority; notices made personally by parties have no binding effect. A party's qualification is governed by federal law, so if any individual is not disqualified from doing business, measures can be enforced in the whole country.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

There is no real difference in law whether real estate is used for commercial or residential purposes. However, there can be different regulations depending on several factors:

- if those who execute the agreements are considered as businesses under commercial law;
- if the material object of the agreement is considered a 'commercial thing' under commercial law; or
- if the legal act is commercial under commercial law.

If the interest in real estate matches any of the above scenarios, it will be regulated under commercial law (including procedural matters), leaving civil law only as a supplementary function.

11 Planning and land use

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Restrictions on property may be imposed by authorities at the three levels of government.

Both states and municipalities are responsible for the approval of urban development plans and zoning within their respective jurisdictions. States must take into consideration the concerns of municipal authorities when drafting urban development plans.

States legislate on urban planning, development and land use, while municipalities are responsible for their enforcement. Thus land use authorisations and building licences are issued by municipal authorities in accordance with their own procedures and development plans.

12 Government appropriation of real estate

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Mexico does have a legal regime for the compulsory appropriation of real estate by the government. This regime must comply with requirements such as:

- there must be a public utility situation (for example, public services such as transport, schools, hospitals or public offices); and
- the appropriation must be done exactly according to law with compensation to the owner of an average commercial value of the appropriated real estate.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Buildings constructed without the required permits and authorisations may be closed and even demolished, especially in cases when structural damage poses a significant risk.

14 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy in Mexico can be either filed by the business entity, one or more of its creditors or the Federal Public Prosecutor.

The bankruptcy proceeding can either be filed to try to make an agreement between the business and its creditors or to declare the company bankrupt.

If the bankruptcy proceeding is filed to declare the company bankrupt, all the company's goods are sold by an executor chosen by the Federal Institute of Specialists in Insolvency Procedures and the business's creditors get paid with the proceeds.

Investment vehicles

15 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The most common forms of entity to perform business in Mexico are the limited liability company, the stock company and the investment promotion stock company.

It is highly advisable to incorporate trusts, which in most cases are pass-through vehicles pursuant to tax legislation.

16 Foreign investors**What forms of entity do foreign investors customarily use in your jurisdiction?**

The most common vehicles for foreign investors are business entities (particularly the limited liability company) and trust agreements.

17 Organisational formalities**What are the organisational formalities for creating the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?**

Formalities for incorporating the above-mentioned entities include:

- (i) request authorisation from the Ministry of Economy to use a corporate name;
- (ii) notarise the company's by-laws before a notary public;
- (iii) register the public deed before the Public Registry of Commerce;
- (iv) file the registration at the Federal Taxpayer's Registry; and
- (v) file the registration at the National Registry of Foreign Investment (if applicable).

Failure to comply with (i), (ii) and (iii) invalidates the incorporation; failure to comply with (v) results in monetary penalties.

The tax consequences depend on the foreign investor's country; Mexico has entered into 95 tax agreements with other countries.

The limited liability company is the most advantageous entity for tax matters.

Acquisitions and leases**18 Ownership and occupancy****Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.**

Legal ownership is evidenced by public deed whereby the transmission of ownership from a previous owner is notarised. See questions 2 and 3.

Leasehold is evidenced with the lease agreement entered into with the landlord: it is not customary to notarise these agreements or to register them. However, certain local regulations may require long-term leases to be registered.

Legal ownership grants the owner the right to sell, use and benefit from the real estate; leasehold grants the tenant the right to use and benefit from the property.

Burdens and benefits such as rights of way, easements, etc, are part of the property and both owner and tenant benefit from them. Such benefits and burdens are created from agreements with third parties or by legal dispositions and must be established in the public deed and be registered at the Public Registry of Property.

Condominium regimes and cooperative ownership are recognised by law and must be registered at the Public Registry of Property.

Mexican legislation provides for special treatment and a special law for condominium regimes.

Master leases are used for expansion of big industrial companies, but are not typical.

19 Pre-contract**Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?**

Customarily a letter of intent is used when the transaction has not yet been defined at all or is to be negotiated over a long period, and when there is some due diligence research to be undertaken first to decide whether to enter the transaction.

These kinds of agreements are not often approved by judicial authorities; however, Mexican law covers promissory agreements, by which seller and purchaser agree to enter into a future purchase agreement; this promissory agreement is binding on the parties and enforceable before judicial authorities. It is not customary to take the property off the market until the negotiations have been concluded.

20 Contract of sale**What are typical provisions in a contract of sale?**

Typical provisions are:

- object of the contract;
- price;
- closing date and closing conditions;
- expenses and taxes;
- representations and warranties;
- penalties;
- indemnities; and
- jurisdiction

A typical down payment depends on the specific transaction.

The purchaser may request evidence of good title and a certificate of non-encumbrance of the real estate's title.

Payment for the certificate may be agreed by the parties. The general representations and warranties are that sellers have good and valid title of the purchased real estate and that it is free and clear of encumbrances, the real estate was legally acquired and is in compliance with laws and permits, among other things; also there is indemnity for eviction for the purchaser, in the event of any act or circumstance that prevents, deprives or limits the disposability, ownership, possession or use of the purchased real estate.

Each party is responsible for the fulfilling its corresponding tax obligations. The risk of loss until closing is on the seller, since once the sale is completed the purchaser assumes the risks of loss.

21 Environmental clean-up**Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?**

In cases involving soil pollution, owners are jointly responsible with the performers of high-risk activities before the environmental authorities for clean-up. Likewise, owners must allow clean-up actions within their property. In both cases, owners may sue the faulty party for the damage caused. However, clauses in an agreement may include obligations on each party for cleaning up the property and notifying the environmental authorities; as well as the obligation on the seller to provide a Phase I environmental study, in some cases a Phase II study may also be required following the results obtained in Phase I.

Environmental liability expires 12 years after the day the damage was caused.

22 Lease covenants and representation**What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?**

Typical representations may include that the property is not subject to any other lease, usufruct or to any other agreement that may grant rights to any third parties. In the case of existing leases, sellers must indicate their existence and status, as in some local jurisdictions tenants may be entitled to a right of first refusal regarding the purchase of the property.

Typical covenants usually consist of the obligation that no amendments to any existing leases shall be made and no new leases shall be

entered into. Parties may also agree that the landlord shall complete all incomplete tenant improvement work. In addition, sellers shall notify current tenants of the sale and purchase of the property, as well as instructing them that all payments from the date of the transfer of ownership shall be made to the purchaser's account.

In Mexican practice it is not common to find brokerage agreements regarding lease agreements. However, lease agreements may survive after the property transfer has been completed if seller and purchaser agree that all lease agreements shall be assigned to the purchaser.

Estoppel certificates from tenants are not required as a condition.

23 Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease is not generally subordinated to a security instrument; however, it is common to secure payment of rent by the issue of promissory notes.

Leases commonly survive any transfer of ownership of the real estate, whether judicial or not. In the case of judicial sales, the lease agreement shall have been executed more than 60 days prior to the transfer of ownership, otherwise the lease agreement may be terminated. In this regard, leases may survive security instruments upon foreclosure. Subordination and non-disturbance agreements are not common practice, but may be required.

Ground leases are not treated differently from other commercial leases with respect to subordination to security instruments.

24 Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Tenant security deposits are usually delivered from seller to buyer upon assignment of the lease agreement. Security deposits may be in the form of letter of credit if agreed by the parties.

It is customary for landlords to request security deposits of a month's rent. Such deposits are refunded upon termination of the lease if the property is returned in good condition. Otherwise, security deposits would be used to perform repairs to the property, cover any outstanding payments or for any breach of the agreement.

25 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain a zoning report or legal opinion regarding legal use and occupancy?

The typical method of title search is through the Public Registry of Property and Commerce (or the National Agrarian Registry, in the case of agrarian real estate). If buyers want to protect themselves against bad title, they can obtain a certificate of non-encumbrance of the real estate's title.

Mexican law gives priority to titles that are recorded in the register; a registered title has higher legal force than one that is not. The time of registration is also relevant to any dispute, since whoever is first in time will have higher priority than the counterparty.

It is not customary to obtain a zoning report, but a legal opinion regarding use and occupancy is.

26 Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

While there is no legal obligation to conduct reviews, environmental due diligence and Phase I and Phase II studies are common in large-scale projects. They provide the following benefits to purchasers and future owners:

- they are useful to determine the level of compliance with environmental regulations;
- they allow the purchaser to know if there is a future risk of environmental damage, even if there is full compliance with the applicable regulations; and
- they may be used as a negotiating tool regarding the value of the purchase operation.

Environmental insurance is usually unavailable except for waste management and high-risk activities.

27 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Important issues to point out include: length of the lease, representations, renewal rights, conditions of payment, events of default and authority of the landlord regarding the property. Special attention is given to causes of early termination and how to perform notices to tenants.

Also, it is customary for business executives to review the lease agreements and provide a business point of view of the documents or any other matters that may arise.

Property management agreements are not common in Mexico.

28 Other agreements

What other agreements does a lawyer customarily review?

Lawyers normally review the following:

- loans;
- trusts;
- leases;
- collateral; and
- concessions.

29 Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Closing must meet the conditions foreseen in the contract including, but not limited to, delivery of:

- invoices;
- * public instruments evidencing title;
- evidence of the seller's authorisation to enter into the agreement (if applicable);
- evidence of termination agreements regarding leases (if applicable);
- all documents evidencing tax credits;
- no-lien certificates; and
- legal opinion from seller's counsel regarding the existence of any pending claims or litigation.

Legal counsel usually verifies authorisation through shareholders' meeting minutes approving the transaction or by specific representations and warranties included in the contract.

There is no normal timescale between contract and closing, it depends on the nature of the transaction.

30 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Transactions may be executed by the parties present or through their legal representatives; also transactions may be performed without the presence of a government representative.

However, in a transfer of real estate it is necessary for all parties to appear before a notary public.

31 Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

It is common to include a non-compliance clause or a conventional penalty in the contract in the case of an event of default. Such event of default may give the purchaser the right to enforce the contract, claim for loss and damage or be entitled to receive the indemnities indicated in the conventional penalty clause.

32 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply?

All remedies depend on whether it is the tenant or landlord who performed the breach of the lease agreement. All remedies can have one of three purposes: termination of the agreement and claim for loss and damage; mandatory execution of the terms of the lease; or payment of a conventional penalty previously established in the agreement.

The customary procedure to evict a defaulting tenant consists in a special procedure in which the landlord claims the payment of outstanding rents; these payments may be claimed from notice of the lawsuit. There is no eviction procedure under which landlords can evict tenants without going to court.

General contract rules apply to lease agreements, as well as local lease rules established in the corresponding civil code of each state.

Financing**33 Secured lending**

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

Finance is normally raised by granting real estate as collateral through a mortgage or a security trust:

- mortgage: this grants the lender a preferential right over lenders with a personal guarantee (such as guarantors or bondsmen); or
- security trust: the settlor transfers title to real property in favour of a trustee to secure payment of secured obligations in favour of the lender as beneficiary. The settlor retains a secondary beneficial interest in the collateral so that on satisfaction of the secured obligations, legal title to the collateral reverts.

Such securities are created in a public deed and perfected by its registration in the public registry where the real estate is located.

34 Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

It is not common to finance leases in our jurisdiction.

35 Form of security

What is the method of creating and perfecting a security interest in real estate?

Several formalities must be complied with in connection with a mortgage or security trust:

- mortgage: this can be created by an agreement, but to be effective against third parties the mortgage agreement must be formalised before a notary public and registered in the public registry in the state where the real estate is located; or
- security trust: this must be established by the settlor transferring title of the real estate in favour of a trustee, for the benefit of the lender; this security must be formalised before a notary public and registered in the public registry.

36 Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?

It is advisable to require a valuation from an independent appraiser, who must be certified as a real estate appraiser by the corresponding government authority.

It is advisable to choose and hire appraisers listed in the list of auxiliary surveyors of the local judicial courts.

37 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

It is common for lenders from other jurisdictions to grant loans secured by collateral in Mexico.

It is not necessary for foreign entities to be qualified or licensed to grant loans, provided that such activity cannot be offered to undetermined people or through the mass media; also, it is forbidden to request or obtain funds or resources on a common or professional basis, since these conditions are reserved to banking institutions.

Upon registration of the mortgage the parties shall pay the fees, which depend on the value of the real estate.

When assigning the mortgage it is necessary to register the assignment agreement at the Public Registry of Property, following the same procedure as when the mortgage was first granted.

The 'tax' to be paid for assignment of the security is the Public Registry of Property fee, which may be paid by the assignor or assignee as agreed.

38 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are freely agreed by the parties depending on the risk of the borrower's default. Legal interest rate established by law is 6 per cent and the interest may not constitute an amount above the principal.

For business to succeed, the interest rates must be lower than the ones offered by banking institutions, which are set by the Bank of Mexico and other government institutions.

Interest rates can be as high as established by the parties without being extortionate or evidently detrimental to the other borrower.

Fees and lender costs are not included as interest rates.

39 Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Remedies against a debtor are enforced through a judicial procedure. It is necessary to sue a debtor requesting the forced execution of the agreement or termination and the payment of losses and damages. After a procedure before the courts, it would be necessary to obtain a favourable judgement. Depending on the amount claimed, there may be a possibility to file an appeal, and thereafter an *amparo* procedure.

One action is not sufficient to realise all types of collateral; as in the case of a real estate guarantee, it must be a special procedure. With pledge agreements there is also be a different procedure. In the case of a joint obligor, the action must be performed along with the procedures previously mentioned, as it constitutes a personal obligation. Personal and real estate obligations may not be claimed jointly.

The time frame may vary from case to case, and depend the size of the claimed amount. If the amount is under 500,000 Mexican pesos approximately, the procedure takes between three and six months. Otherwise, the procedure takes between two and three years.

There are no restrictions on legal actions that may be brought by lenders, as they find their basis on any default. There is no one-action or one-at-a-time rule. As indicated above, personal and real obligation claims may not be undertaken in the same action, but different actions may be performed simultaneously.

40 Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders are entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure. However, such different recoveries must be claimed through different procedures. It depends on each case and the reason of the deficiency. If a judge has ruled on the grounds of the case, this will be a matter of *res judicata*, which will be the only limitation for a lender seeking a deficiency judgement, alongside a 10-year time limit.

41 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

With a mortgage receivership falls on the debtor, who becomes a depositary of the property upon notification of a legal procedure against the debtor. However, a debtor may not be constituted as depositary in case it notifies its refusal and delivers material possession to the plaintiff or to the individual indicated by the court.

During foreclosure rents remain in the possession of the depositary, as well as any corresponding yields of the property. Such rents shall be collected by the lender until foreclose; collection is not permitted until the procedure has concluded.

The concept of mortgage in possession is not recognised.

There are no specific penalties, but note that the depositary is considered as the manager of the property and thus is held liable for any impairment or detriment to the property.

42 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents do not provide recourse to all of the assets of the borrower as each security is specific and only seizes the necessary assets to cover the amount claimed.

Recourses are typically limited to the collateral, as it may not cover all the assets. This does have significance in a bankruptcy or insolvency filing as in this case a lender would appear as a creditor with real guarantee and be able to collect payment before tax and common creditors.

Personal recourse to guarantors is limited to the assets included in the previously granted guarantee.

43 Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is typical to require a cash management system. This requirement may be performed through a common cash management system or through the establishment of a trust, whereby the depositary bank would be deemed as trustee of such trust.

Reserves are usually required for several matters, depending on the needs of the lender. It is common to find reserves required for insurance and repairs, as well as payments and uncompleted tenant improvements.

44 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Other types include letters of credit, holdbacks, bonds and various kinds of payment guarantees, among others. Guarantees of completion are typically given and usually required. All forms of guarantee shall be enforced before the corresponding court, which may be determined by law or agreed in the agreement. Payment guarantees are also common.

Usually such recourses are previously foreseen in the agreement, whereby parties may establish several provisions regarding 'bad boy' acts. However, Mexican law also establishes several commonly enforceable actions such as creditor's fraud, which occurs when a debtor carries out acts with the purpose of obstructing the execution of guarantees by the lender.

45 Loan covenants

What covenants are commonly required by the lender in loan documents?

Typical loan covenants include:

- reporting requirements;
- borrower shall maintain its existence in good standing;
- compliance with all applicable laws;
- borrower to perform, in a timely manner, all of its material obligations pursuant to all agreements to which the borrower is a party;
- inspection of any properties, books and records of the borrower;
- if applicable, borrowers shall obtain insurance coverage;
- to use the proceeds only for the purposes established in the corresponding clauses of the agreement; and
- not to impose any lien on any property related to the loan or its proceeds.

As leasehold financing is not common, different covenants may vary from case to case. However, they would not vary much from the ones indicated above.

The difference between asset classes consists in the following:

- equity or stocks;
- income;
- real estate; and
- commodities.

46 Financial covenants

What are typical financial covenants required by lenders?

Typical financial covenants include:

- reporting requirements;
- annual or quarterly financial statements;
- communications from auditors;
- reviews by the banking authority;
- borrowers shall keep accurate and complete financial books and records;
- borrowers shall provide appraisals before the granting the loan and, typically, each time the loan is restated; and
- financial ratios commonly based on debt-service coverage ratios – loan-to-value ratios may also be required but are not common.

47 Secured moveable (personal) property

What are the requirements for creation and perfection of a security interest in moveable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The requirements depend on the value of such property and the type of security.

Each kind of security interest provides a specific threshold under which it is only necessary that security interests are granted in a written agreement. However, if the value is above that established in the

threshold, it would be necessary to grant it in a public deed before a notary public and register it in the Public Registry of Commerce, the Sole Register for Moveable Guarantees or another special registry such as registration in the Institute of Industrial Property (in the case of pledged intellectual property).

48 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

It is not required that each borrower be an SPE. The requirements for creating an SPE consist of the following:

- incorporation of the SPE before a notary public;
- obtaining a tax identification number for the SPE;
- recording in the corresponding Public Registry of Commerce; and
- if applicable, recording the SPE in the National Registry of Foreign Investment (RNIE).

Depending on the type of SPE, the requirements to maintain it will vary, the most common being:

- annual approval of financial statements;
- approval of management report;
- approval of surveillance report;
- approval of managers' and examiners' fees;
- annual renewal and quarterly reports to the RNIE;
- day-to-day maintenance of corporate books; and
- due payment of taxes.

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