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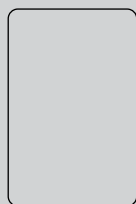
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# Loans & Secured Financing 2022

**Contributing editor****Michael Chernick****Shearman & Sterling LLP**

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Loans & Secured Financing*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology 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 United States, Mexico, Bahamas and Cyprus.

Lexology 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.lexology.com/gtdt](http://www.lexology.com/gtdt).

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.

Lexology 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, Michael Chernick of Shearman & Sterling LLP, for his assistance with this volume.



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# Mexico

Edgar Romo and Manuel Hallivis

DLA Piper

## GENERAL FRAMEWORK

### Jurisdictional pros and cons

- 1 | What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

One of the main advantages for incurring debt in the form of bank loans versus debt securities is the difference in regulatory and reporting obligations (both initial and during the term of the loan) and in the costs associated with such, while in many cases, maintaining similar or competitive financial terms (including mainly amount, term, and interest and commissions). Such a difference can have a relevant impact in structuring costs and closing times. A further advantage is maintaining the privacy of the debtor, as in bank loans there are no public filing obligations. However, debt securities may also provide advantages to offset the higher costs, derived from a diversification of the risk and market appetite, such as larger loans, longer terms and lower rates. Furthermore, bank notes may prepare private companies for going public and gauge the market interest.

### Forms

- 2 | What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

Most forms of bank loan facilities offered by financial institutions in mature financial markets are legally available in Mexico; however, not all are commonly used. The most commonly used are term loans and revolving credit facilities, provided by both domestic and foreign lenders. Swingline facilities and competitive bid revolving credit facilities are not common and when used, are mostly granted by foreign lenders. Letters of credit are highly used, particularly when participating in government bids. A disadvantage of this type of credit is that domestic banks usually require high ratios of liquid back-to-back collateral.

### Investors

- 3 | Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Although commercial banks and development banks (domestic and multilateral development banks, export-import banks) are the most active participants in bank loans, the activity is open to an array of participants, including insurance companies (mostly foreign) private equity funds, factoring and leasing entities, funds publicly issuing securities on the Mexican stock exchange (such as certificates of

capital development (CKDs) and the Mexican REIT equivalents (FIBRAs)), foreign (but not domestic) pension funds and other non-bank lenders (particularly *sociedades financieras de objeto multiple* or SOFOMs, both regulated and unregulated). Larger term loans and revolving credit facilities with lower interest rates and fees are usually reserved for commercial banks and development banks. Costlier loans to higher risk creditors are mostly provided by entities with a natural appetite for higher risk or reward deals, such as domestic and foreign private equities.

Crowdfunding financial technology platforms are steadily gaining market participation, although the loan amounts remain limited when compared to other market participants.

The largest and most active investors in the Mexican debt security market are Mexican pension funds (AFORES), which are highly regulated and highly capitalised entities, usually linked to banking or insurance institutions.

- 4 | How are the terms of a bank loan facility affected by the type of investors participating in such facility?

The terms of bank loan facilities vary depending on the debtor, project and product to be financed. Investors for their part, have differing risk appetites which will impact the debtors and projects they will invest in, and therefore, the terms of the loan. Foreign financial institutions have a greater focus on corporate and project finance with more traditional term loan and revolving loan facilities. Domestic banks offer most types of available facilities, both directly and through affiliates (such as non-balance sheet private equity affiliates). Private equity and CKDs focus more on high interest or risk borrowers, with terms reflecting such risk. Other market participants target specific products and client types.

Tax treatment may also influence the terms. Interest rates on bank loans are generally free of VAT, while non-bank loans interest payments may be subject to VAT. Further, interest payments to certain types of foreign lenders may be subject to tax withholding.

### Bridge facilities

- 5 | Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Yes, bridge financing is used as a form of temporary financing until regular long-term financing is secured. Bridge loans are granted on typical market terms, with short maturity terms, higher financial costs and bullet payment at the earlier of maturity or closing of permanent financing. Bridge loans may be unsecured or secured by a security that may be easily terminated or transferred to the permanent financing structure.

## Role of agents and trustees

### 6 | What role do agents or trustees play in administering bank loan facilities with multiple investors?

The use of agents and trustees is common in syndicated loans. Further, trustees are also common in secured loan facilities, whether or not multiple investors are involved. It is also possible for the involvement of both an administrative agent and a trustee in secured loan facilities.

For syndicated loans, agents' and trustees' responsibilities and obligations follow market practice, including, but not limited to, primary communication with the borrower, collection and distribution of loan disbursement, collection and distribution of payments, foreclosure (if applicable) and monitoring and reporting obligations. Such obligations are clearly laid out in the loan documents, including the credit agreement, the trust agreement or the intercreditor agreement. With respect to agents, there is no legal fiduciary duty outside of duties and obligations set forth in the loan documents. Trustees have a fiduciary duty to act as a good *pater familias* with respect to the trust's estate, a standard that is required under applicable law but that has originated very few judicial precedents to be clarified.

Loan documents will generally include a broad release for the agent or trustee, as well as general and broad indemnification rights.

Fee structures vary significantly among participants, but in general terms, agents will charge a commission as a percentage of the loan, whereas trustees tend to charge flat fees for determined activities. All such fees are generally paid by the borrower, and depending on the purpose of the loan, may be paid from loan proceeds.

## Role of lenders

### 7 | Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

The arranging and syndication commitments of financial institutions follow international practice, including market flex arrangements. Typical fees include underwriting and structuring fees that are commonly a percentage of the total loan amount. All such fees are generally paid by the borrower, and depending on the purpose of the loan, may be paid from loan proceeds.

## Governing law

### 8 | In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, where some or most of the lenders are foreign, it is common to subject the loan documents (except security interest documentation) to non-Mexican law and the jurisdiction of non-Mexican courts. It is important to consider some limits, such as Mexican laws not admitting non-exclusive jurisdiction (a link to the venue must exist) and the need to grant powers of attorney under Mexican law to appoint a process agent.

Security documents for collateral located in Mexico are governed by Mexican law and subject to Mexican courts (generally, federal courts are preferred over local courts).

## REGULATION

### Capital and liquidity requirements

#### 9 | Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Mexican banking institutions are subject to capital requirements in line with Basel III, requirements that may limit the types and amount of risks banking institutions are willing to undertake. Regulated non-banking lenders must also comply with certain capital requirements, although not as stringent. Other non-banking lenders are not subject to capital requirements, which is reflected in their greater appetite for riskier loans.

### Disclosure requirements

#### 10 | For public company debtors, are there disclosure requirements applicable to bank loan facilities?

Yes. Public companies are subject to quarterly and annual financial statements reporting obligations. Further, they must disclose all material agreements that represent an aggregate amount of 5 per cent or more of the company's consolidated assets, liabilities or capital.

### Use of loan proceeds

#### 11 | How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Debtors must use loan proceeds for legal purposes and must use the proceeds for the purposes agreed to in the loan documents.

Debtors and lenders are both legally and (usually) contractually subject to anti-corruption and anti-money laundering laws and regulations and anti-terrorism sanctions. Further, it is usual for cross-border loan documents to subject borrowers to foreign anti-corruption and anti-money laundering laws and regulations and anti-terrorism sanctions, particularly the United States Foreign Corrupt Practices Act of 1977 and its rules and regulations; the UK Bribery Act 2010 and its rules and regulations; and the EU Convention on the fight against corruption involving officials of the European Communities or officials of member states of the European Union, the EU Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, and the EU Council of Europe Criminal Law and Civil Law Conventions on Corruption.

Lenders are particularly subject to anti-corruption and anti-money laundering laws and regulations, which require them to implement know your customer and due diligence standards, report certain suspicious transactions and implement certain internal controls and committees.

### Cross-border lending

#### 12 | Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

There are no specific regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions. Domestic investors are subject to rules requiring them to refrain from engaging with certain individuals and entities (corporate or governmental) from 'sanctioned' countries listed by local authorities based on both local and international sources. Lenders also follow internal

policies restricting their ability to lend to debtors organised or operating in certain jurisdictions.

### Debtor's leverage profile

13 | Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

There are no specific limitations. However, domestic banks and other regulated financial institutions must comply with certain capital requirements that require them to make certain reserves depending on the risk.

### Interest rates

14 | Do regulations limit the rate of interest that can be charged on bank loans?

No. Although usury is generally prohibited by local laws, no specific limit is set in any Mexican law. Court precedents have established that as long as the interest rates are not predatory and generally follow market practice, such will not be considered usurious.

### Currency restrictions

15 | What limitations are there on investors funding bank loans in a currency other than the local currency?

None. There are no limitations to funding loans in foreign currency. However, Mexican Monetary Law allows Mexican debtors to discharge foreign currency payment obligations contractually agreed to be paid in Mexican territory, in Mexican pesos at the exchange rate published by the Mexican Central Bank (Banco de México) effective for the date of the payment.

### Other regulations

16 | Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

Tax regulation may impact the structuring of bank loans, as certain interest payments and fees may be subject to withholding tax and value added tax, depending on the nature and location of the lender.

## SECURITY INTERESTS AND GUARANTEES

### Collateral and guarantee support

17 | Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

All entities within an organisational structure may provide collateral and guarantees for bank loan financings. Further, in some scenarios, it is also common for shareholders to be joint obligors. Securities granted within an insolvency or that lead to an insolvency are subject to close review under fraudulent conveyance rules.

18 | What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

Generally, collateral guarantees all of debtors' obligations, including but not limited to, fees, interest payments (both ordinary and moratory), payment of principal and indemnification obligations. Unless otherwise

agreed in the loan documents, all secured obligations are equally and ratably covered by the collateral and guarantee support. Loan documents generally set forth the order in which obligations will be paid in the event of foreclosure of collateral.

### Commonly pledged assets

19 | Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

Under Mexican law and practice, collateral fall within two major categories, real estate (interests in land, constructions and fixtures) and movable property (all non-real estate assets, including both tangible – machinery and equipment, inventory, finished goods, shares and other equity interests – and intangible property – intellectual property, receivables, bank accounts and collection rights). Generally, a mortgage is established to create a security interest in real estate assets and different types of pledge agreements are established to create a security interest in movable property.

### Creating a security interest

20 | Describe the method of creating or attaching a security interest on the main categories of assets.

#### Real estate collateral

Real estate assets can be set as collateral through the creation of either a mortgage or a guarantee trust.

#### Mortgage

Mortgages are regulated by local (state) laws and create a lien over the asset. Real estate mortgages are registered in the applicable local Public Registry of Property.

Another, seldomly used, type of mortgage, called industrial mortgage (covering the entire business unit of a debtor company, including any concessions, permits or licences, and all real estate and movable assets considered as a whole), may be granted by debtors in favour of certain financial entities (and, in a few states, any lenders).

#### Guarantee trust

Real estate may be transferred to the estate of a trust. In this event, the actual property of the real estate is transferred to the trust's estate for the benefit of the secured parties. Usually, the administration of the real estate is delegated to the debtor. Further, debtors usually retain the right to reacquire the property of the real estate, subject to the fulfillment of all secured obligations.

#### Movable assets collateral

Movable assets can be used as collateral through the creation of a pledge (possessory or non-possessory), a security trust or, in specific cases, a mortgage.

#### Possessory pledge

As a general rule, the pledgor must transfer possession of the pledged asset to the pledgee or a third party for the benefit of the secured party. Additional special requirements must be met for perfection of the security depending on the type of movable asset being pledged.

Possessory pledges are not common in non-retail loans, with the particular exception of share pledges.

#### Non-possessory pledge

As opposed to a possessory pledge, possession, administration and operation of the pledged asset remains with the pledgor.

A non-possessory pledge may be created over any movable asset or category of asset, whether present or future, and whether identified or identifiable. Similar to a floating lien, non-possessory pledges may be created over all of the pledgor's movable assets. Common types of pledged goods under a non-possessory pledge include collection rights, accounts receivables, inventory, bank accounts, intellectual property, machinery and equipment.

### Guaranty trust

Movable assets may be contributed to the estate of a trust to secure any secured obligations. Possession and administration are usually delegated to the settlor of the trust or a person designated by such.

Further, trusts may be used administer a debtor's different revenue streams and set up a payment waterfall for both debtors' operating needs and the payment of secured obligations.

### Mortgage

Special types of mortgages can also be granted, such as mortgages over ships and aircraft, which are regulated under specific statutes and not the general mortgage provisions under local civil codes. There are no legal restrictions on creating other types of security interests over ships and aircraft, such as possessory and non-possessory pledges and security trusts (subject to regulatory requirements), but the mortgage and the contribution to a trust have been the preferred alternatives in practice.

### Perfecting a security interest

21 | What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

### Real estate collateral

#### Mortgage

Mortgages must be entered into in writing before a notary public and registered in the local Public Registry of Property. Depending on the state, lack of registration may lead to either the mortgage not being valid against good faith third parties or the inexistence of the mortgage.

#### Guarantee trust

The transfer of real estate property to the trust must be entered into in writing before a notary public and registered in the local Public Registry of Property. Depending on the state, lack of registration may lead to either the transfer not being valid against good faith third parties or the inexistence of the transfer.

### Movable assets collateral

#### Possessory pledge

A possessory pledge must be entered into in writing and generally, it is perfected when the pledged asset is delivered to the pledgee or a third party for the benefit of the pledgee. A share pledge requires, in addition to the above, for the share certificate to be endorsed in pledge and for the pledge to be recorded in the company's shareholders' registry book.

#### Non-possessory pledge

A non-possessory pledge must be entered into in writing and must either be entered into before a notary public or the signatures thereto be ratified by a notary public. The pledge must be electronically recorded in the Sole Registry of Movable Guaranties.

In the event of a non-possessory pledge over intellectual property assets, the non-possessory pledge instrument should precisely identify the intellectual property rights being pledged and must be physically recorded with the National Copyright Institute or the Mexican Institute of

Industrial Property, as applicable (in addition to electronic registration with the Sole Registry of Movable Guaranties).

Additionally, securities traded in the Mexican stock exchange are pledged through a special variant type of pledge, called a securities pledge, which requires the participation of a regulated depository clearing agency and the appointment of a foreclosure agent (normally a Mexican brokerage firm).

### Guaranty trust

The guaranty trust agreement must be entered into in writing and it must either be entered into before a notary public or the signatures thereto be ratified by a notary public. The transfer of property to the trust's estate must be electronically recorded in the Sole Registry of Movable Guaranties.

Further, depending on the type of rights being contributed to the trust, additional special requirements must be met, such as, in the event of collection rights or receivables, delivery of a notice to the underlying counterparty or debtor.

### Mortgage

Depending on the type of asset being mortgaged (eg, ship or aircraft), special requirements must be met, including a clear description of the asset, signing before a notary public and physical registration with public registries (eg, Mexican Maritime Registry or Mexican Aeronautic Registry).

### Future-acquired assets

22 | Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Future assets may be covered by a non-possessory pledge, a guarantee trust, and an industrial mortgage, as long as the relevant instrument states so. In the case of security interests created in the forms of pledges and mortgages under specific forms of loans regulated under Mexican law (ie, credits on equipment and credits on repairs), a security interest can also cover future assets. Enforcement is dependent on the future-acquired encumbered asset coming into existence and compliance with certain formalities for perfection.

Security interests can secure future-incurred obligations under the same facility (eg, post-closing drawings under term or revolving credit facilities), as long as this is provided for in the loan documents. Amendments to the terms of a loan, including changes in principal amount, interest rates and other payment obligations, may require ratification of the security interest.

An existing security trust or mortgage may also be used to secure future-incurred obligations under a different facility as long as negative pledge, second-lien or similar provisions are observed or waived, and ranking rules are provided in the security documentation.

### Maintenance

23 | Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Generally, no maintenance actions are needed to avoid automatic termination or expiration of a security, unless the security documents set an express term, in which case, an amendment would be required before expiration. Further, the law limits the duration of trusts to 50 years, so an amendment to extend duration would be required before expiration of the trust.

Registration of security interests in the Sole Registry of Movable Guaranties requires a term, parties must extend the registration before its expiration to avoid automatic deregistration of the security interests.



## Release

### 24 | Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

No. Security interests are ancillary to the assets and as such, liens follow the asset, regardless of transfer. Exception to this are ordinary course of business sales of assets under a non-possessory pledge; however, the proceeds from such sale would be considered as part of the security. Furthermore, transfer of security assets is forbidden by law in some cases and market practice is for security documents to prohibit the sale of encumbered assets outside of the ordinary course of business.

Additionally, security interests are generally not automatically released even after fulfilment of secured obligations. Such release requires action by the secured party, by a judge or by the trustee, depending on the circumstances.

Debtors may request release action from the lenders through competent courts upon compliance in full of secured obligations.

## Non-fulfilment of guarantee obligations

### 25 | What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

Guarantors have access to all defences inherent to the underlying obligation. Most defences may be waived, except those considered a matter of public order by law, mainly dealing with basic defence rights, such as audience and notice. Defences personally inherent to the debtor are not available to the guarantors. It is market practice for guarantors to waive common defences, including those that require the creditor to first claim and recover from the principal debtor before turning to the guarantor for payment.

## Parallel debt requirements

### 26 | Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

Parallel debt arrangements are neither regulated nor common in Mexico. However, no restrictions are in place that would impede such arrangements.

## Enforcement

### 27 | What are the most common methods of enforcing security interests? What are the limitations on enforcement?

Security interests may only be enforced upon breach of the secured obligations. It is market practice for security documents to provide for a special foreclosure procedure, with either a judicial sale or an out-of-court sale (available only to certain types of securities, including non-possessory pledge, securities pledge and guaranty trusts).

If any finance documents are in a language different than Spanish, a Mexican court will require an official translation into Spanish by a translator authorised by such Mexican court (such a translation would have to be approved by the Mexican court after the defendant had been given an opportunity to be heard with respect to the accuracy of the translation, and relevant proceedings would thereafter be based upon the translated documents).

Secured lenders may begin or continue an enforcement procedure after a judicial declaration of a bankruptcy proceeding (*concurso mercantil*), as long as the competent court considers the relevant collateral is not strictly indispensable for the ordinary operation of the debtor's business, after hearing the opinion of the bankruptcy conciliator.

Security interests created during the look-back period are subject to close judicial review and can be voided under fraudulent conveyance rules.

If proceeds deriving from foreclosure proceedings are not sufficient to settle guaranteed obligations (including all expenses, fees, interests and principal), a creditor is entitled to collect any outstanding balance not covered by security proceeds as an unsecured creditor.

## Fraudulent conveyance and similar doctrines

### 28 | Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Certain acts by a debtor designed to defraud its creditors if the beneficiary had knowledge of the fraudulent purpose, or if the conveyance was made at no cost to the beneficiary, are considered fraudulent conveyances under the Mexican Bankruptcy Law. Such conveyances, including the granting of security, are voidable under fraudulent conveyance rules if made during a look-back period of up to three years before a judicial bankruptcy declaration.

The concepts of unlawful financial assistance and corporate benefit are not recognised in Mexico, as it is in other jurisdictions, thus, Mexican entities are not prohibited from providing a guaranty or third-party security in favour of affiliate entities. However, arm's-length and fair consideration principles should be followed, particularly to avoid potential avoidance under fraudulent conveyance rules in insolvency situations.

Thin capitalisation is only regulated from a tax perspective. Interest generated by excess debt provided by a foreign related party to a Mexican resident is non-deductible for corporate income tax purposes. Excess debt is understood to be debt exceeding three times the value of shareholders' equity (ie, a 3:1 debt-to-equity ratio).

## INTERCREDITOR MATTERS

### Payment and lien subordination arrangements

#### 29 | What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

Debt subordination is not specifically regulated although the Mexican Bankruptcy Law subordinates the debtor's unsecured related party creditors to all other types of creditors and recognises the right of parties to enter into subordination agreements. Debt subordination arrangements are generally established through intercreditor agreements.

In addition, security documents may specifically indicate the priority between different creditors holding a security interest over the same asset, although certain assets do not allow for a second or subsequent lien over the same. Without specific determination, priority with respect to a security is based on the date on which the security interest is created and perfected.

### Creditor groups

#### 30 | What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

It is common for all creditors of a particular transaction to be party to the intercreditor agreement, whether senior, mezzanine or junior lenders and even hedging counterparties, when applicable, but this depends entirely on the structure of the transactions. It is typical for all creditors to be treated the same within their contractually agreed class.



### Rights of junior creditors

- 31 | Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

There is no legal limitation or provisions for junior creditors to be stayed from enforcing remedies until senior creditors have been paid. However, it is typical for a limitation to be included in the intercreditor agreement, and sometimes also in the security documents.

- 32 | What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

Unless otherwise agreed in subordination agreements, junior creditors would have the same rights as all other creditors recognised within the same class within the bankruptcy proceeding, although statutory subordinated creditors (debtor's unsecured related-party creditors) have certain rights limitations under the Mexican Bankruptcy Law.

### Pari passu creditors

- 33 | How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

Common intercreditor provisions include certain super-majority decisions for specific waivers and amendments as well as for security interest enforcement, and simple majorities for most waivers and amendments, but this is completely dependent on each transaction structure.

## LOAN DOCUMENT TERMS

### Standard forms and documentation

- 34 | What forms or standardised terms are commonly used to prepare the bank loan documentation?

Except for consumer and similar smaller loans that must follow certain consumer protection laws and regulations, and that in general, use standard adhesion contracts registered before the appropriate authorities, financial institutions and other non-bank lenders are free to tailor loan documents to their needs. Furthermore, even though certain clauses may become standardised in practice, the loan documents depend heavily on the lender's forms of agreements.

Cross-border loans tend to follow the practice of the country where applicable law is selected.

### Pricing and interest rate structures

- 35 | What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

Pricing depends on the transaction structure, the lender and the borrower, as pricing may be tailored to each specific transaction. Loans may include fixed or variable rates or a mix of both.

Loans in local currency use reference rates in Pesos, such as TIIE, while loans denominated in foreign currency are usually based on reference rates applicable to such currency. For loans denominated in USD, LIBOR continues to be the most used reference rate, although substitute rates are being incorporated into the loan documents.

- 36 | Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

While LIBOR continues to be the predominant reference rate for loans denominated in foreign currency, for the past years, lenders have included alternate rate provisions in loan documents to replace LIBOR as reference rate in the event such a rate becomes unavailable.

### Other loan yield determinants

- 37 | What other bank loan yield determinants are commonly used?

In the great majority of cases, a margin or spread is typically added to the relevant interest rate as determined by each investor on market conditions and debtor or transaction-specific risk factors. Pricing floors and ceilings for floating rates are usual.

### Yield protection provisions

- 38 | Describe any yield protection provisions typically included in the bank loan documentation.

All types of yield protection provisions common in international lending practice are included in bank loan documentation. The increased costs provision generally identifies the specific costs borrowers are required to absorb resulting from changes in law after the parties entered into the loan (eg, reduction in the rate of return or amounts payable) and what constitutes a change in law requiring such reimbursement of costs. Change in law provisions are often extended by foreign lenders to cover increases in capital or liquidity requirements.

Many loan agreements include clauses that permit borrowers to repay debt prior to the maturity date only if they make additional payments (prepayment premiums or make-whole payments). These types of payments are less common with mainstream financial institutions (as long as the prepayment date coincides with a scheduled principal or interest payment date) than with private equity-type lenders.

Withholding tax gross-up provisions are included in basically all cross-border lending transactions to ensure that the foreign lender receives and retains the same amount that it would have received had no tax been withheld from payments made by the Mexican debtor. Such clauses are drafted in a way that both foreign lenders and Mexican borrowers collaborate to comply with local regulations that allow for reduced withholding tax rates. In connection with tax gross-up provisions, borrowers also negotiate loan assignment provisions to restrict the right of lenders to assign the loan to any potential new lender, as the nature and location of lenders would determine the applicable withholding rate and in certain circumstances (eg, lenders located in tax heavens) such rates could be very high, making the loan very expensive for borrowers subject to tax gross-up obligations.

### Accordion provisions and side-car financings

- 39 | Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

This depends on the loan structure, loan amount and borrower profile. In project finance loans, it is not usual for the loan documents to allow additional pari passu debt; however, subordinated debt may be allowed. Further, most secure loan documents do not allow for additional debt secured with the same assets but may allow additional debt under certain thresholds and secured by different assets.

## Financial maintenance covenants

40 | What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Common financial maintenance covenants include periodical reporting, reserve accounts and minimum maintenance ratios such as debt service, interest coverage, collateral coverage and leverage ratios. Most of such covenants are calculated by incorporating a cushion against the debtor's projected results of operations during the term of the loan facility and make use of non-Generally Accepted Accounting Principles financial measures, such as earnings before interest, taxes, depreciation, and amortisation, for calculation.

Some breaches of financial maintenance covenants can be cured by capital contributions from the debtor's shareholders, others by providing additional collateral or prepaying debt.

## Other covenants

41 | Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

In accordance with market practice, it is common for negative covenants to restrict borrowers' ability to amend any constitutional documents, incur additional debt (whether directly or as guarantor or obligor) or create additional liens over its assets, complete a change of control, materially alter its business, sell, encumber or otherwise dispose of material assets, amend or terminate material agreements, and enter into related-party transactions (except for arm's-length transactions), among others.

## Mandatory prepayment

42 | What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

Common mandatory prepayment triggers include sale of material assets, sale of assets used as security, insurance indemnifications, prepayment of receivables and eminent domain. In practice, the debtor may reinvest proceeds in its business in limited scenarios, such as in asset sales or insurance casualty event proceeds, in lieu of prepaying the bank loans. These provisions are freely agreed upon by the parties on a case-by-case basis.

## Debtor's indemnification and expense reimbursement

43 | Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

Indemnifications generally include tax gross-up or tax indemnification, breakage costs, indemnification for increased costs and indemnification for any damages (and costs, including attorneys' and other advisers' fees) suffered by any of the lenders, agent or trustee in relation with any of the loan documents or due to the borrower's or guarantor's negligence or bad faith.

## UPDATE AND TRENDS

### Key developments

44 | Are there any current developments or emerging trends that should be noted?



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The financial markets, as basically all economic activities to some extent, have been marked by the covid-19 pandemic for over a year. Maintaining liquidity to meet short-term liabilities has been key for all those companies trying to cope with negative effects deriving from the pandemic. Heavily leveraged entities have been under pressure from lenders to implement restructuring arrangements to avoid bankruptcy proceedings and others have initiated court-supervised proceedings, in few cases resorting to Chapter 11 proceedings in the United States, aiming for a coordinated process to solve financial distress.

Since the publication of the Law to Regulate Financial Technology Institutions on March 2018, new players in the lending market have appeared, including new fintech companies, which are setting up technological lending platforms to provide easy access to funds through digital applications. This has increased competition between banks, which are now investing heavily in such platforms, and other market participants.

## Coronavirus

45 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Few governmental initiatives have been implemented to address the negative effects of the pandemic in the financial sector. The Ministry of Finance, through the National Banking and Securities Commission, announced a package of measures for credit restructuring. This initiative consisted of measures to encourage and allow banks and other financial intermediaries to restructure the loans of clients who request it. These measures consist in various options that they may offer, such as extension of terms, reduction of rates or eventual reductions and a term of up to five years (60 months), depending on the client and institution.

Mexico's Central Bank, Banxico, has cut its benchmark rate on several occasions since the start of 2020, from 7.25 per cent to the current 4 per cent.

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