



# ICLG

The International Comparative Legal Guide to:

## Lending & Secured Finance 2017

### 5th Edition

A practical cross-border insight into lending and secured finance

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# Mexico

Gonzalez Calvillo, S.C.

José Ignacio Rivero Andere



## 1 Overview

### 1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

2016 was the year in which the world was witness to Brexit and the election of President Trump; two underdog events that represent a step back from globalisation and towards nationalism and protectionism, and that have created uncertainty and unease in financial markets around the world.

Particularly, in 2016, Mexico's financial markets were hit, among others, with a 30% devaluation of the Mexican Peso against the US Dollar that is expected to continue to some degree throughout 2017; as well as with the expectation of a renegotiation of NAFTA (North America Free Trade Agreement) that will redefine the rules of trade with Mexico's most important commercial partner, the United States of America.

Additionally, President Trump has shown a substantial amount of animosity toward our country and its people and, among others, has threatened to impose tariffs on Mexican goods and to build a wall along the US-Mexico border.

As a result of the above, 2017 is expected to be a challenging year for Mexico with little new capital coming into our country and a significant number of US Dollar-denominated debt restructurings and rearrangements with our US commercial and financial partners. That said, once the financial markets around the world find ease (if they do at all) and assuming Trump's radical positions are somehow softened, Mexico is expected to continue seeing the results of its recent structural reforms (2013–2016) with the injection of noteworthy capital in the energy and infrastructure sectors, which constitute the core of the growing potential of the Mexican economy and, in the case of the energy sector, the opening of an area that was closed for more than 50 years to private investment with a material potential to develop.

### 1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Trends have remained consistent over recent years, as the most significant lending transactions are those related to the construction, operation and maintenance of energy and infrastructure projects.

## 2 Guarantees

### 2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, so long as the by-laws of the Mexican guarantor allow guarantee of the obligations of third parties. These guarantees can be created either under Mexican or foreign law, provided that, when created under foreign law, certain provisions shall be included in the foreign documents to ensure enforceability of a judgment thereto in Mexico against the Mexican guarantor (e.g. limitations on guarantee language; appointment of process agent; submission to jurisdiction; conditions precedent related to the Mexican guarantor; withholding taxes gross-up).

### 2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

No; however, directors must comply with their statutory duties in resolving any transaction that is subject to their review. Specific duties under Mexican law for directors acting for private entities are abstaining from voting in matters where they have a conflict of interest, and confidentiality; for public entities, these are the duty of loyalty and the duty of care.

### 2.3 Is lack of corporate power an issue?

Yes, for the validity of the guarantee (i) the Mexican guarantor shall be authorised under its by-laws to act as a guarantor of third party obligations, (ii) the Mexican guarantor, if applicable under its by-laws, shall obtain the necessary corporate approvals (shareholders/BoD), and (iii) a duly appointed representative of the Mexican guarantor with sufficient powers and authorities under Mexican law shall execute the guarantee.

### 2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Subject to the by-laws of the Mexican guarantor, corporate approvals may be required.

Subject to the contractual provisions applicable to the Mexican guarantor, third party consents may be required.

In general, no governmental consents are required (exception made for regulated entities and sectors where governmental approvals would apply).

### 2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No. However, please note that the enforceability of the guarantee may be limited or affected by statutory priorities or provisions established by: (i) laws imposing federal, state or municipal taxes, including taxes or amounts payable by Mexico that are considered as such under Mexican law, such as social security and payments of similar import owed to, or collectible by, a governmental authority with the power to collect fiscal contributions; (ii) Mexican federal labour laws regarding compensation of any kind owed by Mexico to persons covered by such laws; and (iii) reorganisation, insolvency, fraudulent transfer, bankruptcy, moratorium or other laws affecting creditors' rights generally.

### 2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. On enforcement, see question 2.1 regarding the enforceability of foreign law guarantees.

## 3 Collateral Security

### 3.1 What types of collateral are available to secure lending obligations?

Security trusts, pledges and mortgages. These can be created over: (i) equity (shares, quotas, etc.); (ii) rights and/or any type of movable assets (receivables, cash deposited in bank accounts, inventory, IP, etc.); and (iii) real estate (land and buildings).

### 3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

1. **Pledge over Equity:** To perfect collateral in Mexico over equity issued by a Mexican company, a Mexican equity pledge agreement shall be implemented, jointly with the delivery of (i) if applicable, stock certificates duly endorsed in guarantee, (ii) evidence of an entry regarding the pledge in the shareholders/partners registry book of the issuer, and (iii) stock powers to be exercised upon the occurrence of an enforcement event.

2. **Pledge over Movable Assets:** To perfect collateral in Mexico over any type of assets (other than equity and real estate assets), a Mexican floating lien/regular asset pledge shall be implemented. When structured as a floating lien pledge, the possession of the pledged assets will remain with the pledgor; when structured as a regular pledge, the possession of the pledged assets will be transferred to the pledgee.

Additionally, collateral over equity or movable assets can be created through a security trust (referred to below).

In connection with (1) and (2) above, please note the following:

The signatures of the parties to the equity pledge (to ensure priority over tax credits) and the floating lien/regular asset pledge (to

comply with perfection requirements under Mexican law) shall be ratified before a Mexican notary public and registered at the Sole Registry of Movable Security. To accomplish the notarial ratification, representatives of such parties must be available at closing to execute these documents in front of a Mexican notary public with a valid Mexican law PoA. Also, in case the floating lien/regular asset pledge covers any trademarks registered in Mexico, such pledge shall also have to be registered at the Mexican Institute of Intellectual Property (IMPI). Additional formalities and third party consents may apply depending on the nature of the grantor and the collateral assets.

3. **Security Trust:** As an alternative to the pledge structures referred in 1 and 2 above and to the mortgage structure referred in question 3.3 below, a Mexican guarantee trust structure could be implemented and used to create, among others, a general security structure encompassing all or a substantial number of the assets of a grantor or a relevant project.

Generally speaking, under a trust, the sponsors/security providers will transfer title of assets to a trustee (a Mexican bank or a financial entity authorised to act in such capacity), with the purpose of (i) securing the payment and the performance of obligations under the relevant financing documents, (ii) managing the collateral assets, and/or (iii) serving as a source of payment of the relevant debt.

The formalities for incorporating, operating and transferring assets to a trust will depend on the nature of the sponsors/security providers and the assets involved. These formalities will be the ratification of the trust before a Mexican notary public, and its registration before the Sole Registry of Movable Security; to accomplish the notarial ratification, representatives of the parties to the trust must be available at closing to execute these documents in front of a Mexican notary public with a valid Mexican law PoA.

The primary advantage of the trust structure is that it makes all collateral remote to the bankruptcy of the sponsors/security providers as there is a "true sale" of the assets to the trustee, and that it gives additional control and enforcement capabilities over the assets in an EOD. The primary disadvantage of the trust structure is that it may interfere with the operations of the grantors and affect third parties related to the business (as the assets are transferred to a third party (trustee)), and that its implementation represents additional costs.

Any PoAs granted outside of Mexico must be notarised and apostilled or legalised in the country in which they were granted, and sent to Mexico for further notarisation.

### 3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

**Collateral over Real Estate Assets (land and buildings):** To perfect collateral in Mexico over Mexican land and/or buildings, a Mexican mortgage agreement shall be implemented.

- In terms of Mexican law, this mortgage shall be granted through a notarial deed and thus representatives of the parties thereto shall be available at closing in Mexico to execute this document before a notary public.
- In addition, and in terms of Mexican law, for this mortgage to produce effects *vis-à-vis* third parties, it shall be registered in the public registry of property of the place where the assets are located.
- In relation with the creation of security over machinery and equipment, please refer to question 3.2, point 2.

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**3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?**

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It can be taken; see question 3.2, point 2.

Debtors are not required to be notified of the creation of the collateral for such collateral to be perfected; however, it is a good practice to notify such debtors so that they acknowledge the pledge and the fact that once and if enforced, they should pay to the parties acquiring the receivables as a result of enforcement.

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**3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

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It can be taken; see question 3.2, point 2.

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**3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?**

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It can be taken; see question 3.2, point 1.

The form of the certificates depends on the corporate form of the issuer; generally, shares are in certificated form.

Such security can only be granted by means of Mexican collateral documents.

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**3.7 Can security be taken over inventory? Briefly, what is the procedure?**

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It can be taken; see question 3.2, point 2.

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**3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?**

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Yes, so long as the by-laws of the company allow the granting of security interests. These security interests should be created under Mexican law when the subject matter thereof are assets located in Mexico or governed by Mexican laws.

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**3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?**

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In most cases where security is granted, the participation of a notary public is required to perfect the security interests being created; see question 3.2, points 1 and 2. In other cases, although not legally required for perfection, it may be advisable to ratify security documents with a notary public. Notarial fees are variable and will depend on the type of document and/or security interest being created; these fees are topped out in most cases but can be high (although, in large transactions or when topped fees are high, notaries can and will typically grant fee discounts).

Registration fees for security over real estate assets are associated with security registration at public registries. All security over real estate assets must be registered at the local public registry of property for the security to be perfected and opposable to third parties, and fees will also greatly vary from state to state. In most cases, registration fees are also topped out by local authorities, but in some cases special discounts may apply when the security is associated with benefits for the locality or state (i.e., infrastructure, investment, etc.).

While registration of security over assets other from real estate, such as receivables, cash deposited in bank accounts, inventory and similar assets will typically be required (depending on the type of security being created), documents evidencing security over these movable assets are, as of recently, electronically registered at the Sole Registry of Movable Security, and there is no fee payable for such registration (although associated notarial costs may apply).

Please note that, in addition to the above, in some other cases and in certain local jurisdictions, additional taxes or fees may apply on perfection and/or registration of security.

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**3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

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The time and/or expenses associated with creating, perfecting and registering security in Mexico vary on a case-by-case basis. The number of secured assets, type and extent of security, nature of the assets in security (i.e. real estate, receivables, etc.) all play a role in determining the amount of time and expense.

Registration of real estate-backed security can take anywhere from a few days to a couple of months, depending on the locality where it needs to take place. Registration of security over movable assets was, until recently, also subject to time considerations but with the advent of electronic registration, it can now be done in a matter of days and at marginal cost. As for costs associated with creation, notarisation and perfection, please refer to the foregoing answers.

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**3.11 Are any regulatory or similar consents required with respect to the creation of security?**

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There can be, if the project involves a regulated activity. Security over permits, concessions, procurement contracts, licences and other regulated assets (such as pipelines, water treatment plants, energy plants, mining properties), or over companies or entities that use, procure, manage and/or operate such assets, will typically require prior governmental approval to create security over them (or, at best, prior notice to the relevant authorities).

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**3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?**

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No, there are not.

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**3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?**

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See questions 3.2, 3.9 and 3.10.

#### 4 Financial Assistance

- 4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?**

No, not generally.

#### 5 Syndicated Lending/Agency/Trustee/Transfers

- 5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

Yes. Mexico would recognise the role of security agents. In some cases, the granting of a PoA to the agent by the secured parties to act as such may be advisable.

- 5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not applicable in Mexico.

- 5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

Specific contractual requirements must be complied with. Also, unless the Mexican borrower entity is notified of the assignment, it will be released of its obligations by paying to Lender A.

#### 6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

- 6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Yes. Withholding taxes generally apply to interest payable to foreign lenders, as well as to the proceeds of a claim or an enforcement of security that are destined for payment of interests, commissions or fees (and not principal). The withholding rate will depend on the

underlying transaction, the characteristics and nature of the relevant lender, the applicability of international taxation treaties and other related factors.

Please note that withholding requirements do not apply to Mexican banks and financial entities, which will calculate and pay their taxes in accordance with applicable Mexican tax laws.

- 6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

Mexico has entered into many treaties to avoid double taxation with different countries, and each treaty or agreement provides for distinct types of privileges, restrictions, fees, and, in some cases, exemptions thereof.

- 6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?**

Foreign lenders are required to pay income tax if they have a permanent establishment within Mexican territory, or when the income comes from sources within the Mexican territory.

- 6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

See section 3.

- 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

No, there are not.

#### 7 Judicial Enforcement

- 7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?**

Yes. Mexican law generally allows the parties freedom in the choice of law and jurisdiction, and Mexican courts will recognise a judgment under a contract governed by a foreign law, provided such laws do not contravene Mexican law principles.

- 7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?**

See question 7.1.

**7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?**

Timing depends on the circumstances of the particular cases, applicable foreign governing laws, and applicable foreign jurisdictions, as well as on the consistency with Mexican law principles.

**7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?**

Yes. Foreclosure of a mortgage or a regular pledge will typically require a summary judicial procedure that would ultimately result in public auctions to sell (or transfer) the collateral as payment to the lenders. For non-possessory pledges and guarantee trusts, it is possible to choose between a judicial or a non-judicial procedure.

As for regulatory consents, typically the same consents required, if applicable, for the creation of security will apply to its foreclosure (especially if the receiver or buyer of the assets is not the same entity as that which requested the original consent), but in many cases the original consent would cover the ability to foreclose on the assets, subject in some cases to prior notice to the relevant authorities. Also, enforcement can be significantly affected or impacted in case of reorganisations or bankruptcy under applicable law.

**7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?**

Generally, no; however, restrictions applicable to foreign investors or creditors to own or operate certain assets (restrictions on foreign investment) will apply to foreign investors or creditors in the event of a foreclosure.

**7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?**

Yes. From the date of the bankruptcy judgment to the end of the reorganisation stage, no claim or foreclosure will be enforceable against the company pursuant to the Federal Bankruptcy Law.

**7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?**

Yes. Mexican courts have the legal obligation to recognise contractual submission of disputes to international arbitration, as well as international arbitral awards, subject to compliance with procedural and formal requirements under the Mexican

Commerce Code and applicable international treaties. Please note that enforcement of an arbitral award may be denied, among other applicable matters: if one of the parties to the arbitration agreement did not have adequate or sufficient legal capacity to enter into such arrangement or such arrangement is not valid under the laws chosen by the parties; if service of process is not correctly and legally completed; if the award refers to a controversy which, under the terms of the arbitration agreement, was not subject to arbitration or contains a decision that exceeds the terms of such arbitration agreement; if the subject matter of the arbitration procedure cannot be arbitrated or the enforcement of the award is contrary to Mexican law, public policy of Mexico, international treaties or agreements binding upon Mexico; or if the award is not final in the jurisdiction where it was obtained.

## 8 Bankruptcy Proceedings

**8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?**

Mexico's Federal Bankruptcy Law is the general statute governing reorganisation and bankruptcy proceedings throughout Mexico. Reorganisation and/or bankruptcy proceedings will directly affect enforcement of a security for a lender, but the impact will greatly vary depending on the legal robustness of the security received by such lender.

In general terms, and subject to exemptions and rights, the Federal Bankruptcy Law treats a lender secured under a security structure created under a pledge or a mortgage as a secured creditor. Important benefits afforded to a secured creditor are priority ranking, continued ordinary interest accrual, loan currency protection and (subject to some exemptions) ability to participate or not in the eventual creditor agreement that concludes the reorganisation proceeding; in the event no agreement is reached and the relevant company becomes bankrupt, secured creditors have the right to foreclose on their security, and they have the same right if such an agreement is validly reached but not signed by the relevant creditor.

Because, as explained above, under a trust title to the assets that form the trust estate is transferred to the relevant trustee and therefore subtracted from the patrimony of the relevant company, lenders secured by or through a trust have, through this agreement, a bankruptcy remote vehicle under applicable law. Please note, however, that in recent cases, while this remoteness has been generally accepted by Mexican courts, precautionary measures issued by Mexican courts have temporarily frozen enforcement and foreclosure of assets under trusts on the basis, among others, of the need for the company subject to the reorganisation procedure to use such assets for its survival.

**8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?**

Yes. The Federal Bankruptcy Law and its associated regulations establish clawback rights (general 270 clawback period for fraudulent conveyance) and also sets forth a list which, subject to exemptions and interpretation, sets forth the following ranking priorities for creditors: (i) singularly privileged creditors (i.e. burial and sickness expenses); (ii) secured creditors (those secured with an *in rem* guarantee, such as the pledges and mortgage agreements); (iii) specially privileged creditors; and (iv) common (typically unsecured) creditors. However, please note that credits against



the asset mass, such as certain tax or labour credits, debts incurred while at the reorganisation process, asset maintenance and other similar costs, may have higher ranking than secured credits and will typically be paid first.

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**8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

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Yes. Governmental entities (i.e., states, municipalities, and certain government entities) are not subject to the Federal Bankruptcy Law. However, they can (and have) implemented trust structures to guarantee debt instrument offerings and other forms of financing, even governmental procurement, and ascertain that assets transferred to such trust are considered to be isolated from the reach of said governmental entity, and could be subject to the Federal Bankruptcy Law.

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**8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?**

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Yes; however, please note that Mexican law does not allow the actual seizing or taking possession of assets through out-of-court proceedings; therefore, any actual seizure or taking possession of project assets prior to the conclusion of an out-of-court proceeding of foreclosure must be undertaken and approved by the applicable courts.

## 9 Jurisdiction and Waiver of Immunity

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**9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?**

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See question 7.1.

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**9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?**

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Sovereign immunity is not recognised in Mexico and, therefore, waiver of immunity is generally valid in Mexico.

## 10 Licensing

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**10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?**

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Generally, no.

## 11 Other Matters

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**11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?**

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No, there are not.



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