

SECURED TRANSACTION REFORMS IN MEXICO: IN PURSUIT OF A UNIFORM SYSTEM

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I. PROLOGUE

The strength of a country's financial system is critical to its economic stability, and the ability of credit institutions to move capital through the market effectively and efficiently is crucial to the country's political and economic growth and development. In the case of Mexico, the rise and fall of its banking industry during the 1990s has played a crucial role in the availability of credit to Mexico's commercial sector and has led to multiple legislative reforms designed to address the shortcomings of the financial infrastructure. In analyzing the causes for the 1995 crash of its banking industry, followed by the effects of deregulation of foreign bank investment, Mexico has isolated a number of areas requiring reform if it is to foster greater lending and economic growth. One such area has been its secured transaction system and its related registry process. Since 2000, Mexico has enacted several legislative changes, all designed to garner greater creditor confidence and encourage lending.

On September 23, 2010, Mexico published its newest set of

regulations for the establishment of a centralized electronic single registry system for security interests. This system, known as the Registro Único de Garantías Mobiliarias (the “RUG”), has been designed to add greater transparency to a secured transaction system that has been fraught historically with contradictions, inconsistencies and confusion. The success of the new filing system in achieving its goals remains to be seen. Will Mexico’s secured transaction system finally achieve a level of ease, consistency and transparency, or will the shortfalls of its system continue to be swept under the RUG?

II. INTRODUCTION

In the United States, lawyers and bankers tend to take for granted the ease with which security interests may be created, filed and subsequently monitored. We forget that Article 9 of the Uniform Commercial Code is the product of an evolution that began in this country in the 1950s, a process that involved several different iterations of the first presentation and then several “official” amendments to that model.¹ Even more significantly, Americans seldom recognize the importance of this body of rules to the economic growth and development of our private sector. The ease with which businesses can leverage their assets and creditors can realize upon those assets in the event of default has enabled America’s private sector to access credit more readily and at relatively low costs.² One has only to look at emerging markets³ where the concept of collateralizing personal property has been virtually nonexistent to appreciate the value of an “Article 9-type system” to the development of an economy.

1. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 30-1a (5th ed., 2002) (“[T]he 1962 Official Text of Article 9 was the victim of more state amendments than other Articles.”).

2. See Todd C. Nelson, *Commercial Credit: A Push for Reform*, BUS. CREDIT, Jan. 1994, at 34.

3. An “emerging market” can be defined as a country that has changed its economic policies from extreme protection to some degree of openness to foreign investors and business partners. It refers to a country that had not known much private or foreign economic activity in prior decades and implies a certain degree of ongoing transition and fluidness. See generally RICHARD N. DEAN & PAUL B. STEPHAN, DOING BUSINESS IN EMERGING MARKETS: A TRANSACTIONAL COURSE (2010).

This limitation on the uses of collateral has affected the ability of many businesses and entrepreneurs, in particular small and medium enterprises (referred to as SMEs), in emerging markets to access credit and thereby reach their economic potential.⁴ The International Finance Corporation reports that “constrained access to finance remains among the top three limitations on private sector growth in the developing world. More than half of private firms in emerging markets have no access to credit.”⁵ The IFC’s research indicates that credit in these regions is denied not because the collateral is necessarily insufficient, but rather because of the developing market’s inability to harness the value of existing forms of collateral.⁶ Large caches of assets become what is referred to as “dead capital.”⁷ Ineffective secured transaction systems often limit the use of such assets as collateral, which in turn leads to higher interest rates and a reduced borrower pool.⁸ Ultimately, this translates into inadequate investment and slower economic growth.⁹

In the context of Mexico, despite the size and developed nature of its economy, access to credit historically has been a challenge. In that regard, its credit market has an evolutionary story that mirrors the political and cultural history of the

4. See THE WORLD BANK, DOING BUSINESS IN MEXICO 2007 13 (2006) [hereinafter referred to as DOING BUSINESS], available at <http://www.doingbusiness.org/reports/~media/FPDKM/Doing%20Business/Documents/Subnational-Reports/DB07-Sub-Mexico.pdf>.

5. INTERNATIONAL FINANCE CORPORATION, SECURED TRANSACTIONS AND COLLATERAL REGISTRIES 6 (2010), [hereinafter IFC TOOLKIT].

6. *Id.* at 6–7. The concept of “insufficient collateral” is used in the IFC TOOLKIT to mean collateral that is deemed unacceptable or unsuitable to the relevant lenders.

7. See Mehnaz Safavian, Heywood Fleisig, & Jevgenijs Steinbuks, *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance*, WORLD BANK, no. 307, Mar. 2006, at 2, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2006/05/09/000090341_20060509145908/rendered/PDF/360790Viewpoint1an1Fleisig1Steinbuks.pdf. “Dead capital” is a phrase used by Safavian, Fleisig and Steinbuks to refer to collateral—primarily moveable property—which would ordinarily have value in developed countries, but which banks in underdeveloped regions refuse as security for loans.

8. See *id.* at 1.

9. See DEAN & STEPHAN, *supra* note 3, at 14–21.

country.¹⁰ The first section of this paper will review the historical context from which the reforms to Mexico's credit industry arose. The second section of this paper will briefly describe the legal framework of the Mexican secured transaction system and explain the complexities involved in attempting to create a security arrangement. Finally, we will explore the reforms to Mexico's secured transaction legislation that have taken place over the last decade and the technical reasons for those reforms. In the process, the paper attempts to give the U.S. legal practitioner a better understanding of intricacies involved in creating a security interest covering Mexican collateral. It is the premise of this paper that notwithstanding the significant reforms that have been made to Mexico's secured transaction laws, a great deal of confusion and complexity continues to exist.

III. HISTORICAL BACKGROUND

Throughout its development, Mexico has been resentful of its own heavy dependence on foreign capital, which is perhaps one reason its 1917 Constitution instituted several restrictions on foreign investment in certain sectors of the economy.¹¹ "Although the constitution and subsequent foreign investment laws did not set aside banking as a Mexican-only activity, as a practical matter the banking industry in Mexico was concentrated in the hands of a few powerful families."¹²

Increased nationalism and regulatory reforms, including the establishment of the Central Bank of Mexico, followed the Mexican Revolution.¹³ The following decades experienced increased political stability and greater confidence in the banking industry.¹⁴ However, by the 1970s Mexico was experiencing hyperinflation and a tremendous increase in

10. *See id.*; *see also* STEPHEN ZAMORA ET AL., MEXICAN LAW 536–37 (2004).

11. Eric J. Gouvin, *Cross-Border Bank Branching under the NAFTA: Public Choice and the Law of Corporate Groups*, 133 CONN. J. INT'L L. 257, 267 (1999)

12. *Id.*; *see also* ZAMORA, *supra* note 10, at 536–37.

13. *See generally* KAREN B. SIGMOND, MEXICAN BANKING LAWS: EVOLUTION INTO NAFTA AND THE GLOBAL ECONOMY (2008) (discussing the history of the Mexican banking industry).

14. *See id.* at 5.

foreign borrowing.¹⁵ This was also a period of many bank mergers, resulting in economic power consolidating under a handful of banks.¹⁶ During the 1980s, as a result of government over-spending and an overly enthusiastic prediction of increased oil prices, the Mexican economy suffered a serious financial crisis.¹⁷ In an effort to deflect blame for the financial debacle, President José López Portillo claimed Mexico's economic troubles were the fault of greedy private banks.¹⁸ He nationalized the banking system, stifling foreign investment for the next decade.¹⁹

In 1988, new economic and political reforms were ushered in by the newly elected President Carlos Salinas de Gortari.²⁰ Salinas, who holds a doctorate in economics from Harvard, made luring foreign investment back to Mexico one of the cornerstones of his administration.²¹ Most significantly, the Salinas administration realized that in order to attract foreign investors, not only did Mexico need to change its economic policies, but it needed to make legal reforms as well.²²

As a result of the political and economic failures of the previous administrations, the Salinas administration found itself in a position of being unable to borrow in the foreign markets and constrained in what it could cut in spending.²³ In

15. See JOHN A. ADAMS JR., *MEXICAN BANKING AND INVESTMENT IN TRANSITION* 2–3 (1997).

16. See *id.* at 3.

17. See generally NORA LUSTIG, *MEXICO: THE REMAKING OF AN ECONOMY* (2d ed. 1998) (discussing the historical background of the 1980s in chapters 1 and 2).

18. See SIGMOND, *supra* note 13, at 46.

19. See *id.*; see also Gouvin, *supra* note 11, at 267–68.

20. See LUSTIG, *supra* note 17, at 55.

21. See *id.*; SIGMOND, *supra* note 13, at 60.

22. See SIGMOND, *supra* note 13, at 64.

23. See Stephen Haber & Shawn Kantor, *Getting Privatization Wrong: The Mexican Banking System, 1991–2003* 6 (Nov. 2003) available at <http://info.worldbank.org/etools/docs/library/156393/stateowned2004/pdf/haberkantor.pdf> (explaining that Mexico's largely single political party, the Partido Revolucionario Institucional [PRI], was facing a major crisis of confidence by the Mexican population, evidenced by the fact that the Salinas administration had won the 1998 election by the smallest margin in PRI history). In order to maintain its governing authority it had to maintain social services. Sigmond explains that Salinas gained support for his privatization movement by claiming that the revenues derived from privatization would be used for social programs.

short, it needed to find a large source of revenue in a short period of time, which led the administration down the path of re-privatization of state-owned firms, including the Mexican banks.²⁴

For the Salinas administration, the privatization movement was not only a means of garnering much needed revenue but was also a way of building a closer relationship with the United States.²⁵ Consequently, in the early 1990s Mexico engaged in significant reforms to its foreign investment and banking laws, which paved the way for the adoption of the North American Free Trade Agreement (NAFTA).²⁶ By 1990, Mexico's inflation rate, which had been 176.8% in 1988, had been reduced to 22.5%, which was further reduced by the adoption of NAFTA.²⁷ Mexico had been able quickly to reduce its inflation rate and its foreign debt not only from the re-privatization process but also because foreign investors became interested in Mexico once again.²⁸ While negotiating NAFTA with Mexico, the United States was cognizant of the economic growth potential of its neighbor to the south, and saw Mexico as "under-banked."²⁹

The policies of the Salinas administration appeared to be a success. Financial deregulation, the introduction of NAFTA, and the reduction in inflation resulted in a surge in capital inflows back into Mexico.³⁰ However, this massive influx in capital led to an unsustainable surge in consumption and investment, which led to the devaluation of the Mexican peso in 1994 and a devaluation of its exchange rate.³¹ Thereafter, the Mexican banking system collapsed.³² Thus, in four short years the

See SIGMOND, *supra* note 13, at 61.

24. See Haber & Kantor, *supra* note 23, at 6.

25. See SIGMOND, *supra* note 13, at 61.

26. See generally ADAMS, *supra* note 15, at 59–85 (discussing investment reforms).

27. See SIGMOND, *supra* note 13, at 61.

28. See *id.*

29. See *id.* at 82.

30. See ADAMS, *supra* note 15, at 51–62.

31. See José J. Sidaoui, *The Mexican Financial System: Reforms and Evolutions 1995–2005* 277 (Bank for Int'l Settlements, BIS Papers No. 28, Aug. 2006), available at <http://www.bis.org/ifc/publ/ifcb26a.pdf>.

32. See *id.*

privatization of the Mexican banks from 1991 to 1995 made the Mexican banking system insolvent.³³

The 1995 banking crisis in Mexico, in many respects, was not unlike the recent crisis experienced in the United States. As one author described it:

The Mexican banking crisis of 1995 contained many of the same characteristics as other banking crises: as massive expansion of credit in a short period of time, poor bank management, supervisory and regulatory loopholes, and a shock (both domestic and external).³⁴

In reviewing the events that occurred before and after the “Crash of ‘95,” it is easy to lay the blame for the failure of the Mexican banking system on the devaluation of the peso and the collapse of the exchange rate. However, some authors have argued that the privatization process of the Mexican banks was fundamentally flawed from the start, and these failures would have caused the collapse of the banking system notwithstanding the macroeconomic factors, which only sped up the crisis.³⁵ Stephen Haber and Shawn Kantor argue that in response to privatization, the Mexican banks built up a large portfolio of nonperforming loans, which because of fundamental flaws in the Mexican political system were not recoverable.³⁶ The authors contend that one of the three factors that contributed to the banking collapse was flaws in the system of creating and enforcing collateralized loans. “As Mexico’s bankers quickly found out, they neither had mechanisms to assess the credit worthiness of borrowers nor did they have the ability to enforce their contract rights once loans went bad because of . . . the government’s low capacity to actually enforce property and contract rights.”³⁷

The banking crisis brought to light, for Mexico as well as for foreign investors, the flaws in the Mexican judicial and regulatory systems relating to the processing of loans and then

33. See Haber & Kantor, *supra* note 23, at 1.

34. Sidaoui, *supra* note 31, at 277.

35. See Haber & Kantor, *supra* note 23, at 2.

36. See *id.*

37. *Id.* at 11.

the recovery of loans upon default. As early as 1993, following the adoption of NAFTA, a group of scholars commenced a comparative analysis of the secured commercial lending opportunities among the three NAFTA parties.³⁸

“The study showed that most of the secured lending available in Canada and the United States was not available in Mexico and that the reasons for the unavailability of the numerous loans to various sectors of the economy could be found in the inflexibility of existing statutory and decisional law. Even though Mexican secured creditors had access to more than twenty legal methods of structuring secured transactions, few, if any, satisfied their need for certainty of enforceability.”³⁹

In response, political, legal, business and academic representatives from the United States and Mexico began work towards drafting and enacting comprehensive reforms of Mexico’s secured transaction system.⁴⁰ These efforts led not only to the reforms that were enacted in 2000 in Mexico, but also resulted in the creation of an Inter-American Model on Secured Transactions adopted by the OAS, which has served as the basis for reform in other Latin American nations.⁴¹

In the past ten years, Mexico has taken enormous steps towards fine-tuning its secured transaction laws in an effort to open its economy to greater lending potential.⁴² Recognizing the need to reform its secured transaction system in order to improve the access to credit, Mexico made significant changes to its secured transaction laws and its registry system in 2000,⁴³

38. See Boris Kozolchik & Dale B. Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J. L. & TRADE AM. 235, 258 (2006).

39. *Id.*

40. See John M. Wilson, *Mexico: New Secured Transactions and Commercial Registry Laws*, 7 INTER-AM TRADE REP. 1815 (2000) [hereinafter Wilson, *Mexico*].

41. See Hale E. Sheppard, *Overcoming Apathetic Internationalism to Generate Hemispheric Benefits: Analysis of and Arguments for Recent Secured Transactions Laws in Mexico*, 10 J. TRANSNAT’L L. & POL’Y 133, 164–65 (2001).

42. See generally SIGMOND, *supra* note 13.

43. Three different legislative reforms comprise the 2000 Amendments: (i) Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de

2003,⁴⁴ and in 2009.⁴⁵ Yet, bank credit continues to be underutilized and unavailable at reasonable costs to the majority of the Mexican population. “Bank loans to the private sector amounted to a paltry 24.4% of gross domestic product at the end of 2008, compared with 57.8% in Brazil, 67.7% in Chile and more than 100% in the United States and Western Europe.”⁴⁶ In the wake of interest rates averaging 15%, analysts are finding that SMEs in Mexico are continuing to rely heavily on suppliers for their financing needs.⁴⁷

According to a 2009 central bank survey, SMEs in Mexico used supplier financing for 56.7% of their credit needs compared to 26.3% reliance on bank financing.⁴⁸ Reliance upon trade and

Crédito, Diario Oficial de la Federación [D.O.], 23 de mayo de 2000 (Mex.); (ii) Decreto por el que se reforman y adicionan diversas disposiciones del Código para el Distrito Federal en Materia Común y para toda la República en Materia Federal, del Código Federal de Procedimientos Civiles, del Código de Comercio y de la Ley Federal de Protección al Consumidor, Diario Oficial de la Federación [D.O.], 29 de mayo de 2000 (Mex.); and (iii) Ley de Concursos Mercantiles Comercial y la reforma del artículo 88 de la Ley Orgánica del poder judicial de la Federación [D.O.], 12 de mayo de 2000 (Mex.). See Patrick Del Duca & Rodrigo Zamora Etcharren, *Mexico’s Secured Lending Reform*, 33 UCC L.J. 225, 227 (2000).

44. See Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio, de la Ley de Instituciones de Crédito, de la Ley del Mercado de Valores, de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, de la Ley Federal de Instituciones de Fianzas y de la Ley General de Organizaciones y Actividades Auxiliares del Crédito. Diario Oficial de la Federación [D.O.], 13 de junio de 2003 (Mex.) [hereinafter 2003 Amendments].

45. See Decreto por el que se reforman y adicionan diversas disposiciones del Código de Comercio. Diario Oficial de la Federación [D.O.], 27 de agosto de 2009 (Mex.) [hereinafter referred to as the 2009 Amendments].

46. Jonathan Kandell, *Mexican Bank Credit Becomes Harder to Find*, INST. INVESTOR, Mar. 2010, available at <http://www.institutionalinvestor.com/Article/2446428/Mexican-Bank-Credit-Becomes-Harder-To-Find.html>.

47. See *id.* Small and medium enterprises in Mexico generally called PYMEs (pequeña y mediana empresa). PYMEs are classified by type and number of employees. A small enterprise is between 11 and 50 employees in the manufacturing and service sectors, and up to 30 in the retail sector. A medium enterprise is between 51 and 250 employees in the manufacturing sector, 31 to 100 in the retail sector, and 51 to 100 in the service sector. Khrystyna Kushnir, *How Do Economies Define Micro, Small and Medium Enterprises (MSMEs)?*, INT’L FIN. CORP., [http://www.ifc.org/ifcext/gfm.nsf/AttachmentsByTitle/MSME-CI-Note/\\$FILE/MSME-CI-Note.pdf](http://www.ifc.org/ifcext/gfm.nsf/AttachmentsByTitle/MSME-CI-Note/$FILE/MSME-CI-Note.pdf) (last visited Oct. 25, 2011).

48. See Kandell, *supra* note 46. According to a 2011 paper, around 70% of Mexican

supplier credit comes at a much higher cost to the borrower. Consequently, one must ask why use of bank credit continues to be underutilized in Mexico in light of all the reforms that have taken place.

IV. THE BASICS OF MEXICAN SECURED TRANSACTION LAW

As an introduction to general principles of Mexican secured transaction law, it must first be explained that Mexico makes a distinction between commercial law and civil law.⁴⁹ The body of Mexican civil law includes not only the obvious examples such as family law and probate law, but would also include general principles of contract law and property law, while commercial law would encompass banking law, bankruptcy, insurance law and, important to this paper, secured transaction law.⁵⁰ This dichotomy is important for a number of reasons. First and foremost, Article 73, Section X of the Mexican Constitution provides that the federal government (as opposed to the individual Mexican states) has exclusive jurisdiction to legislate all commercial matters.⁵¹ While this principle was an important step towards creating uniformity in the commercial laws of the nation,⁵² even at a national level, uniformity in the secured transaction law of Mexico was not readily forthcoming. In the first instance, the creation of a “security interest” under Mexican

businesses used supplier credit, “which carries costs of 60 to 150 percent per year.” See Rodrigo Canales and Ramana Nanda, *A Darker Side to Decentralized Banks: Market Power and Credit Rationing in SME Lending* 8 (Harvard Business School, Working Paper No. 08-101, 2011).

49. See Del Duca & Etcharren, *supra* note 43, at 227.

50. See Rona R. Mears, *Contracting in Mexico: A Legal and Practical Guide to Negotiating and Drafting*, 24 ST. MARY’S L.J. 737, 741–42 (1993). Since the Mexican commercial law originates from “the law of merchants,” the distinction between the two bodies of law has its roots in what constitutes a “merchant.” See Del Duca & Etcharren, *supra* note 43, at 227. Traditionally, Mexican commercial law has applied only to a merchant (comerciantes), which is defined as one who, having the legal capacity, engages in some sort of commerce on an everyday basis. *Id.*

51. See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Diarios Oficial de la Federación [D.O.] Feb. 5, 1917 (Mex); see also ZAMORA, *supra* note 10, at 531.

52. See ZAMORA, *supra* note 10, at 532; see also Del Duca & Etcharren, *supra* note 43, at 227.

law will either be governed by the Civil Code⁵³ or the Commercial Code,⁵⁴ depending upon the nature of transaction.⁵⁵ In some cases, the civil code of the relevant Mexican state may also be applicable.⁵⁶ If the security interest constitutes a commercial pledge it will be also be governed by the Ley General de Títulos y Operaciones de Crédito (“LGTOC”).⁵⁷ A traditional pledge granted as security for a loan to finance a business enterprise will always be a commercial pledge.⁵⁸

The origins of the secured transaction system in Mexico are best explained by analyzing the traditional views of the Mexican culture towards wealth.⁵⁹ Unlike the United States, Mexico remained a fundamentally land-owning society as opposed to a “moveable property” society for a much longer period in its history.⁶⁰ Even today after the modernization of the Mexican economy, land ownership holds a premium status in credit analysis.⁶¹ Traditionally, personal property, chattels, accounts receivables and other intangible property have held significantly less value in the Mexican economy.⁶² If a Mexican national desired to obtain credit, the only source of collateral that a

53. See CÓDIGO CIVIL FEDERAL DE MEXICO [hereinafer C.C.F.], publicado en el Diario Oficial de la Federación, Mar. 12, 2000, art. 759.

54. See CÓDIGO DE COMERCIO, Nuevo Código publicado en el Diario Oficial de la Federación, Oct. 7, 1889. Última Reforma DOF Aug. 27, 2009 [hereinafter CÓD.COM.].

55. See Humberto Gayou & Robert G. Gilbert, *Legal Building Blocks for Structuring Sales in the Mexican Market*, 25 ST. MARY'S L. J. 1115, 1140 (1994); see also Del Duca & Etcharren, *supra* note 43, at 227.

56. See Del Duca & Etcharren, *supra* note 43, at 240.

57. LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO, [D.O.], Nueva Ley publicada en el Diario Oficial de la Federación, el 27 de agosto de 1932 [hereinafter L.G.T.O.C.]. See, e.g., L.G.T.O.C., Sección Segunda (*regarding la Cuenta Corriente*), el 27 de agosto de 1932; L.G.T.O.C., Sección Quinta (*regarding los Créditos de Habilitación o Avío y de los Refaccionarios*), el 27b de agosto de 1932.

58. See Carlos Enriquez Terrazas, *Moving Money Across the Border*, NAVIGATING CROSS BORDER ISSUES, State Bar of Texas, El Paso, Nov. 4–5, 2004.

59. See Kozolchyk & Furnish, *supra* note 38, at 245.

60. See John M. Wilson, *Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions* 33 U.C.C. L. J. 46, 51 (2000) [hereinafter Wilson, *Secured*]. “Once the shift from real to personal property occurred, security devices started to evolve at a rapid pace.” *Id.* at 52.

61. See Kozolchyk & Furnish, *supra* note 38, at 245.

62. See *id.*

lender would consider of any value was real property, which only the wealthy held.⁶³ As the economy of Mexico began to develop away from solely an agrarian, landowning society, the use of different types of collateral slowly evolved, and the concept of “bienes muebles” began to creep into the law.⁶⁴

The term “bienes muebles,” which means “movable property,” was intended to distinguish itself from immovable property—or real estate.⁶⁵ Without a strong tradition of personal property ownership, Mexico developed its personal property system of security by using real property concepts that have their foundations in the principles of title ownership. This foundation creates the potential for confusion. For instance, unlike the Uniform Commercial Code, Mexico has never had a clear definition of the term “collateral.”⁶⁶ The Mexican Civil Code defines “bienes muebles” as everything that is not bienes inmuebles.⁶⁷ This apparent simple dichotomy is not without confusion, however, as there has never been a unitary concept of a “security interest” under Mexican law.⁶⁸ As explained in detail below, there are several concepts that have been used in Mexico to describe the rights of a creditor who takes an interest in the personal property of a debtor to secure the repayment or

63. *See id.*

64. *See* Wilson, *Secured*, *supra* note 60, at 56. “Over the last decade, Latin American countries have begun to open their borders to foreign goods and services and to privatize state enterprises . . . this shift also creates the need for increasingly sophisticated security devices required for local businesses to compete on a [sic] equal basis with their international competitors that enjoy access to the advantages of a secured financing system.” *Id.* at 59.

65. *See* Del Duca & Etcharren, *supra* note 43, at 227.

66. U.C.C. art. 9, § 102(a)(12) (Revised 1999). All references to Article 9 of the Uniform Commercial Code, entitled “Secured Transactions” shall hereinafter be referred to as *U.C.C.* The term includes:

- (A) proceeds to which a security interest attaches;
- (B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and
- (C) goods that are the subject of consignment.

Id.

67. *See* C.C.F., *supra* note 53; *see also*, JORGE A. VARGAS, MEXICAN CIVIL CODE ANNOTATED (*Bilingual Edition*) (2009 ed.).

68. *See* Wilson, *Secured*, *supra* note 60, at 47.

performance of an obligation.⁶⁹

Another unique aspect of Mexican secured transaction law has traditionally been the requirement that the creditor have possession of the collateral.⁷⁰ The most common personal property security mechanism used in Mexico has been the “*prenda*” or pledge.⁷¹ In the United States, we typically use the term “pledge” to refer to a transaction in which the creditor must have possession of the collateral, such as a pledge of stock.⁷² Until very recently, the Mexican term “*prenda*” also referred to a transaction whereby the creditor took possession of the collateral.⁷³ The Mexican economy therefore developed other mechanisms to address the “possession” issue. Mexico has traditionally utilized many types of security devices to establish a creditor’s rights in collateral, each of which will have its own statute regulating the formalities of establishing the security interest. The security devices that have traditionally been available in Mexico include the following:

A. Guarantee Trust (fideicomiso).

The guarantee trust is utilized to secure real property and personal property.⁷⁴ Through this device, title to the collateral actually passes to the trustee for the benefit of the beneficiary. The trustee must be a bank or other statutorily authorized entity. The trustee actually manages the assets for the beneficiary and ensures the assets are properly liquidated to satisfy the obligation owed to the beneficiary in the event of a default by the borrower. The benefit of this device is that because title passes to the trustee, the collateral is no longer a part of the borrower’s estate in the event of bankruptcy, and the trustee is free to realize upon the collateral without the need to

69. See Del Duca & Etcharren, *supra* note 43, at 227.

70. See *id.* at 226.

71. See Wilson, *Secured*, *supra* note 60, at 55.

72. BLACK’S LAW DICTIONARY 1192–93 (8th ed. 2004).

73. See Del Duca & Etcharren, *supra* note 43, at 228.

74. See generally L.G.T.O.C., *supra* note 57, at CAPITULO V, Sección Primera (Del fideicomiso); see also JORGE A. GARCIA, THE MEXICAN TRUST (FIDEICOMISO) 5 (2010), available at <http://www.mdtlaw.com/upload/pages/The%20Mexican%20Trust%20Fideicomiso.pdf>.

resort to judicial process.⁷⁵ The drawback of this device is its higher cost because of the need to use a notary's deed and to pay a trustee to manage the assets.

B. Industrial Mortgage (hipoteca industrial).

Similar to a real estate mortgage, the industrial mortgage enables the borrower to provide a bank with a floating lien over all of the assets of the borrower's business.⁷⁶ Prior to 2006, this type of mortgage could generally only be used by Mexican banks and not by other private commercial lenders.⁷⁷ Accordingly, this type of security device has not been readily available to U.S. commercial banks.

C. Pledge (prenda).

The prenda takes many forms under Mexican law. The primary distinction is between the civil pledge and the commercial pledge. The Civil Code sets out the basic rules governing both pledge forms,⁷⁸ but the commercial pledge is further governed by the Code of Commerce and the General Law of Instruments and Credit Operations.⁷⁹ Historically, the civil pledge allowed for constructive delivery of the collateral through the recording of the pledge in the public registry, while the commercial pledge required that the creditor obtain physical possession of the collateral.⁸⁰ Because of the impracticality of this concept in the commercial setting, the Mexican legislature created unique forms of prendas to address the needs of the parties in specific borrowing situations.

75. See GARCIA, *supra* note 74, at 5.

76. See LEY DE INSTITUCIONES DE CREDITO, [D.O.], Jul. 18, 1990, as amended, art. 67; see also Thomas S. Heather & Martha Traudt Collins, *Secured Financing of Machinery and Equipment, Including Cross-Border Leasing and Conditional Sales Contracts*, 5 U.S.-MEX. L.J. 23, 26 (1997).

77. See BAKER & MCKENZIE, *DOING BUSINESS IN MEXICO* 68 (2d ed. 2008). In 2006, the Mexican legislature created a new entity known as the "Financial Corporation with Multiple Purpose (SOFOMES), which could also serve as the beneficiary of an industrial mortgage. *Id.*

78. See generally C.C.F., *supra* note 53, at Título Decimocuarto.

79. See L.G.T.O.C., *supra* note 57, at Sección Sexta (De la Prenda).

80. See Heather & Collins, *supra* note 76, at 25.

D. Equipment Credit (credito refaccionario).

The credito refaccionario is a security device provided to finance the operational needs of the borrower.⁸¹ This type of device allows the debtor to retain possession of the collateral provided the credit proceeds are used exclusively for the purchase or installation of machinery and equipment used in the operation of the business.⁸² It creates an automatic lien over the machinery and equipment and other assets proscribed by the borrowing purpose. It can apply to after-acquired property and can secure future advances.

E. Operating Credit (el credito de habilitación o avio).

Like the credito refaccionario, this credit device is used to finance the operating needs of a borrower, but specifically for the purchase of raw materials or the payment of wages.⁸³ It too allows the borrower to retain possession of the collateral that secures the loan, and can apply to the proceeds of the initial collateral. While both the credito refaccionario and the credito de habilitación o avio allow for the attachment of proceeds in keeping with the concept of a floating lien, neither device is similar to a U.S.-style working line of credit since the proceeds of the loan must be used for the purposes precisely specified in the security agreement.⁸⁴

F. Warehousing (bono de prenda).

Another commonly used pledge device in Mexico is warehousing, whereby documents of title such as bills of lading are pledged as security for a credit facility.⁸⁵ Through this device, possession of the warehoused collateral is constructively delivered to the secured party through the pledge and delivery of

81. See David W. Banowsky & Carlos A. Gabuardi, *Secured Credit Transactions In Mexico*, 28 INT'L LAW. 263, 12 (1994).

82. See *id.*

83. See L.G.T.O.C., *supra* note 57, at Sección Quinta (regarding *los Créditos de Habilitación o Avío y de los Refaccionarios*).

84. See Banowsky & Gabuardi, *supra* note 81, at 12–13.

85. See *id.* at 10.

the warehouse certificates.⁸⁶ By law, only the holder of the warehouse receipt is entitled to possession of the warehoused goods, thus establishing the secured party's superior rights in the collateral to secure its loan.⁸⁷ Obviously, warehousing only relates to specific property, thereby precluding the concept of a floating lien from applying.

G. Accounts Receivable Assignment (cession de creditos).

Traditionally, Mexican law did not address specifically the use of accounts receivable as a collateral device.⁸⁸ Borrowers and lenders have worked around this void by relying upon the general provisions of the Civil Code dealing with the assignment of contract rights, which provides that any right may be assigned, unless another statute expressly prohibits its assignment.⁸⁹ Use of this method requires the borrower to notify all of its account debtors of its assignment of the receivables.⁹⁰ Currently, the *prenda sin transmisión de posesión*, the *fideicomiso de garantía* both discussed below, and the industrial mortgage all allow accounts receivable to be included as a part of the collateral for these types of security devices.⁹¹

In conclusion, the U.S. lender is left with the obvious question: which security devices does the lender use? By way of example, suppose a U.S. commercial bank is evaluating a US\$1,200,000.00 loan to a Mexican manufacturing company, the proceeds of which will be used to acquire equipment for its operations. The loan will be a three-year term loan, which will be disbursed throughout the life of the loan for items of production equipment. What type of security instrument should the lender use? Prior to the establishment of the *prenda sin transmisión de posesión*, the lender's best alternative would have been the *credito refaccionario* based on the following issues:

86. *See id.*

87. *See id.* at 11.

88. *See id.* at 17.

89. *See id.* at 19.

90. *See id.*

91. *See generally* BAKER & MCKENZIE, *supra* note 77, at 67–71.

- (i) unlike commercial pledges that existed prior to the adoption of the *prenda sin transmisión de posesión*, the *credito refaccionario* would allow the borrower to maintain possession of the collateral, and
- (ii) the purpose of the loan is specifically stated to be for the purchase of equipment and the loan has a stated term.

However, in this fact scenario, the loan proceeds are to be advanced in stages as the need to acquire new items of equipment arises. This fact would require the lender using the *credito refaccionario* to re-file a security instrument describing the new equipment each time a new item of equipment was purchased with the loan proceeds, which would increase substantially the lenders' transaction costs. Today, as will be discussed below, the lender would not have this problem because of its ability to use the *prenda sin transmisión de posesión* as the preferred security device, which would afford the borrower possession of the collateral and the lender a floating lien.

Under Mexican law, all of the types of commercial transactions described above must be registered, and the registration process for all of these types of security devices also has its own set of complexities.⁹² Because all commercial transactions under Mexican law are governed by federal law, as opposed to state law, registration of these transactions is also governed by federal law. The Public Registry of Commerce (Registro Público de Comercio or "RPC") is a federal agency under the jurisdiction of the Secretaría de Economía, and is provided for in the Commercial Code.⁹³ However, there has never been a federal office where a party may search the records, nor has there been an electronic database to file and search online.⁹⁴

92. See Banowsky & Gabuardi, *supra* note 81, at 9.

93. See REGLAMENTO DEL REGISTRO PÚBLICO DE COMERCIO, [D.O.], Oct. 24, 2004 [hereinafter RPC]. For the regulations governing registration, See generally <http://www.siger.gob.mx/siger/RRPC18.htm>. The RPC is divided into three sections: (i) the registration information of all commercial entities, including the formation documents, the organizational acts, the ownership records, and the like; (ii) a record of all mortgage, debenture, secured transactions, and other related-type filings; and (iii) matters regarding bankruptcy. See Mears, *supra* note 50, at 749 (1993).

94. Mears, *supra* note 50, at 749 (explaining how Mexican registration is kept in

Although Mexico, unlike the United States, maintains single commercial registry which is applicable to the entire country, the maintenance of the system has traditionally been delegated to the states and the officials therein who oversee the Public Registry of Property in each municipality.⁹⁵ Each of the Mexican states, as well as the Federal District of Mexico, has its own Civil Code which incorporates its own local registry system for deeds and mortgages. The filing of personal property security interests, while governed by the RPC, has traditionally been managed by the local registries of the states.⁹⁶ Registration of security interests typically occurs in the debtor's domicile or where the property is located, but also depends on the nature of the collateral.⁹⁷ Once the filings have been made at the local level, the individual states feed this information to the federal centralized database.⁹⁸ The reliability of these locally managed commercial registries varies from state to state, and significant delays in obtaining searches and filings are not uncommon.⁹⁹

In general, registration must be performed by a notary public or a public commercial broker ("*corredores publicos*," who, together with notaries, are sometimes referred to as "*fedatarios*"). Unlike U.S. notaries public, who have no significant qualifications and are merely licensed by each State to attest to a person's execution of a document, the notaries public in Mexico are a select and elite group of lawyers who must engage in additional legal training in order to obtain a

three books, by different local Public Registries, which are products of local law, and thus function differently in each jurisdiction).

95. See Mears, *supra* note 50, at 748–49.

96. John E. Rogers and Ramiro Rangel, *Mexico's Unified Secured Transactions Registry Offers New Opportunities for Secured Lending*, BANKER'S ALERT (Strasburger & Price, LLP, Dallas, Tex.), Dec. 9, 2010, available at <http://www.strasburger.com/calendar/news/banking/Mexico-new-secured-transactions-registry-secured-lending.htm>.

97. See Frederick W. Hill, *Creditors' Rights in Secured Transactions Enhanced in Mexico: Recent Changes in Mexican Law Have Improved the Climate for Secured Lending*, L.A. LAWYER, Mar. 2004, at 19–20.

98. See Dale Beck Furnish, *Accommodating Registry Systems for the OAS Model Law on Secured Transactions: Mexico's New Registry Regulations and the Integral System of Registry Management (Sistema Integral de Gestión Registral or SIGER)*, 37 UCC. L.J. 3, 10 (2005).

99. See Rogers & Rangel, *supra* note 96.

license to serve in their prestigious governmentally appointed positions.¹⁰⁰ They are thereupon vested with the public faith (*fé pública*). The *fé pública* (literally, “public trust” or “public faith”) establishes that a document is legally valid and is authentic, and the notary, in carrying out his function, essentially “gives faith” (in other words, certifies for the State) to the document’s authenticity and validity, which, in general, may not be contested.¹⁰¹ Accordingly, under Mexican law, certain documents must be certified by a notary and then registered in the Public Registry to not only provide notice to third parties of their existence but more importantly to establish the validity of an agreement between the contracting parties.¹⁰² “Only after the [Registry] qualifies and inscribes a document in its official database does that document exist before the law.”¹⁰³

Given the importance of the act of notarization and registration, the cost involved with these processes should not be surprising. Because the individual states have been involved in the registration and recording process, the registration fees vary from state to state.¹⁰⁴ The same transaction in one state may have a very different filing and registration expense in another state.¹⁰⁵ The rates are typically based on the value of the collateral and vary from state to state. These fees and expenses are in addition to what the lender pays its lawyer for creating the security documents.

In addition to all of the separate statutory provisions which address the various security mechanisms, and the registry provisions,¹⁰⁶ the enforcement provisions,¹⁰⁷ judicial and

100. See Furnish, *supra* note 98, at 11, n.15.

101. See *id.*

102. See *id.*

103. *Id.* at 12. Dr. Furnish further explains that “under Mexican and Latin American legal systems, most commercial documents—including those creating security interests—are inscribed in a public registry for both constitutive *and* declarative purposes. Traditionally, the two functions both depend on public faith and go together.” *Id.* at 11, n.15.

104. See *Costs for Securing Sales*, HMH LEGAL, <http://www.hmhlegal.com/attorneyscosts.htm> (last visited Nov. 9, 2011).

105. See *id.*

106. See RPC, *supra* note 93.

107. CÓD.COM., *supra* note 54, art. 1414 *bis* 2.

extra-judicial, for the various types of security devices will be found in separate sections of the Commercial Code and the LGTOC.¹⁰⁸

It is with all these complexities in mind that the Mexican legislature has sought refinement and clarity to its various rules and statutes since the year 2000. The various steps it has taken to achieve this reform are described below.

V. EVOLUTION OF APPLICABLE LAWS

As mentioned earlier, prior to the 2000 Amendments, the traditional commercial pledge of personal property in Mexico, with few exceptions, could only be attained by physical delivery of the collateral to the creditor.¹⁰⁹ The particular goods that were the subject of the traditional pledge had to be specifically identified.¹¹⁰ There was no such thing as a “blanket lien” or a “floating lien” on assets.¹¹¹ Anytime the debtor acquired new collateral, the secured party had to establish a new pledge or amend the existing one which specifically covered the new items in order to obtain priority in the additional collateral.¹¹² In addition to specification of collateral description, the secured party also had to specify the amount of the debt which was being secured by the collateral at the time the security agreement was made.¹¹³ If the debt was increased in the future, a new security interest had to be created.¹¹⁴ Furthermore, since the creditor had actual possession of the collateral, the Commercial Code did

108. See Rogers & Rangel, *supra* note 96.

109. See Sheppard, *supra* note 41, at 147.

110. See Amauri G. Costa, *New Trends in Commercial Lending in Latin America*, FINANCIER WORLDWIDE (Mar. 2007), available at http://www.bracewellgiuliani.com/dir_docs/news_publication/92f6c03e-7442-4d7f-b0be-e0b23fe9ec0a_pdfupload.pdf.

111. See Hans P. Goebel Caviedes, *Current Techniques for Secured Financing of Negotiated Acquisitions in Mexico, Including Analysis of Effective Use of Guaranty Trusts and Pledges Without Possession*, 13 U.S.-MEX. L.J. 71, 72–73 (2005).

112. See Baker & McKenzie, *Summary of Amendments to Mexico's General Law on Negotiable Instruments and Credit Transactions Allowing the Creation of a "Non-Possessory" Pledge*, 6 NAFTA L. & BUS. REV. AM. 575 (2000) [hereinafter Baker & McKenzie, *Summary of Amendments*].

113. See Costa, *supra* note 110.

114. See *id.*

not necessarily require the secured party to register its pledge.¹¹⁵ Enforcement proceedings for commercial pledges were cumbersome and time-consuming since all foreclosures had to occur through judicial sale.¹¹⁶ There was no special summary proceeding for judicial foreclosure of the collateral, and an extrajudicial foreclosure process was largely unavailable.¹¹⁷

In 2000, Mexico took the first major step towards modernizing its secured transaction laws and amended certain provisions of the LGTOC, the result of which was the first round of sweeping changes to its secured transaction laws.¹¹⁸ In general, the 2000 Amendments (1) created two new security devices which allowed the debtor to maintain possession of the collateral; (2) broadened the scope of items that could be used as collateral; (3) allowed for general descriptions of collateral and for recognition of after-acquired property—or floating liens in inventory and accounts receivable; (4) refined the concept of the purchase money-type security interest (PMSI); (5) granted extra protections to buyers in due course; and (6) began the development of a system of centralized registration of security interests.¹¹⁹

A. *The 2000 Amendments*

1. *New Security Devices*

The most important change to the Mexican secured transaction law was to allow for the creation of a “non-possessory” pledge—a *prenda sin transmisión de*

115. See Gayou & Gilbert, *supra* note 55, at 1141.

116. See Ines Vargas Christlieb, *Enforcement of Pledge Agreements under Mexican Law*, *LATIN AM. L. & BUS. REP.* 16 (2008).

117. See *id.*

118. Del Duca & Etcharren, *supra* note 43, at 225–26. The authors explain that the 2000 Amendments were particularly significant in that they were reforms to Mexico’s commercial law. Since commercial law is governed at the federal level, as opposed to the state level, the reforms were uniformly applicable throughout Mexico. *Id.* at 227.

119. *Id.* at 225. The authors translate article 346 of the LGTOC to defined a “pledge without transfer of possession as “a property right over moveable property whose object is to guarantee the performance of an obligation and the priority of its payment, while the debtor may maintain physical possession of the property.” *Id.* at 228.

posesión.¹²⁰ Under the old law, the inability of the debtor to retain possession of the collateral severely interfered with the debtor's ability to repay the loan for which the *prenda* was given.¹²¹ By allowing the debtor to maintain possession of the collateral, the 2000 Amendments recognized the modern principle that in commercial transactions the flow of commerce is predicated on the notion that many parties in the chain of the transaction will have rights in the collateral but not necessarily title to the collateral.¹²² The non-possessory lien allows for the "mobilization" of the debtor's assets which more readily leads to "self-liquidation" of the loan.¹²³

After the 2000 Amendments, the debtor and the creditor can create a non-possessory pledge upon agreeing in writing to the following:

- (1)The location, if applicable, of where the collateral will remain;
- (2)the minimum price that the debtor is entitled to receive as a result of the sale of the collateral;
- (3)information allowing the specific identification of the person or persons to which the debtor is authorized to sell or transfer the collateral;
- (4)the destination of the proceeds obtained from such sale or transfer; and
- (5)the information that the debtor must deliver to the creditor regarding the transformation, sale, or transfer of the collateral.¹²⁴

By having possession of the pledged goods, the debtor may dispose of them through sales as part of the debtor's ordinary business activities, in contrast to the traditional commercial pledge without possession.¹²⁵ Pursuant to Article 356 of the

120. *See id.* at 226.

121. *See Baker & McKenzie, Summary of Amendments, supra* note 112, at 575.

122. *See Kozolchuk & Furnish, supra* note 38, at 247.

123. Boris Kozolchuk, *Secured Lending and Its Poverty Reduction Effect*, 42 TEX. INT'L L.J. 727, 732 (2007).

124. Baker & McKenzie, *Summary of Amendments, supra* note 112, at 575; *see also* L.G.T.O.C., *supra* note 57, art. 357.

125. *See* Jorge A. Garcia & Luis A. Unikel, *Mexico Upgrades Laws on Security Interests*, 7 INTER-AM. TRADE REP. 1815, 1819 (2000).

LGTOC, the debtor has the right to:

- (i) Use the collateral, combine it with other assets and use it for the manufacture of its products, as long as its value is not diminished and the combined and manufactured assets become part of the collateral, and are kept in the same location as the original collateral;
- (ii) Obtain and use the products of the collateral; and
- (iii) Sell the collateral, only to its current and future commercial clients, in the ordinary course of business and on an arms-length basis, in which case, the benefits derived from the sale become a part of the collateral as well.¹²⁶

If the *prenda sin transmisión de posesión* involves property valued at the equivalent of 250,000 Mexican Pesos Investment units, it must be notarized.¹²⁷ Additionally, in order to maintain priority against third parties, it must be recorded in the Public Registry.¹²⁸ Once it is properly created and registered, the secured creditor has priority in the blanket property over all other unregistered and subsequently created pledges, with the exception of those derived from labor claims.¹²⁹

Upon satisfying its technical requirements, the *prenda sin transmisión de posesión* creates rights *in rem* for the benefit of creditors.¹³⁰ Therefore, according to Article 13 of the Mexican Federal Civil Code, the pledge agreement must be governed under Mexican law, since recognition of a foreign judgment based on foreign law whose subject matter is the creation of real property rights over assets located in Mexico will not be honored by a Mexican court.¹³¹

In addition to the *prenda sin transmisión de posesión*, the 2000 Amendments added another method of creating a security interest in the form of the “guaranty trust” or the *fideicomiso de*

126. L.G.T.O.C., *supra* note 57, art. 356.

127. Baker & McKenzie, *Summary of Amendments*, *supra* note 112, at 576; *see also* Garcia & Unikel, *supra* note 125, at 1820.

128. Baker & McKenzie, *Summary of Amendments*, *supra* note 112, at 576.

129. *See id.*

130. L.G.T.O.C., *supra* note 57, art. 346.

131. C.C.F., *supra* note 53, art. 13 III.

garantía.¹³² The concept of the *fideicomiso* was not a new one under Mexican law and was being widely used primarily in real property transactions.¹³³ Whereas the *prenda sin transmisión de posesión* allows for the pledge of personal property only, the new *fideicomiso de garantía* allows for the use of personal property to guaranty the debtor's performance on an obligation in addition to real property.¹³⁴ "Under the guaranty trust agreement, the debtor grants a security interest in favor of the secured party. Title to the collateral is transferred to a 'trustee,' which under Mexican law has to be a Mexican banking institution or surety institution, naming creditor as beneficiary of the trust."¹³⁵ The legal term of the guaranty trust is of 30 years.¹³⁶ "The same *fideicomiso* can be used serially for obligations to different creditors, i.e. its beneficiaries may change."¹³⁷ Like the *prenda sin transmisión de posesión*, the debtor has the advantage of use of the collateral prior to full repayment of the debt, even though title to the collateral is held by a third party for the benefit of the creditor. The *fideicomiso de garantía* has the added benefit of allowing the creditor, upon an event of default by the debtor, to instruct the trustee to dispose of or otherwise use the collateral covered by the trust.¹³⁸ Consequently, through use of the guaranty trust, the secured party may be able to cause the sale of the collateral by extrajudicial measures, subject to certain defenses available to the debtor.¹³⁹

132. L.G.T.O.C., *supra* note 57, art. 395.

133. Del Duca & Etcharren, *supra* note 43, at 230. The authors state that the *fideicomiso* has been used to, among other things, provide security interests in real property and to allow foreign investors to hold interests in real property along the Mexican border and coast. *Id.*

134. *Id.* at 229.

135. See Terrazas, *supra* note 58; see also Del Duca & Etcharren, *supra* note 43, at 229.

136. See Del Duca & Etcharren, *supra* note 43, at 230. The 2003 Amendments changed term from 30 to 50 years. See 2003 Amendments, *supra* note 44, art. 394.

137. Del Duca & Etcharren, *supra* note 43, at 229; see also L.G.T.O.C., *supra* note 57, art. 398.

138. See Del Duca & Etcharren, *supra* note 43, at 230.

139. See *id.*

2. *Broadening the Scope of Collateral*

Traditional underdeveloped secured transaction laws often restrict security interests to property that currently exists. However, “[t]he essence of economic activity lies in transforming that which exists . . . into that which does not yet exist.”¹⁴⁰ In order to achieve this economic transformation, the business enterprise needs to support its business activity with working capital, and the creditor must be willing to “bet” on the future production.¹⁴¹ Another fundamental principle of modern secured transaction law is that there is potential value in many different kinds of personal property, tangible and intangible, presently existing or acquired in the future, and the debtor should be able to create a security interest in all such property.¹⁴²

Consequently, an effective security system must enable the debtor and the secured party to accomplish this objective. Recognizing these limitations in its system, Mexico through the 2000 Amendments broadened the scope of the collateral to provide for blanket liens,¹⁴³ allowing collateral to be identified generically.¹⁴⁴ The following assets and rights may be subject to the *prenda sin transmisión de posesión*:¹⁴⁵

- (i) All rights and assets currently owned by the debtor in Mexico;
- (ii) All such rights and movable assets, acquired by the debtor in Mexico after the date of the Pledge;
- (iii) All assets considered to be products of (i) and (ii) above;
- (iv) All assets obtained as a result of the transformation of the assets mentioned above; and

140. HEYWOOD FLEISIG, MEHNAZ SAFAVIAN, & NURIA DE LA PEÑA, REFORMING COLLATERAL TO EXPAND ACCESS TO FINANCE 29 (The World Bank 2006), available at <http://www-wds.worldbank.org> (Search “37096” in “Search / Browse (more than 110,000 Bank documents online)”).

141. See *id.*

142. See National Law Center for Inter-American Free Trade, *12 Principles of Secured Transactions Law in the Americas*, Principle 3 (2006), available at <http://www.natlaw.com/bci9.pdf>. [hereinafter NLCIFT *Principles*].

143. See Garcia & Unikel, *supra* note 125, at 1819.

144. See *id.*

145. L.G.T.O.C., *supra* note 57, art. 355.

- (v) All of the rights and assets that the debtor receives or that it has a right to receive as payment for the sale to third parties of the pledged assets or as indemnification in the event of damages or losses of such assets.¹⁴⁶

The 2000 Amendments also allowed for the pledge of after-acquired property by allowing the secured party to include future property in the general description of the collateral.¹⁴⁷ This amendment changed Mexico's antiquated method of requiring specific identification of each item pledged.¹⁴⁸ The pledged assets still must be specifically identified in certain instances, unless all assets used by the debtor for carrying out its business are being pledged.¹⁴⁹

3. *Changes to the Purchase Money Security Interest*

The 2000 Amendments also allowed the debtor who had already granted a non-possessory lien in its blanket collateral to create purchase money security interests (PMSI) to future creditors who could claim priority provided its collateral was specifically identified.¹⁵⁰ While the Mexican regulations do not use the term "purchase money security interest," the regulation states that notwithstanding the debtor's creation of a lien over all of its assets through a *prenda sin transmisión de posesión*, the debtor may grant a security interest to another creditor who will have priority over the first creditor if the latter has provided funds for the debtor's purchase of specifically identifiable goods.¹⁵¹ This new development comports with the modern principle that a PMSI should take priority over previously

146. *Id.*

147. See Wilson, *Mexico*, *supra* note 40, at 1815–16. Wilson explains that prior to the 2000 Amendments generic descriptions were allowed exclusively for blanket liens. Just days before the 2000 Amendments passed the Mexican Congress still had a requirement for specific collateral descriptions in all other circumstances. At the eleventh hour, while the term "specific" was removed from the regulations concerning creation of the lien, it was not removed from all complementary regulations, including those requiring specificity of the collateral to bring an enforcement action. *Id.* at 1816.

148. Garcia & Unikel, *supra* note 125, at 1819.

149. L.G.T.C.O., *supra* note 57, art. 354.

150. See *id.* art. 358.

151. *Id.*

perfected blanket security interests “as an incentive to those wishing to provide timely, valuable and needed loans and as a safeguard against the monopolization and immobilization of the collateral available by one or more secured creditors.”¹⁵²

4. *Sales of the Collateral in Due Course*

Another change brought about by the 2000 Amendments was the additional protections for buyers in the “ordinary course” by allowing them to take free of a non-possessory secured party’s lien if the buyer purchases the goods from the debtor in the course of the debtor doing business.¹⁵³ The buyer need not give new consideration for the goods, and the law does not restrict the amount of goods the buyer may purchase.¹⁵⁴ The debtor must, however, obtain the creditor’s consent to sell the collateral to certain “affiliated” parties.¹⁵⁵

5. *Changes to Registration*

Hand-in-hand with the goal of mobilizing assets in the economy, effective public notice of the creditor’s lien is a significant objective of an efficient secured transaction system.¹⁵⁶ The UNCITRAL Legislative Guide on Secured Transactions¹⁵⁷ outlines that the purpose of a registry system is to provide:¹⁵⁸

- (a) A method by which an existing or future security right in a grantor’s existing or future assets may be

152. NLCIFT *Principles*, *supra* note 142, Principle 8.

153. Wilson, *Mexico*, *supra* note 40, at 1817.

154. *Id.*

155. See Baker & McKenzie, *Summary of Amendments*, *supra* note 112, at 577 (“The debtor is required to obtain authorization from the creditor to sell the collateral, even in the ordinary course of business, to any of the following: (1) individuals or companies who hold more than 5% of the capital stock of the debtor; (2) members of the board of directors of the debtor or their replacements; and (3) spouses and family relatives (including in-laws) within the second degree of kinship with the individuals referred to in sections (1) and (2).”)

156. U.N. COMM. ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS: TERMINOLOGY AND RECOMMENDATIONS, at 1, 17–18, 25 U.N. Sales No. E.09.V.13 (2009) [hereinafter UNCITRAL].

157. *Id.*

158. *Id.*

made effective against third parties;

- (b) An efficient point of reference for priority rules based on the time of registration of a notice with respect to a security right; and
- (c) An objective source of information for third parties dealing with a grantor's assets (such as prospective secured creditors and buyers, judgment creditors and the grantor's insolvency representative) as to whether the assets may be encumbered by a security right.¹⁵⁹

To this end, most legal scholars would agree that such a system should entail a registry which is central in nature, accessible electronically, inexpensive to use, and uses streamlined, standardized forms for filing.¹⁶⁰

The 2000 Amendments to Mexico's secured transaction laws introduced these elements into Mexico's system.¹⁶¹ On May 29, 2000, the Mexican legislature enacted a Commercial Registry Law (CRL) in order to institute electronic filings coordinated on a national level.¹⁶² As mentioned above, prior to the amendments, the Mexican states were responsible for their own filing systems.¹⁶³ The different state systems were not linked in any fashion and were often in conflict with each other.¹⁶⁴ The 2000 Amendments attempted to maintain the filing systems at the state level, but link each state's database to a federal database which would contain a record of all filings.¹⁶⁵ The result of the legislation was the creation of the Integral System of Registry Management (Sistema Integral de Gestión Registral, or SIGER).¹⁶⁶ Through the use of SIGER, parties could now access the federal registry electronically, using a

159. *Id.* at 25.

160. *Id.*; NLCIFT *Principles*, *supra* note 142, Principle 7.

161. *See* Wilson, *Mexico*, *supra* note 40, at 1818.

162. *See* Alejandro Lopez-Velarde & John M. Wilson, *A Practical Point-by-Point Comparison of Secured Transactions Law in the United States and Mexico*, 36 U.C.C. L.J. 3, 50 (2004).

163. Wilson, *Mexico*, *supra* note 40, at 1818.

164. *Id.*

165. *Id.*

166. *See generally* SIGER, <http://www.siger.gob.mx/> (lasted visited Jan. 29, 2011); *see generally* RPC, *supra* note 93.

pre-codified filing form. Fedatarios were still responsible for the filing process, but searches could now be conducted by other interested parties throughout the world.¹⁶⁷

In addition to the move towards a more centralized database, the new Registry Regs moved the Mexican secured transaction filing system from a “transactional filing system” to a “notice system.”¹⁶⁸ Prior to the 2000 Amendments, whole security agreements were required to be filed, which described in detail not only the collateral but the rights of the parties and were quite cumbersome to file.¹⁶⁹ With the creation of the pre-codified form for filing, which contained only essential information about the collateral, the parties and the debt, the filing process was moving towards one only requiring information sufficient for notice.¹⁷⁰ As originally enacted, the pre-codified form applied only to the *prenda sin transmisión de posesión*, and was accompanied by a copy of the underlying agreement, but this step paved the way for future reforms with the implementation of the RUG.¹⁷¹

Another important aspect of the new Registry Regs was the presumption of validity that accompanied the filings. Prior to the enactment of the Registry Regs, all filings were scrutinized by the filing officers to determine whether their content conformed to the requirements of the law, which was cumbersome and time consuming in the perfection process. The new regulations, however, provided as follows:

The transmission of the pre-codified form to the Registry presumes that the provider of public faith shall have previously ascertained that all elements required for the validity of the act to be inscribed have been accredited, and that he has under his custody the original document as well as the documentation to certify compliance with all requisites thereto.¹⁷²

Accordingly, under the new Registry Regs the task of the

167. Furnish, *supra* note 98, at 13–14.

168. Wilson, *Mexico*, *supra* note 40, at 1818.

169. *Id.*; Furnish, *supra* note 98, at 14–16.

170. Furnish, *supra* note 98, at 14–17.

171. *Id.*

172. *Id.* at 16 (citing Registry Reg. § 6 (I)).

filer of the pre-codified form was to receipt the filing and assign a control number to the filing to establish the priority.¹⁷³ The filer's task did not include analyzing the underlying document. Again, this was further evidence of a move by the Mexican government to a registry system that functioned more akin to notice system.¹⁷⁴

6. *Rights of the Creditor Upon Default*

A creditor has three years from the time its debt becomes due during which to pursue its rights against the collateral under a *prenda sin transmisión de posesión* or a *fideicomiso de garantía*.¹⁷⁵ In this regard, the 2000 Amendments provided for a form of extrajudicial foreclosure of the collateral, provided the debtor consented to such procedures.¹⁷⁶ As will be discussed below, however, the extrajudicial foreclosure procedure included many technical steps for the creditor to follow.¹⁷⁷ Furthermore, if there was any controversy regarding the amount of the debt or the delivery of the collateral to the creditor, then the matter falls out of the extrajudicial process and into a judicial proceeding.¹⁷⁸ If the extrajudicial procedure was unavailable to the creditor, the 2000 Amendments still afforded the creditor with a summary judicial procedure.¹⁷⁹ Under the new rules, once the creditor met the formalities for filing a motion, the court must act on its motion within two days.¹⁸⁰ If the judge found that the creditor's claim was in order, it must require the debtor to either pay the claim or deliver the collateral to the creditor.¹⁸¹ The new laws also allowed the judge to serve the debtor at the same time as requiring the debtor to pay or deliver the collateral. This act

173. *Id.* at 18.

174. *See id.* at 18–19.

175. Garcia & Unikel, *supra* note 125, at 1820; Del Duca & Etcharren, *supra* note 43, at 244.

176. 2000 Amendments, *supra* note 43, art. 1414 *bis* 3; BAKER & MCKENZIE, *supra* note 77, at 577; Lopez-Velarde & Wilson, *supra* note 162, at 59.

177. Lopez-Velarde & Wilson, *supra* note 162, at 59–64.

178. Del Duca & Etcharren, *supra* note 43, at 245.

179. 2000 Amendments, *supra* note 43, art. 1414 *bis* 8.

180. Del Duca & Etcharren, *supra* note 43, at 246–47.

181. 2000 Amendments, *supra* note 43, art. 1414 *bis* 8.

forced the debtor to appear before the court on a shorter timetable and provide its defenses if it did not pay or deliver the collateral.¹⁸²

An unfortunate addition of the 2000 Amendments, however, was a provision that stated if the realization of the collateral did not cover the amount stipulated as due and owing to the creditor, the creditor could not assert a claim against the debtor for the amount of the deficiency.¹⁸³ This provision could not be contractually waived by the debtor.¹⁸⁴

As a result of the last mentioned provision, the 2000 Amendments were not seen by creditors as a positive improvement to their secured transaction rights.¹⁸⁵ Creditors who feared they would undervalue the collateral upon a default and not be able to sue the debtor for the deficiency saw little value in the 2000 Amendments.¹⁸⁶ Additionally, while the 2000 Amendments adopted the concept of extrajudicial foreclosure for the *prenda sin transmisión de posesión* and the *fideicomiso de garantía* in theory, the new rules included so many safeguards to protect the debtor's due process rights that no creditor, especially in light of the no deficiency rule, would ever attempt to resort to extrajudicial measures.¹⁸⁷ First, the law required that in order for the creditor to retake the collateral, there must be no dispute among the debtor and the creditor with respect to the amount or the maturity of underlying debt.¹⁸⁸ In fact, the creditor must request the debtor to turn over the goods and the debtor must willingly do so.¹⁸⁹ Additionally, if the value of the collateral had not been established at the time of the execution of the security agreement, the parties must engage in an

182. *Id.*; Lopez-Velarde & Wilson, *supra* note 162, at 62.

183. 2000 Amendments, *supra* note 43, art. 1414 *bis* 17 (providing that in the case of real estate only, a creditor may not continue to pursue a debt claim if more than 50% is recovered from the sale of the collateral).

184. Garcia & Unikel, *supra* note 125, at 1820.

185. Lopez-Velarde & Wilson, *supra* note 162, at 64.

186. *See id.* at 60.

187. *Id.*

188. *Id.*

189. *Id.*

appraisal process prior to a foreclosure sale.¹⁹⁰

If the creditor is able to satisfy each of these requirements, it must then engage a notary public to certify the creditor's repossession of the collateral and to describe in detail the goods in the secured party's possession.¹⁹¹ Accordingly, the process remained cumbersome and expensive for the creditor.

B. *The 2003 Amendments*

The impetus for the 2003 Amendments was the elimination of the provision that disallowed the creditor to assert rights to a deficiency.¹⁹² While the 2003 Amendments removed the provisions from the law that disallowed creditors to sue for a deficiency, the new rules did not change the 2000 Amendment procedures. Additionally, while the 2003 revisions made efforts to revise extrajudicial foreclosure mechanisms, such efforts did not sufficiently afford creditors the assurances that any such extrajudicial actions would pass constitutional due process muster or would prove to be expeditious.¹⁹³

In sum, the 2003 Amendments, other than eliminating the no deficiency provision, did very little to clear away these hurdles to extrajudicial foreclosure. In fact, it kept those obstacles in place, but curiously, it adopted a completely new law that allowed the parties to a *fideicomiso de garantía* (but not the *prenda sin transmisión de posesión*) to contractually agree to allow the creditor to retake and liquidate the collateral upon a default by the debtor.¹⁹⁴ Under this new law, the parties must set out in a separate provision in the *fideicomiso* the details of the creditor's repossession rights, which must be separately signed by the debtor (in addition to the debtor's signature to the complete *fideicomiso*).¹⁹⁵ Upon a default, the creditor must then inform the trustee of the debtor's default and request that the

190. *Id.*

191. Kozolchyk & Furnish, *supra* note 38, at 297–98.

192. *See* Caviedes, *supra* note 111, at 73.

193. Kozolchyk & Furnish, *supra* note 38, at 297.

194. *See id.* at 298.

195. *See id.*

trustee initiate foreclosure procedures.¹⁹⁶ The trustee then must provide the debtor with written notice and a copy of the creditor's request.¹⁹⁷ The debtor's only recourse is to pay off the debt or establish that he is not in default or that the *fideicomiso* does not authorize the creditor to extrajudicially foreclose on the collateral.

Absent one of these defenses, the trustee may foreclose on the property.¹⁹⁸ The 2003 Amendments added the word "transfer" to the definition of the *fideicomiso*, which had the effect of establishing the *fideicomiso* as a "true sale."¹⁹⁹ This strengthened the protection of the guaranty trust assets upon bankruptcy since the assets would no longer be deemed to be a part of the debtor's estate.²⁰⁰ For many creditors and Mexican practitioners, the strength of creditor protections upon default and the ease with which they can pursue their rights against the collateral are strong motivating factors for using the *fideicomiso de garantía* in lieu of a *prenda* provided the size of the loan can justify the additional transaction costs involved with the *fideicomiso de garantía*.²⁰¹

C. *The 2009 Amendments*

On August 27, 2009, in an effort to improve the federal registry system, Mexico adopted new provisions to its Commercial Code under Article 32 *bis*.²⁰² The preamble to the new law states that the goals of the reform are to strengthen the secured transaction system in Mexico to create better access to credit, increase the use of movable property as collateral in credit transactions, to provide more transparency and clarity with respect to priority issues among creditor.²⁰³ The law

196. *See id.*

197. *See id.*

198. *See id.*

199. *See* Caviedes, *supra* note 111, at 73.

200. *See id.*

201. *See id.* at 74.

202. Published in the D.O.F. on August 27, 2009, available at http://www.diputados.gob.mx/LeyesBiblio/ref/ccom/CCom_ref42_27ago09.pdf; *See* 2009 Amendments, *supra* note 45.

203. *See* 2009 Amendments, *supra* note 45.

attempts to create a unified electronic central registry system covering all secured transactions in Mexico through the development of a new registry called the Registro Único de Garantías Mobiliarias or the “RUG.”²⁰⁴ The RUG will be a supplement to the existing RPC. It does not attempt to exclude its coverage to just the *prenda sin transmisión de posesión* or the *fideicomiso de garantía*. In furtherance of this goal, the Mexican legislature uses the generic term “garantías mobiliarias” to establish the scope of the new registry laws and does not specifically refer to *prendas*, *fideicomisos* or other types of mechanisms.²⁰⁵ The 2009 Amendments did not define the term “*garantía mobiliaria*,” although the regulations that followed in 2010 did include a definition.²⁰⁶ The term is used throughout Latin America to refer to security interests. The *Model Inter-American Law on Secured Transactions* defines “garantías mobiliarias” to mean security interests that are created:

over one or several specific items of movable property, on generic categories of movable property, or on all of the secured debtor’s movable property, whether present or future, corporeal or incorporeal, susceptible to pecuniary valuation at the time of creation or thereafter, with the objective of securing the fulfillment of one or more present or future obligations regardless of the form of the transaction and regardless of whether ownership of the property is held by the secured creditor or the secured debtor.²⁰⁷

The new Article 32 *bis* does state that the security interests

204. *See id.* art. 32, *bis* 2.

205. *See id.* art. 32, *bis* 1.

206. Published in the D.O.F. on Sept. 23, 2010, available at <http://decMexico.com/files/como-hacer-negocios/mexico/DOF-LEYSDCYFI-14.pdf>; see ARTICULO ÚNICO, Art. 10 (which defines a Garantía Mobiliaria as follows: Es el efecto de un acto jurídico mercantil por medio del cual se constituye, modifica, transmite o cancela una garantía o un privilegio especial o un derecho de retención en favor del Acreedor, sobre un bien o conjunto de bienes muebles, para garantizar el cumplimiento de una obligación).

207. Adopted by the Sixth Inter-American Specialized Conference on Private International Law on Feb. 8, 2002 [hereinafter OAS Model], Art. 2, available at <http://www.natlaw.com>.

included under the law are those that, by their nature, arise from commercial legal acts through which a special privilege or lien on property is created in favor of third parties.²⁰⁸ The law also states that all security interests to be filed with the Registry will be presumed to be commercial interests, which are the only interests covered by the Single Registry Law.²⁰⁹ Accordingly, the RUG's use of the term "*garantía mobiliaria*" is important not merely because it clarifies that all of Mexico's security devices are to be registered in the future under the RUG, but also because it is symbolic of Mexico's push towards a single security device concept.

The 2009 Amendment gave the Ministry of the Economy one year to establish the guidelines and mechanisms for processing the electronic filings and to create the new website.²¹⁰ Those guidelines were published on September 23, 2010,²¹¹ when the website became operational.²¹² The regulations clarify many of the questions left open by the 2009 Amendments. In particular, it unequivocally states that the RUG is to cover all forms of security instruments.²¹³ It also outlined the types of moveable property that may be covered by a "*garantía mobiliaria*."²¹⁴

208. See 2009 Amendments, *supra* note 45.

209. See *id.*

210. See *id.*

211. Published in the D.O.F. on September 23, 2010 [hereinafter RUG Regs], available at <http://decMexico.com/files/como-hacer-negocios/mexico/DOF-LEYSDCYFI-14.pdf>.

212. See *id.*

213. See *id.*, art. 32.A.A. Las Garantías Mobiliarias se clasifican en:

- I. Prenda sin transmisión de posesión;
- II. La derivada de un crédito refaccionario o de habilitación o avío;
- III. La derivada de una hipoteca industrial;
- IV. La constituida sobre una aeronave o embarcación;
- V. La derivada de un arrendamiento financiero;
- VI. Cláusula de reserva de dominio en una compraventa mercantil de bienes muebles que sean susceptibles de identificarse de manera indubitable, y
- VII. La derivada de un fideicomiso de garantía, derechos de retención, y otros privilegios especiales conforme al Código de Comercio o las demás leyes mercantiles.

Id.

214. See *id.* art. 32B. Los bienes muebles que pueden ser objeto de una Garantía

Through the RUG, any party may register to gain access to the system to conduct a search; however, parties with authority to conduct filings are still generally limited to fedatarios.²¹⁵ The website has an extensive and helpful user guide, which leads the user through the electronic filing process.²¹⁶ The filing of a security interest is completed by inputting the relevant information in the electronic form on the website. Including:

- (1) name and other relevant information regarding the user;
- (2) description of the collateral;
- (3) type of security device being used (*prendas, fideicomisos, etc.*);
- (4) date of the security agreement;
- (5) amount of the underlying obligation;
- (6) a description of the public record acknowledged by the relevant fedatario; and
- (7) the length of time the filing is to remain effective.²¹⁷

While this information is more extensive than that required by a UCC financing statement in the United States, the new registry system is still more streamlined than past requirements.²¹⁸ To date, there is no cost to conduct an online

Mobiliaria se clasifican de la siguiente manera:

- I. Maquinaria y equipo;
- II. Vehículos de motor;
- III. Ganado;
- IV. Productos agrícolas;
- V. Bienes de consumo;
- VI. Inventario;
- VII. Acciones y obligaciones, bonos, contratos de opción y futuros;
- VIII. Derechos, incluyendo derechos de cobro, y
- IX. Otros.

Id.

215. See RUG Regs, *supra* note 211, qrt. 10 *bis*. Institutional creditors can also gain access if they satisfy the technical requirements of the system to use the electronic signature apparatus. See Rogers & Rangel, *supra* note 96.

216. See <http://www.rug.gob.mx/Rug/resources/pdf/guia%20de%20usuario/Manual%20de%20Usuario%20RUG.pdf> [hereinafter User Guide].

217. See RUG Regs, *supra* note 211, art. 33 *bis* 2.

218. *Id.*

search under the RUG nor is there any indication of the fees that will be charged for the filings.

VI. ANALYSIS OF MEXICO'S SECURED TRANSACTION SYSTEM

Ultimately, the evolution of Mexico's secured transaction system reflects its struggle towards "better practices" in the face of what many considered to be major obstacles derived from Mexico's cultural heritage.²¹⁹ The International Finance Corporation (IFC) Toolkit operates under the premise that creation of an effective secured transaction system must begin within the confines of the pre-existing legal system and traditions of a country, but certain of these traditions should not get in the way of establishing certain core principles of a modern secured transaction system.²²⁰ These "core principles" for the development of a secured transaction system have their roots in many bodies of works.

First, there is the United Nations Convention on International Trade Law (UNCITRAL) and its work involving secured transactions.²²¹ The World Bank has also been influential in establishing a framework for developing modern secured transaction systems in emerging markets.²²² Second, in January 2010, the IFC published a comprehensive "toolkit" "to provide advice and guidance to World Bank group staff, donor institutions, government officials and other practitioners on the implementation of secured transaction law and institutional reforms in emerging market countries."²²³ Third, the Uniform Commercial Code adopted in the United States to which Mexico can look for guidance,²²⁴ but more importantly to Mexico, there are the rules, concepts and principles of interpretation found in the OAS Model Law on Secured Transactions, which was completed in 2002, and since that time has been adopted by

219. See *supra* Part II for a description of this cultural heritage.

220. See IFC TOOLKIT, *supra* note 5, at 18.

221. See generally UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), *Legislative Guide on Secured Transactions* (2008).

222. *Id.*

223. IFC TOOLKIT, *supra* note 5, at 13.

224. See generally U.C.C., *supra* note 66.

Mexico's neighbors to the south, Guatemala and Honduras.²²⁵

Finally, partnering with the work conducted by the OAS on the "*Ley Modelo Interamericana sobre Garantias Mobiliarias*" is the ongoing projects by the National Law Center for Inter-American Trade (NLCIFT). During its ten years of work throughout Latin America, NLCIFT has developed 12 Principles of Secured Transactions Laws in the Americas as the core for assisting nations such as Mexico in establishing modern and harmonized secured transaction systems.²²⁶ It is against these bodies of works that we can measure the successes and shortcomings of Mexico's reforms to date.

Inherent in each of the models set forth above are the basic concepts required of any successful secured transaction system. These concepts can be summarized as follows:

- (1) A "simple" system of creating a "security interest" and determining priority among competing liens;
- (2) A system by which future collateral and future debt obligations of the debtor may be covered by the existing "security interest;"
- (3) An ability of the debtor to acquire new credit for future needs and for the creditors of such loans to obtain priority security interests notwithstanding the existence of pre-existing perfected liens;
- (4) Protection of buyers in the ordinary course of the debtor's business;
- (5) A registration system that is notice-based, easily accessible and uniform in its procedures; and
- (6) An ability for the creditor to readily realize upon its collateral in the event of default.²²⁷

Consequently, it is with these principles in hand that we analyze the changes in Mexico's secured transaction laws.

A. A "Simple" Security System

First and foremost in importance to any effective secured transaction system is the ability to create a security interest

225. See generally OAS Model, *supra* note 207.

226. See generally U.C.C., *supra* note 66.

227. See Lopez-Velarde & Wilson, *supra* note 162, at 6.

with ease and confidence.²²⁸ Clearly, if the process is cumbersome and difficult to undertake, the mechanism becomes an obstacle to lending. Ideally, the simplest system is one by which a single type of security device exists, with one method by which such security device is created and perfected.²²⁹ Accordingly, Article 9 utilizes a unitary concept of a security device to establish the secured transaction system in the United States.²³⁰ A “security interest” is simply defined as an interest in personal property or fixtures which secures payment or performance of an obligation.²³¹ In respect of this goal, Mexico’s reforms have fallen short. Mexico’s secured transaction system continues to consist of a myriad of security devices from possessory and non-possessory pledges, conditional sales, guaranty trusts, leases, and a host of other mechanisms.²³² The reforms did not eliminate any of the previously existing devices, but rather added new ones to the system, thereby complicating and confusing the system even further.²³³

However, as mentioned earlier, the United States system was also once plagued by multiple devices which had to be discarded for true innovation to be achieved.²³⁴ In recognition of the difficulty many other emerging countries will have in discarding traditional security devices, modern theorists have proposed that if a unitary security mechanism is impractical to achieve, reform should come in the form of unitary treatment of all forms of security devices.²³⁵ Accordingly, the OAS Model states that the main objective of the law is to create a “unitary and uniform” system “applicable to all existing movable property security mechanisms in the local legal framework.”²³⁶ Likewise,

228. *See id.*

229. *See* Boris Kozolchik, *What to Do About Mexico’s Antiquated Secured Financing Law*, 12 ARIZ. J. INT’L & COMP. L. 523, 532 (1995).

230. *See* U.C.C. *supra* note 66, art. 9 § 109(a)(1).

231. *See* U.C.C. *supra* note 66, art. 9 § 201(37).

232. *See* Wilson, *Secured*, *supra* note 60, at 60, *citing* Dale E. Furnish, *Mexican Law on Secured Transactions*, in *DOING BUSINESS IN MEXICO* § 37.01 (SMU ed., 1987).

233. *See* Kozolchik & Furnish, *supra* note 38, at 282.

234. *See id.* at 249.

235. *See* IFC TOOLKIT, *supra* note 5, at 40.

236. OAS Model, *supra* note 207, art. 1.

UNICTRAL's recommendation for a uniform system states that "[a] secured transaction law should apply to all rights in movable assets created by agreement that secure payment or other performance of an obligation, regardless of the form of the transaction, the type of the movable asset, the status of the grantor or secured creditor or the nature of the secured obligation."²³⁷

B. Future Collateral and Future Debt

An effective and efficiently functioning secured financing system must also:

- (i) allow for the debtor to have use and possession of the collateral in the operation of its business in order for the obligations secured thereby to be self-liquidating,
- (ii) encompass the proceeds from the original collateral that arise from the debtor's use of the original collateral in order to protect the secured creditor who originally funded the operation,
- (iii) cover property acquired by the debtor after the creation and registration of the security interest registration so that the debtor is free to use the original collateral in the operation of its business and create new revenues and new collateral (all generated from the fruits of the original loan and security interest made by the secured party), and
- (iv) allow for the existing security interest to cover further advances of credit made by the secured party on behalf of the debtor that may arise in the context of future operations of the debtor's business.²³⁸

All of these principles necessarily require a secured transaction system that allows the parties to use generic descriptions of the collateral in its filings which trump future filings made by creditors of the debtor.²³⁹ These principles

237. IFC TOOLKIT, *supra* note 5, at 40 (citing UNCITRAL's Recommendations for the Scope of a Secured Transactions Law).

238. See Lopez-Velarde & Wilson, *supra* note 162, at 18.

239. See *id.* at 17; Kozolchyk & Furnish, *supra* note 38, at 272–73.

require a flexible secured transaction system that allows the debtor to maintain possession of the collateral, and the creditor to create a security interest in generically described assets of the debtor that include proceeds from the original collateral and any collateral that the debtor acquires in the future, after the security interest has been created and perfected.²⁴⁰ Since the collateral to be acquired in the future will not be known at the time the security interest is created and perfected, the concept of securing after-acquired property necessarily requires that the filing upon which such after-acquired property relates be a generic description of the collateral.²⁴¹ Both the OAS Model and the UCC provide for all of these principles.²⁴²

As described above, prior to enactment of the new regulations, Mexico did not recognize any of these principles as a part of its secured transaction system.²⁴³ With the creation of the *prenda sin transmisión de posesión* and the *fideicomiso de garantía*, Mexico's secured transaction system now encompasses all of these concepts.²⁴⁴ Notwithstanding the foregoing, the new regulations still create some doubt as to when a general description of the collateral and the obligation secured thereby are permitted and when specific descriptions of the collateral and the secured obligation are required.²⁴⁵ As discussed below, the new regulations also leave in question what constitutes the "preponderant activity" of a debtor, the concept which allows the creditor to use a generic description of the collateral being pledged.²⁴⁶

C. *Purchase Money Security Interests*

A fundamental goal of modern secured transaction systems is to afford the debtor the flexibility of obtaining credit from multiple sources.²⁴⁷ Consequently, one method of achieving this

240. See IFC TOOLKIT, *supra* note 5, at 20.

241. See Lopez-Velarde & Wilson, *supra* note 162, at 16.

242. See generally OAS Model, *supra* note 207, art. 2; U.C.C. §§ 9-204–05 (2009).

243. See Lopez-Velarde & Wilson, *supra* note 162, at 22–23, 26, 31.

244. See *id.* at 65.

245. See *id.* at 20.

246. *Id.* at 37; L.G.T.O.C., *supra* note 57, art. 354.

247. See IFC TOOLKIT, *supra* note 5, at 45.

objective has been to allow for a purchase money security interest to create an exception to the “first to file” principle of perfection.²⁴⁸

A purchase money security interest (hereinafter: PMSI) is a security interest in goods that are purchased with the credit advanced by the creditor. A PMSI has priority over an earlier-registered security interest, provided that notice of the PMSI is registered before or within a brief period specified by the law . . . after the debtor obtains possession of the collateral.²⁴⁹

The OAS Model Code states that “[a] purchase money security interest must be publicized by the filing of a registration form that refers to the special priority character of this security interest and that describes the collateral by category without the need for a detailed description.”²⁵⁰ Because of the unique nature of inventory as collateral, however, the UCC only allows a PMSI creditor to trump an existing perfected lien in inventory when the PMSI creditor gives notice to the pre-existing creditor and the PMSI inventory is adequately defined.²⁵¹

Under the new regulations, Mexico also recognizes a PMSI-type concept in specifically described collateral which may be covered by a pre-existing *prenda sin transmisión*.²⁵² The regulations state that “a new creditor can obtain a security interest in purchase money collateral even when a previous security interest exists over all of the movable goods that the debtor uses in the realization of its preponderant activities.”²⁵³ At least one author has indicated that this provision creates two ambiguities in Mexico’s PMSI law.²⁵⁴ The first ambiguity is whether all of the goods of the debtor must have been previously pledged before a PMSI can be created. The second ambiguity results from the usage of the term “preponderant activity” of the

248. *Id.*

249. *Id.*

250. See OAS Model, *supra* note 207, art. 12.

251. U.C.C. § 9-324(b) (2009).

252. L.G.T.O.C., *supra* note 57, art. 358.

253. Lopez-Velarde & Wilson, *supra* note 162, at 37.

254. See *id.*

debtor.²⁵⁵ Additionally, there are other aspects of the Mexican PMSI provisions that could be problematic for prospective lenders.²⁵⁶ In particular, because the title retention mechanisms for creating security devices continue to be prevalent under Mexican law, it is possible for a debtor to create a subsequent conditional sale in future collateral as a means of bypassing the PMSI regulations and creating a secret lien in new collateral.²⁵⁷ In addition, unlike the UCC, the Mexican regulations do not require the PMSI creditor to give notice to the pre-existing creditor, which could lead an unsuspecting secured creditor to make future advances on collateral to which it would not be entitled to a PMSI.²⁵⁸

Consequently, while the new approach has worked well with equipment, the amendments did not go far enough in clarifying the priority issues over inventory. Since the new “PMSI” creditor is not required to give notice of its lien in specific purchase money inventory to a previously perfected lender of a blanket lien on inventory, the amendments do not adequately protect the prior lender.²⁵⁹ Such loopholes in the secured transaction system continue to place unnecessary obstacles to the creditor’s ability to comfortably take such collateral as security for its loan.

D. Buyers in the “Ordinary Course”

Another fundamental principle of a modern secured transaction system is that a buyer who purchases goods from a debtor in the regular course of the debtor’s business should be protected from pre-existing security interests encumbering those goods.²⁶⁰ This rule is an exception to the general priority rule and serves to enhance the free flow of business, thereby enabling the debtor to obtain the necessary proceeds to repay its secured obligations.²⁶¹ Accordingly, the Model OAS Code states that “a buyer or transferee of collateral in the ordinary course of the

255. *See id.*

256. *See id.* at 37–40.

257. *See id.* at 38.

258. *See id.* at 40.

259. *See id.*; Banowsky & Gabuardi, *supra* note 81, at 274–75.

260. *See* Kozolchuk & Furnish, *supra* note 38, at 292.

261. *See id.*

transferor's business takes free of any security interest in the collateral."²⁶² The UCC affords such a buyer protection from a pre-existing security interest provided:

- (i) the buyer purchases the goods from a seller who is in the business of selling those goods that the buyer purchases,
- (ii) the buyer does not buy the goods in bulk, and
- (iii) the buyer purchases the goods for "new" value, not in repayment of a pre-existing obligation.²⁶³

The UCC defines a buyer in ordinary course of business as "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind."²⁶⁴

Mexican law also seeks to protect the "innocent purchaser" acquiring goods sold in connection with the debtor's "preponderant activity."²⁶⁵ Drafted in the context of the debtor's rights in respect of collateral in his possession, Article 356 (III) of the LGTOC states that the debtor has the right to dispose of the collateral in the normal course of its "actividad proponderante," in which case the effects of the security interest in the goods themselves will cease in relation to a good faith purchaser.²⁶⁶ What is not clear is what will constitute a debtor's preponderant activity, leading some analysts and lawyers to argue that the stated purpose in the debtor's corporate charter, however vague and general, will be a sufficient definition of "actividad proponderante."²⁶⁷ What is clear is that the Mexican rules do not limit the amount of goods the buyer can acquire and still maintain protection from a pre-existing security interest, nor does it provide that the buyer must give new value.²⁶⁸ The Mexican law leaves open the possibility that a debtor could

262. See OAS Model, *supra* note 207, art. 49.

263. U.C.C. § 1-201(b)(9) (2009).

264. *Id.*

265. See L.G.T.O.C., *supra* note 57, art. 356.

266. See *id.*

267. See Lopez-Velarde & Wilson, *supra* note 162, at 43–44.

268. See *id.* at 44.

transfer a large quantity of a secured party's collateral in satisfaction of a pre-existing obligation to a buyer who would take free and clear of the secured party's interest.²⁶⁹ In recognition of these dangers, the Mexican legislature amended the LGTOC in 2003 to require the debtor to obtain the consent and authorization of the creditor prior to transferring the collateral.²⁷⁰

E. Registration

The function of a modern and effective registry system for secured transactions should be notice.²⁷¹ A registry should not be a repository of descriptive collateral, but rather a simple means of putting third parties on notice that a debtor has pledged its assets thereby endowing a creditor with certain rights to the property of the debtor.²⁷² As stated earlier, the rules of the registry should apply to all types of security mechanisms. In addition, the registry should be easily accessible and thereby electronic in this day and age, and it should be centralized with respect to filing location.²⁷³ Furthermore, the act of registration should clearly establish the priority of the security interest being filed.²⁷⁴

Under Article 9, these principles have been translated into an electronic filing system that generally occurs in the state where the debtor is located.²⁷⁵ Most of the states have largely adopted among themselves a standardized uniform filing form which contains only the briefest of information regarding the secured transaction.²⁷⁶ Priority is predicated on the "first to file" rule.²⁷⁷ Furthermore, the cost of filing is largely standard among the states and is minimal in amount. The cost of filing a UCC-1

269. *See id.*

270. *See* Kozolchuk & Furnish, *supra* note 38, at 292–93.

271. *See id.* at 252–53.

272. *See id.* at 253.

273. *See* IFC TOOLKIT, *supra* note 5, at 50.

274. *See* OAS Model, *supra* note 207, art. 10; Lopez-Velarde & Wilson, *supra* note 162, at 46.

275. Lopez-Velarde & Wilson, *supra* note 162, at 49.

276. *See generally* U.C.C. § 521 (2009).

277. Lopez-Velarde & Wilson, *supra* note 162, at 48.

financing statement electronically in the states of Texas and California is \$5.²⁷⁸

As discussed above, Mexico has endeavored to establish a modern registry system. It has adopted the “first-in-time, first in right” rule.²⁷⁹ The 2009 registry law, “*Del Registro Único de Garantías Mobiliarias*” appears to reflect Mexico’s desire to create a registry (i) that applies to all security mechanisms, not just the *prenda sin transmisión de posesión*, (ii) that adopts a precodified form containing minimal notice information, (iii) and that establishes a central electronic database.²⁸⁰

F. Enforcement Against the Collateral

The World Bank’s Principles for Effective Insolvency and Creditors’ Rights Systems states that “[e]nforcement systems should provide efficient, cost-effective, transparent, and reliable methods (both nonjudicial and judicial) for enforcing a security interest over assets. Enforcement proceedings should provide for prompt realization of the rights obtained in secured assets, designed to enable maximum recovery according to market-based asset values.”²⁸¹ In essence, the model systems provide that a creditor’s ability to exercise “self-help” remedies in respect of the collateral upon a debtor’s default in the underlying obligation is the most efficient and cost-effective method of enforcement.²⁸² However, evolving secured transaction systems have always faced the need to balance the effectiveness of self-help remedies against the due process rights of the debtor.²⁸³

Once a secured transaction system develops away from a

278. See TEXAS SECRETARY OF STATE HOPE ANDRADE, <http://www.sos.state.tx.us/ucc/formfees.shtml> (last visited Nov. 4, 2011); CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/business/ucc/forms.htm> (last visited Nov. 4, 2011).

279. See Lopez-Velarde & Wilson, *supra* note 162, at 51; Steven L. Harris & Charles W. Mooney, Jr., *Filing and Enforcement Under Revised Article 9*, 54 BUS. LAW. 1965, 1970–72 (1998).

280. See 2009 Amendments, *supra* note 45, art. 32 *bis* 1–4.

281. See IFC TOOLKIT, *supra* note 5, at 132.

282. See Kozolchyk & Furnish, *supra* note 38, at 294–95.

283. See *id.* at 294–98.

system whereby the creditor always maintains possession of its collateral into a process in which the debtor has access to the collateral for the conduct of its business, the creditor's primary concern becomes how it will regain possession and control of its security in the event the debtor defaults on its loan.²⁸⁴ A process by which the creditor may regain possession of the collateral in such instances without having to resort to the judicial system is commonly referred to as "self-help."²⁸⁵

Article 9 of the UCC affords the creditor this remedy so long as it does not "breach the peace" in the process of retaking the collateral.²⁸⁶ This concept is the means by which Article 9 of the UCC seeks to balance the interests of the debtor from abusive tactics by a creditor, against the need for creditors to expeditiously regain control of its collateral.²⁸⁷ American case law, however, has proven that a breach of the peace can effectively occur by a creditor's attempts to reclaim the collateral in derogation of the debtor's refusal to allow the creditor access to the collateral.²⁸⁸ In practice, the acquiescence of the debtor to the creditor's repossession of the collateral is required.²⁸⁹ If the creditor cannot retake the collateral without the consent of the debtor, the creditor must then resort to judicial action to gain possession.²⁹⁰

Mexico has taken a much stronger position in protecting the

284. See *id.* at 256–58, 260–262.

285. See U.C.C. § 9-609 (2009); James R. Call, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 76–77 (1973).

286. The U.C.C. does not define the term "breach of the peace" and expressly prohibits the parties to a security agreement from defining the term by agreement. *Id.* § 9-603. See generally, Roger A. Bartlett, *Representing the Article 9 Creditor, COLLECTIONS AND CREDITORS' RIGHTS COURSE* (State Bar of Texas 2010) (describing the types of actions that may or may not constitute a "breach of the peace."). Generally, use of force will almost always constitute a breach of the peace, but other courts have found that the mere presence of a police officer at the scene of the repossession may also constitute a "breach of the peace." *Id.*

287. U.C.C. § 9-609 cmt. 3 (2001); Scott Rose, *Secured Transactions—Davenport v. Chrysler Credit Corp.: Defining the Term "Breach of Peace" as it Applies to Repossession of Secured Collateral*, 24 MEM. ST. U. L. REV. 145, 146, 150 (1993).

288. See Kozolchik & Furnish, *supra* note 38, at 295.

289. See WHITE & SUMMERS, *supra* note 1, § 34–8.

290. See Lopez-Velarde & Wilson, *supra* note 162, at 56; see also U.C.C. § 9-609 (2004).

debtor's due process rights with regard to enforcement actions against pledged collateral, and the Mexican courts and legislature have generally found self-help remedies to be unconstitutional.²⁹¹ Under the revisions to its secured transaction laws, the Mexican legislature instituted a limited form of "self-help" procedure for the *prenda sin transmisión de posesión* and the *fideicomiso de garantía* provided the creditor follows a strict set of guidelines and satisfies all of the necessary legislative requirements.²⁹² First, the debtor and the creditor must have agreed to the "self-help" remedy in the written security agreement.²⁹³ At the time of the alleged default, there must be no dispute between the debtor and the creditor over whether the debt is due and owing nor the amount that is owed, and the debtor must acquiesce to the creditor's repossession of the collateral.²⁹⁴ The creditor initiates the "self-help" process by engaging a *fedatario público* to send a formal request to the debtor to turn over the collateral.²⁹⁵ Possession of the collateral must take place in the presence of the *fedatario* who must prepare an inventory of the collateral retaken.²⁹⁶ If, throughout this process, the debtor raises any controversy as to the rights of the creditor to proceed, the self-help process must cease, and the creditor must resort to the judicial process.²⁹⁷

291. See Kozolchik & Furnish, *supra* note 38, at 297, but see Christlieb, *supra* note 116, at 16 (explaining that in 1997 the Mexican Supreme Court determined that providing the debtor with only limited defenses in a repossession action did not violate the debtor's due process rights because (i) the debtor voluntarily entered into the loan, and (ii) the officiating judge had the ability and the responsibility to evaluate the issues surrounding the collection action.). Professors Kozolchik and Furnish explain that the limited defenses established by the Mexican Supreme Court in 1997 were actually more limited than those subsequently established by the Mexican legislature in 2000 and 2003. See Kozolchik & Furnish, *supra* note 38, at 297.

292. See CÓD.COM., *supra* note 54, at art. 1414 *bis*.

293. *Id.* at *bis* 3 ("Fuera de los casos previstos en el artículo anterior, el fudciario o el acreedor prendario podra obtener la posesión de los bienes objeto de la garantía, si asi se estipulo expresamente en el contrato respectivo.")

294. See Lopez-Velarde & Wilson, *supra* note 162, at 59.

295. See Del Duca & Etcharren, *supra* note 43, at 245.

296. See CÓD.COM., *supra* note 54, art. 1414 *bis* 3 ("Este acto deberá llevarse a cabo ante fedatario public, quien deberá levantar el acta correspondiente, así como el inventario promenorizado de los bienes.")

297. *Id.* at *bis* 2 ("Se dará por concluido el procedimiento extrajudicial y quedará

Once the creditor has taken possession of the collateral, its next concern is maximizing its value to satisfy the obligation owed to it by the defaulting debtor. Under Article 9 of the UCC, the U.S. creditor generally has three remedies available to it: “strict foreclosure,” nonjudicial foreclosure and judicial foreclosure. For various reasons, the creditor may decide that it will be most productive to retain the collateral in full or partial satisfaction of the indebtedness. This act is known as a “strict foreclosure.”²⁹⁸ The creditor will be entitled to rely on this remedy if, after default, the debtor consents to the retention after having received a written proposal thereof from the creditor.²⁹⁹ The creditor must also give notice to other parties who have an interest in the collateral, such as junior creditors.³⁰⁰ Again, if the debtor does not tacitly³⁰¹ or formally³⁰² consent to the creditor’s proposal, the creditor must proceed with disposition of the collateral through non-judicial or judicial means.³⁰³

Under Mexican law, there is no remedy akin to “strict foreclosure” nor is there a remedy of non-judicial sale if the debtor has not previously consented to the creditor’s self-help proposal, and the secured creditor must resort to the Mexican courts to gain control and realize upon its collateral. The judicial process in Mexico traditionally has been extremely time consuming, taking as long as two years to finalize a judgment.³⁰⁴ With this in mind, the Mexican legislature instituted an abbreviated process by which holders of the *prenda sin transmisión de posesión* could obtain judicial relief.³⁰⁵

expedita la vía judicial en los siguientes casos: I. Cuando se oponga el deudor a la entrega material de los bienes o al pago del crédito respectivo, o II. Cuando no se haya producido el acuerdo a que se refiere el artículo 1414 *bis* o éste sea de imposible cumplimiento.”); *see also* Del Duca & Etcharren, *supra* note 43, at 245.

298. *See* WHITE & SUMMERS, *supra* note 1, § 34-10.

299. *See* U.C.C., *supra* note 66, § 9-620(a).

300. *See id.* § 9-621.

301. *See id.* § 9-620(a)(2).

302. *See id.* § 9-620(a)(1).

303. *See* WHITE AND SUMMERS, *supra* note 1, § 34-11, et seq (generally explaining the non-judicial and judicial processes under Article 9 of the U.C.C.).

304. *See* Christlieb, *supra* note 116, at 16.

305. *See* CÓD.COM., *supra* note 54, art. 1414 *bis* 5, et. seq.

Conceivably, and provided there are no appeals or the intervention of a bankruptcy, a judgment can be obtained by the secured lender within a month, a vast improvement over the previous alternative.³⁰⁶ The process commences with the creditor's filing of a complaint which must be accompanied by the security documents and an affidavit certifying as to the amount due on the obligation.³⁰⁷ If the court determines that all the legal requirements of a valid security instrument and sum certain have been satisfied by the creditor, it must issue an order within two days requiring the debtor to pay the debt or turn over the collateral.³⁰⁸ The debtor then has five days to contest the order, but its defenses are statutorily limited in scope.³⁰⁹ The creditor has three days to file a response to the debtor's defenses, whereupon the judge will set a hearing within ten days thereafter.³¹⁰ At the end of the hearing, the judge is to render a judgment immediately.³¹¹ The debtor, of course, is entitled to appeal, but an appeal does not stay the creditor's ability to execute on the judgment provided the creditor has posted a bond for an amount equivalent to the value of the collateral.³¹² If the debtor takes full advantage of its appeal rights, including its constitutional right to seek a writ of *amparo*,³¹³ the creditor will find itself in litigation for several

306. See Del Duca & Etcharren, *supra* note 43, at 249.

307. See CÓD.COM., *supra* note 54, art. 1414 *bis* 8.

308. *Id.* ("El juez bajo su más estricta responsabilidad, si encuentra que se reúnen los requisitos fijados en el artículo anterior, en un plazo no mayor de dos días, admitirá la misma y dictará auto con efectos de mandamiento en forma para que el deudor sea requerido de pago y, do no hacerlo, haga entrega de la posesión material al actor, de los bienes objeto de la garantía indicados en el contrato.")

309. See *id.* at *bis* 10.

310. See *id.*

311. See *id. bis* 16. ("El juez debe presidir la audiencia, ordenar el desahogo de las pruebas admitidas y preparadas, y dar oportunidad a las partes para alegar lo que a su derecho convenga, por escrito o verbalmente, sin necesidad de asentarlos en autos en este último caso. Acto continuo, el juez dictará sentencia, la que será apelable únicamente en efecto devolutivo.")

312. See Del Duca & Etcharren, *supra* note 43, at 249.

313. "Mexico's *Juicio de Amparo* is among the most original, deeply revered, and highly utilized causes of action before Mexican federal courts to protect individuals from laws or public authorities' acts that violate any of the constitutional rights explicitly enunciated in the first twenty-nine articles of that country's Federal Constitution (rights

years, but if the court honors the statutory time frame of the abbreviated judicial process and the debtor does not contest the proceeding, the creditor could feasibly obtain a judgment and execute upon it within a month.³¹⁴

One of the more interesting distinctions between the U.S. foreclosure process and the Mexican procedure involves the determination of the value of the collateral. Under the UCC, the amount that the creditor will receive from the sale of the collateral in a foreclosure is determined by the market.³¹⁵ So long as the sale is conducted in a commercially reasonable manner, the creditor is protected from a claim by the debtor that the sale price of the collateral was too low.³¹⁶ Under the Mexican procedure, the value must be established prior to the sale. The parties must specify in the security agreement the procedure by which the value of the collateral will be determined prior to its disposition and/or designate an appraiser who will determine the value prior to sale and the collateral must sold for the assessed value.³¹⁷ If there is no bidder at the initial assessed value, the creditor may reduce the offer price by 10% per week until the collateral is sold.³¹⁸ This aspect of the Mexican foreclosure process appears to be just one of many safeguards put in place by the Mexican legislature to protect the debtor from unscrupulous lender practices.

VII. CONCLUSION

One of the primary goals of the North American Free Trade Agreement (NAFTA) was and continues to be the increase of investment opportunities among the participating nations.³¹⁹ NAFTA reflects the United States' recognition of Mexico as a valued trading partner and a source of tremendous economic

commonly known as *Garantías individuales*, or 'individual guarantees')." JORGE A. VARGAS, *MEXICAN LAW FOR THE AMERICAN LAWYER*, 38 (2009).

314. See Del Duca & Etcharren, *supra* note 43, at 249.

315. See Lopez-Velarde & Wilson, *supra* note 162, at 63.

316. See U.C.C. § 9-627 (2004).

317. See *CÓD.COM.*, *supra* note 54, art. 1414 *bis*.

318. See *id.* art. 1414 *bis* 17.

319. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, Art. 102, § 1(c), available at <http://www.sice.oas.org/trade/naftatce.asp>.

growth. The United States Embassy in Mexico City reports that United States foreign direct investment (FDI) in Mexico totals more than \$120 billion, concentrated largely in the manufacturing and banking sector,³²⁰ with the United States providing up to 68% of the total investment in manufacturing and assembly plants, and 51% of the total investment in the financial and banking sector.³²¹ The United States Department of Commerce has reported that as of 2007, Mexico ranked as the United States' 2nd largest export market and its 3rd largest import market.³²² Notwithstanding these impressive statistics, access to affordable credit remains a challenge for many Mexican companies.³²³

After Mexico opened up unrestricted access to foreign investment of Mexico's banking industry in 1997, foreign ownership of banks in Mexico increased from 11% in 1997 to 83% in 2004.³²⁴ As a result of the increased foreign ownership of the Mexican banking system, the data derived during that time period reveals that banking administrative costs declined, competitiveness increased along with operational efficiency, resulting in significantly greater bank profitability.³²⁵ Yet, private sector lending during the same time period fell from 25% to 14% of GDP.³²⁶ Clearly, Mexico's complex secured transaction system is not the only reason access to credit remains elusive for large segments of the Mexican economy.³²⁷ However, the

320. See U.S. EMBASSY, MEXICO CITY, Foreign Direct Investment, http://photos.state.gov/libraries/mexico/310329/Econ/Fact_Sheet_FDI_2011.pdf. (last visited July 14, 2010).

321. See *id.*

322. See U.S. Department of Commerce, International Trade Administration, Top U.S. Export Markets, 92 (2009), <http://trade.gov/publications/pdfs/top-us-export-markets-2009.pdf> (last visited September 4, 2010).

323. See *Secured Transactions Reform in Mexico: A Round Table Discussion, Regulation of Secured Transactions in Mexico*, 18 NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE 2 (July 2011), available at <http://www.natlaw.com/novedad/novedades-pdf/jul11.pdf>.

324. See STEPHEN HABER & ALDO MUSACCHIO, CONTRACT RIGHTS AND RISK AVERSION: FOREIGN BANKS AND THE MEXICAN ECONOMY, 1997–2004 (2005).

325. See *id.* at 21.

326. See *id.* at 3.

327. See generally HABER & MUSACCHIO, *supra* note 324 (discussing lending issues to SMEs in Mexico); see also Augusto de la Torre, Maria Soledad Martinez Perla, &

difficulty in safely and knowledgeably securing loans in Mexico and then expeditiously foreclosing on collateral upon an event of default continues to be cited as a major obstacle to the growth of the credit market.³²⁸

While Mexico has made tremendous advancements in reforming its secured transaction system, its regulations continue to be riddled with inconsistencies and complexities which seem to multiply with each round of reforms that are made.³²⁹ In lieu of abandoning its existing structure and adopting the OAS Model, it has created what some observers have referred to as a “crazy quilt” of piecemeal legislation.³³⁰ Practicing attorneys and lenders continue to rely on a number of security mechanisms for a variety of reasons. The *fideicomiso de garantía* remains the mechanism of choice in large, complex transactions involving several different types of assets.³³¹ It grants the creditor the greatest protection in the event of a bankruptcy and greater ease in asserting rights to the collateral. On the other hand, the *fideicomiso de garantía*, with its accompanying trustee fees, can be a large expense to the transaction.³³² Accordingly, in less complex matters involving all of the moveable assets of the debtor, lenders and their lawyers may opt for the less expensive *prenda sin transmisión de posesión*. The better practice for Mexico, however, would be to embrace fully the concept of a single type of security instrument.³³³

Notwithstanding its continued reliance on multiple security mechanisms, Mexico’s development of a single, centralized and

Sergio L. Schmukler, *Bank Involvement with SMEs: Beyond Relationship Lending* (June 2008) (Policy Research Working Paper 4649).

328. See HABER & MUSACCHIO, *supra* note 324, at 22; see also See *Secured Transactions Reform in Mexico: A Round Table Discussion, Regulation of Secured Transactions in Mexico*, 18 NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE 2 (July 2011), available at <http://www.natlaw.com/novedad/novedades-pdf/jul11.pdf>.

329. Wilson, *Mexico*, *supra* note 40, at 1815 (discussing the changes and shortcomings in secured transaction law in Mexico).

330. Wilson, *Secured*, *supra* note 60, at 59–60.

331. Kuri Breña Sánchez Ugarte y Aznar, *Mexico: Keeping Debt Secure*, INT’L FIN. LAW REVIEW 26 (Jul. 2008).

332. *Id.*

333. Wilson, *Secured*, *supra* note 60, at 69–70.

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transparent registry system that will apply to all of the available devices is truly a major advancement for the Mexican economy. It has the potential of opening the credit industry to greater transparency, speed and efficiency. The ramifications of this development are important not only to the credit industry but also to all other aspects of the business and legal community which have likewise suffered from antiquated filing systems. Mexico's attempt to modernize its registry system is a clear indication of its desire to open up its credit markets to a wider range of businesses.