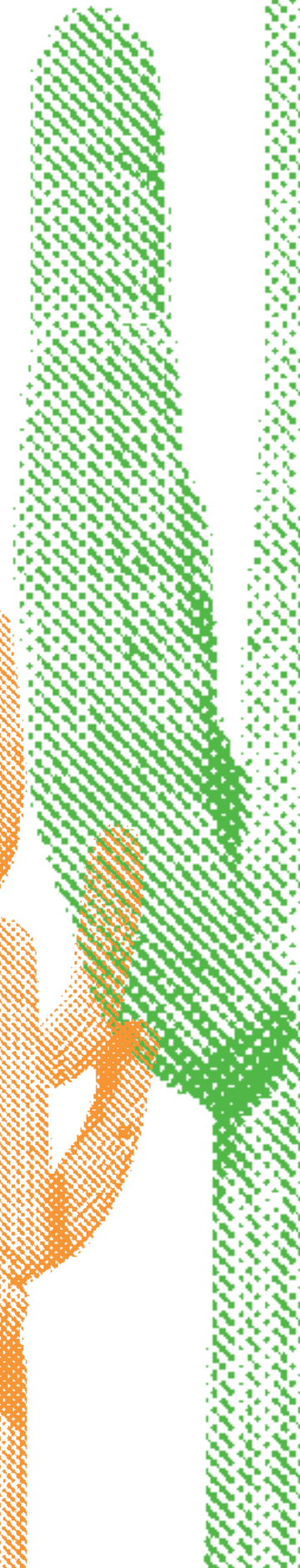
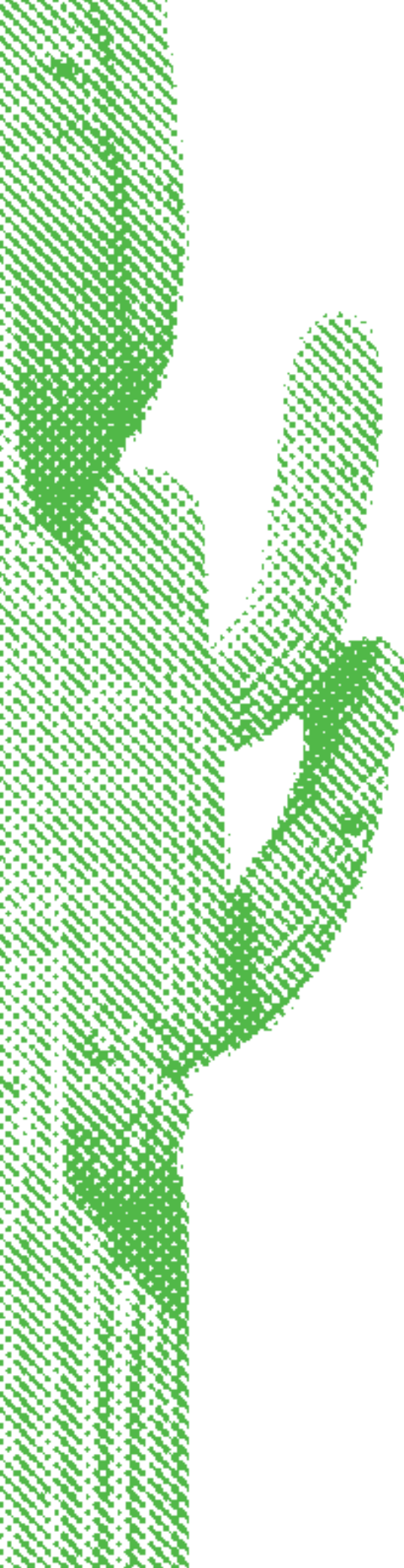


Asset-Based Lending

IN MEXICO

An Overview Of Key Considerations





The laws governing secured transactions in Mexico have improved over the last decade, but challenges still exist. CFA hosted a teleconference seminar on the topic earlier this year and *The Secured Lender* is pleased to present highlights of the seminar.

In the past decade, U.S. companies increasingly have shifted significant portions of their production and assembly operations to Mexico in order to meet the challenges of global competition. During this time, U.S. lenders have repeatedly been asked by their customers to finance these operations.

While the legal environment in Mexico historically was not conducive to asset-based lending, this has begun to change. In the past decade, the laws governing secured transactions have improved significantly, largely as a result of two sets of amendments that were enacted during this time. There still can be problems with the courts, though there has been some recent improvement there as well.

As a result, the ability to realize upon collateral in Mexico has been enhanced in recent years and is causing U.S. lenders to reconsider lending against Mexican collateral. That said, if a decision to lend against Mexican collateral is made, it is imperative that the transaction be properly structured, that collateral be regularly monitored, and that a well thought-out exit plan be in place and ready to implement at the first sign of trouble.

Earlier this year, the Commercial Finance Association sponsored a teleconference seminar on ABL in Mexico. The panel was moderated by *Arnie Dratt*, CEO of Chicago-based Hilco Appraisal Services, LLC. Panelists included *Richard Kohn*, founder and senior principal at the Goldberg Kohn law firm in Chicago. Richard is co-general counsel of the CFA, and he represents the CFA at the United Nations Commission on International Trade Law (UNCITRAL) in connection with a project aimed at modernizing world-wide secured lending laws. Richard was joined by *Jonathan Cooper*, also a principal at Goldberg Kohn.

Jonathan works with Richard on the UNCITRAL project, and has significant experience in international commercial finance transactions in both the western hemisphere and Europe. Panelists from Mexico included *Hugo Cuesta*, a partner at the law firm of Cuesta Campos & Asociados, founded in 1978. Hugo has developed substantial expertise in the representation of leading multinationals operating in Mexico, including Mexican and foreign entities in financing transactions, as well as international lenders with asset-based lending projects in Mexico. He specializes in foreign investment in Mexico and is a regular speaker at various international panels focused on international business law (including the recent CFA International Asset-Based Lending Workshop held in New York). Joining Hugo was *Ildefonso Acevedo*, the chief executive with Hilco Acetec, a leading provider of appraisal and asset disposition services in Mexico.

It is estimated that over 300 people participated on the call; record attendance for any CFA teleconference. This clearly demonstrates the significant interest among CFA members in lending in Mexico. Highlights of the discussion follow.

Background; *Maquiladoras*

DRATT: In the past few years, we at Hilco have worked on many valuations outside the U.S., and many have been for secured lenders with interests in Mexico. We've done machinery, equipment, inventory and real estate valuations, and we believe there is great interest today in understanding both the risks and the rewards of secured lending in Mexico. This discussion will provide practical insight and information relevant to lenders who want to expand business in Mexico.

KOHN: We've been watching the evolution of cross-border asset-based lending in many countries over the past 20 plus years, and it's clear to us that lending in Mexico is in a transition stage, a pattern that we have seen in the past with various other countries. Borrowers are exerting a lot more pressure on lenders to consider lending against collateral in Mexico, and lenders are looking for ways to do so; and in fact are doing so with increasing frequency. And we think this trend will continue. One reason is that the recent liberalization of regulations that make trucking goods from Mexico to the United States more cost- and time-efficient, as well as other factors, have compelled many U.S. companies to reconsider using Mexico for their manufacturing and assembly operations rather than China or other countries.

DRATT: Let's start with some of the basics. Hugo, when U.S. asset-based lenders are asked to lend against Mexican operations, the Mexican operations are often a component of a business that is primarily run out of the U.S. Please elaborate on how these operations are typically structured in Mexico.

CUESTA: Since a number of these types of transactions that we have worked on in the last few years have involved assets which have been either owned or possessed by a Mexican subsidiary which operates under the IMMEX program (formerly known as the *maquiladora* program), in order to understand how asset-based lending in Mexico works, it is useful to understand the role of the "*maquiladora*."

A large portion of U.S. manufacturing operations in Mexico, to serve the U.S. market, are conducted through a wholly-owned Mexican subsidiary that qualifies under the IMMEX program (commonly referred to as the "*maquiladora*" program). The *maquiladora* program originally was created to encourage foreign businesses to engage in labor-intensive manufacturing activities in Mexico. The *maquiladora* program permits the easy importation of assets into, and their exportation out

More and more U.S. borrowers are asking their lenders to [lend against Mexican collateral] and recent improvements in Mexican secured transactions laws are helping this process.

of, Mexico, generally without incurring custom duties or value-added taxes. The *maquiladora* generally performs labor-intensive activities on raw materials and exports the finished goods to the party (often its U.S. parent) requesting such services abroad. In the case of a *maquiladora* providing services to its parent company, the *maquiladora* charges fees for its services (generally on an arms-length/cost-plus basis). If the Mexican subsidiary intends to service the Mexican market — and not simply manufacture products on behalf of its parent for sale outside of Mexico — the Mexican subsidiary will not operate under the *maquiladora* program.

COOPER: Hugo, where do you typically find *maquiladoras*? In which regions of Mexico?

CUESTA: Initially, *maquiladoras* were located along the U.S.-Mexico border because their parent companies wanted a quick re-export to the United States. However, today, *maquiladoras* are spread throughout the country and often are located in areas where other companies in their industry are concentrated. For example, there are a large number of electronics firms in the state of Jalisco, around the city of Guadalajara, which is known as the Mexican Silicon Valley. This area is nowhere near the U.S.-Mexico border.

DRATT: Hugo, I understand that when *maquiladoras* are used, the Mexican operations are often spread among multiple Mexican subsidiaries of the U.S. parent rather than being concentrated in a single Mexican subsidiary. Please explain.

CUESTA: Typically, the bulk of the Mexican operations are conducted by a single Mexican operating subsidiary. However, in some cases the owned Mexican real estate (such as a manufacturing plant or industrial park) is held by a separate Mexican subsidiary. Additionally, it is common in Mexico for a separate Mexican subsidiary to hire the work force for the Mexican operating subsidiary rather than having the Mexican operating subsidiary hire its own work force.

DRATT: Why have a separate company for employees?

CUESTA: Under Mexican federal labor laws, employers have a number of labor-related liabilities, since in Mexico we do not have "employment at will." As *maquiladoras* require a flexible work force due to the nature of their labor needs, in order to have the operating entity fully concentrated on the operation of the entity, it is often the case that an employee company, focused specifically on the human resources and labor requirements of the operating entity, is created. The service companies created for that purpose often employ well-qualified and fully trained HR and labor specialists to confirm compliance with Mexican federal labor laws.

DRATT: I have heard that under Mexican law, there can be significant employee wage claims and that these claims may rank ahead of the claims of secured creditors. Does the "employee company" structure help avoid those priming claims since the employees are not employed by the operating company (i.e., the company that owns the bulk of the collateral)?

CUESTA: This structure helps to avoid priming labor claims, but it does not act

as an absolute shield for those claims. If the employees make a claim for unpaid wages against the assets of the operating company, there is a basis to reject that claim since it is the employee company (not the operating company) that is the employer of the labor force. However, the employees could argue that, regardless of having been retained by the employee company (rather than by the operating company), the ultimate beneficiary of employment and work is the operating company. According to federal labor laws, that may create an employment relationship and in the event of an unpaid adverse resolution against the operating company, this could subject the operating company's assets to exposure. So, while this structure is helpful to avoid priming Mexican labor claims, it is not 100% failure-proof. At a minimum, the structure can be helpful in negotiating a settlement with labor. We will discuss the labor claims in more detail later in the program.

DRATT: So, Hugo, how does the *maquiladora* structure affect a prospective secured lender?

CUESTA: First, in a number of cases, the *maquiladora* does not own the assets (other than the real estate) that are located at the *maquiladora* and is therefore not able to grant a lien on them. As such, the lender needs to determine which entity actually owns the assets and have that entity grant the lien. In any case, since the *maquiladora* will retain possession of the assets, it is always important to involve the *maquiladora* in the security documents.

COOPER: I'd like to elaborate on what Hugo just said. When the *maquiladora* structure is used, the U.S. parent typically retains ownership of the inventory that it sends to the *maquiladora* for processing. The U.S. parent typically also owns the accounts receivable that are generated from the sale of that inventory. With regard to equipment, there really is no general rule. Sometimes the equipment is owned by the U.S. parent,

sometimes it's owned by the *maquiladora*, and sometimes it's owned by a third party that is requesting the manufacturing. The lesson here is not to assume that your loan party owns the collateral. You must make this inquiry.

DRATT: Jon, would a lender perfect under U.S. law or Mexican law with respect to assets used and generated by the Mexican operations?

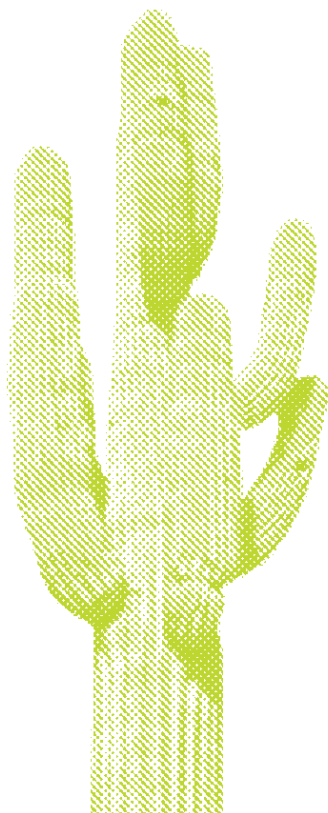
COOPER: With respect to tangible assets, such as inventory and equipment, the rule is clear. If the inventory or equipment is located in Mexico, you generally must perfect under the laws of Mexico. This is true even if the U.S. parent owns the assets. If you don't perfect under Mexican law, and you only perfect under U.S. law, you generally will not have an enforceable lien. With respect to intangible assets, such as accounts receivable, the key factor is which entity owns the receivables. If the receivables are owned by the U.S. parent, then you should perfect under U.S. law, though even in this case it may be advisable to perfect under Mexican law as well depending on the circumstances, such as where the receivables are, by their terms, expressly governed by Mexican

law. If the receivables are owned by the Mexican subsidiary, then you should perfect under Mexican law. If it's not clear which entity owns the receivables, you shouldn't take a chance. Perfect under both laws.

KOHN: We have seen situations in which lenders will not lend against the receivables unless they are owned by the U.S. parent. In these situations, in order to be able to obtain financing for its receivables, the Mexican subsidiary may sell its receivables, via a true sale, to the U.S. parent. But even in that situation, we will typically perfect not only under U.S. law, but also under Mexican law. This is to guard against the possibility of a subsequent insolvency in Mexico and an argument by the Mexican insolvency administrator that the sale was not effective, which could result in the administrator trying to pull the receivables back into the Mexican subsidiary's insolvency estate. So we perfect both ways in that circumstance.

DRATT: Let's assume a workout situation occurs. How does the *maquiladora* structure affect a lender's ability to sell collateral in Mexico upon enforcement?

COOPER: The assets that have been temporarily imported into Mexico under the *maquiladora* program – largely inventory (and sometimes machinery) – would first need to be naturalized in Mexico before they could be sold by the lender in Mexico. That requires the payment of various custom duties and value-added taxes. As such, if part of a lender's exit plan is predicated on selling these assets in Mexico (rather than exporting them back to the U.S. for sale), the lender needs to carefully monitor, throughout the life of the loan, the potential duties and taxes that would need to be paid if the assets are sold in Mexico and make sure that funds are available to pay these amounts. The lender should strongly consider establishing borrowing-base reserves for these amounts.



Loan Structures

DRATT: Let's talk about typical loan structures that involve a U.S. lender, a U.S. parent and Mexican operations.

KOHN: In these situations, until recently, many of these transactions involved taking Mexican assets merely as boot collateral to secure loans made to the U.S. parent. Primary reliance was placed on the U.S. collateral, and no borrowing credit was given to the Mexican

[If] a decision to lend against Mexican collateral is made, it is imperative that the transaction be properly structured, that collateral be regularly monitored, and that a well thought out exit plan be in place and ready to implement at the first sign of trouble.

collateral. In these transactions, the U.S. lender obtained an upstream secured guarantee from the Mexican entity. This structure was prompted largely because of uncertainties with the Mexican legal system. That is now changing. Because of improvements in Mexican law, and in response to increased competition in the lending market, lenders are now placing more reliance on the Mexican collateral and giving some borrowing credit to Mexican collateral.

CUESTA: Richard, you mentioned that Mexican subsidiaries are often required

to give upstream guarantees to support loans made to their parent companies. It is interesting to point out that Mexican law is often viewed as more creditor-friendly in this regard than U.S. law. I understand that under U.S. law, the enforceability of an upstream guarantee can sometimes be challenged as a fraudulent conveyance under the U.S. Bankruptcy Code. Under Mexican law, as long as certain formalities are followed, such as making sure the bylaws specifically allow for the guarantee to be provided, an upstream guarantee is generally valid.

DRATT: Are you seeing U.S. lenders make direct loans to Mexican subsidiaries?

KOHN: We are starting to see more U.S. lenders make direct loans to Mexican subsidiaries (instead of just making loans to the U.S. parent). The Mexican loans tend to be a limited sub-facility of a larger U.S. credit facility. We see this as a positive sign that some U.S. lenders are now feeling more comfortable in making these cross-border loans.

COOPER: When lending directly, there are two additional issues that need to be considered. The first is withholding taxes, which I'll discuss. The second is Mexican regulatory issues, which Hugo can handle.

Normally, when interest is paid by a Mexican borrower to a non-Mexican lender, a withholding tax is required to be paid. There is a tax treaty between the U.S. and Mexico which reduces the withholding tax from the normal 28% tax to 10%, with respect to certain U.S. lenders. Additionally, this rate may be further reduced to 4.9% for certain U.S. lenders that are registered with the Ministry of Finance in Mexico (there is a list available of the financial institutions that are registered).

DRATT: Typically, there is a gross-up provision in the loan agreement that shifts the burden of the withholding tax to the borrower. However, that effectively increases the borrower's cost and puts the U.S.

lender at a bit of a competitive disadvantage to a Mexican domiciled lender.

CUESTA: I agree with what Jon and Arnie just described with respect to withholding taxes. Also, as Jon mentioned, the second factor to consider when lending directly is Mexican regulatory issues — whether any licenses or regulatory approvals would need to be obtained from the Mexican government for a U.S. lender to make a loan to a commercial borrower located in Mexico. Generally, as long as the U.S. lender does not receive funds or deposits from the general public in Mexico, and does not make those funds available to the general public in Mexico, the U.S. lender's loan will not qualify as conducting Mexican banking activities and thus will not require any special license or regulatory approval from the Mexican government. There are some exceptions (which are beyond the scope of this discussion) to this general statement that should be considered at the time of any such loan.

Obtaining Liens

DRATT: Now, let's talk about how a lender goes about getting a good lien on collateral in Mexico.

KOHN: As we noted earlier, there have been certain recent reforms to the Mexican secured transactions laws that significantly improve the landscape for asset-based lending in Mexico. As a result of these reforms, a lender can now obtain a non-possessory security interest that attaches to existing and future receivables, inventory and equipment. This is a major development, since in the past actual or constructive possession of collateral was typically required; which is not practical for assets such as inventory and equipment that generally need to be retained by the grantor for use in its day-to-day business. Two new security devices are particularly helpful for U.S. lenders that seek to take Mexican collateral. The first is a non-possessory pledge or a "*prenda sin posesion*," which is similar in many ways to a security agreement that U.S.

lenders use in the United States with respect to existing and future personal property. The second is a device known as a “*fideocomiso*,” or a guarantee trust. This involves transferring the ownership of the collateral to a trust controlled by the lender.

CUESTA: As Richard mentioned, the “*prenda sin posesion*” is a nonpossessory pledge, meaning there is no requirement that the lender hold and keep possession of the collateral. The borrower can retain possession of the assets (this is obviously the case when the assets constitute inventory and equipment) and continue to use them in its business. Also, the nonpossessory pledge may cover both existing and future property. In other words, much like a security interest in the United States, it is a “floating lien” that, when so provided in the agreement, extends to future assets (which is critical when lending against a constantly changing pool of collateral such as receivables or inventory). The device first came into being in the early 2000s, and we have seen it applied to accounts receivable, inventory and equipment, the three most-often used types of personal property collateral for asset-based loans. The downside of the *prenda*, however, is that enforcement typically requires a trip to the Mexican courts; nonjudicial enforcement is often not available for the *prenda* (especially if the borrower is contesting the terms of the loan). Additionally, the *prenda sin posesion* is a relatively new security device, and as such it has only rarely been tested by the Mexican courts.

COOPER: Hugo, I recall when the nonpossessory pledge of tangible property was first introduced in the early 2000s, the pledge had to be nonrecourse — meaning that the lender had to waive any deficiency claim against the grantor that might remain after the pledge was enforced. This feature substantially undercut the value of the nonpossessory pledge. It should be pointed out that in 2003 additional reforms were made to the Mexican secured transactions

laws and, as a part of such reforms, the pledge no longer needs to be nonrecourse — a very positive development.

CUESTA: Jon, that is correct. As a result of those reforms, the use of the nonpossessory pledge by lenders has significantly increased.

DRATT: Hugo, please give an overview of the second security device that Richard mentioned — the “*fideocomiso*.”

CUESTA: The “*fideocomiso*,” or the security guarantee trust, is also an option for certain types of collateral. While this security device has some drawbacks, the most positive aspect of it is that it provides for nonjudicial enforcement. No court proceeding is required for enforcement.

From a theoretical standpoint, the *fideocomiso* is like the perfect guarantee. Not only does it permit nonjudicial enforcement, it allows quicker access to collateral, and one of the main beauties that I like most is that the title of the assets is transferred to the trustee. This means the assets are now isolated from claims and the bankruptcy processes.

KOHN: If you are going to use this security device, it is critical to select a trusted and experienced trustee. Some trustees are reluctant to follow instructions from the lender when the borrower challenges the enforcement — fearing that they may be subject to liability — and turn the matter over to the Mexican courts. It is important to select a trustee that will not back down when it comes to enforcement.

CUESTA: I absolutely agree with Richard’s comments. In general, a business-oriented trustee is expected to enforce regardless of the pressure that may come from the borrower and its counsel challenging the validity of the trust structure.

DRATT: Hugo, what is the typical range of fees that a trustee charges for a *fideocomiso*?

CUESTA: The fees range from trustee to trustee. We have seen an initial fee in the U.S.\$3,000 to U.S.\$10,000 range, annual fees in the U.S.\$6,000 to U.S.\$25,000 range, and an enforcing fee (if the trust needs to be enforced), which could be 1.5% of the value of the assets contributed to the trust estate. While trustee fees can be significant, they should only be a secondary consideration. As Richard pointed out, the primary consideration should be selecting a reliable trustee — one that will not back down when it comes to enforcement.

DRATT: Is it true that the use of the *fideocomiso* can actually jeopardize the duty-free status of certain collateral?

CUESTA: Yes, this is a significant issue when collateral is being sought from a Mexican subsidiary that operates under the *maquiladora* program discussed earlier. The usual purpose of the *maquiladora* is to permit the importation and exportation of goods and equipment without the payment of duties and VAT. The transfer of the collateral to the trustee may have the same effect as naturalizing the assets for sale in Mexico. In other words, the assets may lose their temporary import status. They may no longer be regarded as being used for the manufacturing purposes under which they were imported into the country. As such, if the assets are transferred to the trustee, the transfer could require the payment of such duties and VAT.

DRATT: Hugo, would you comment briefly on the real estate mortgage as a security device?

CUESTA: The mortgage is a pretty straight-forward type of security. It has been used for many years and is well-tested in Mexican courts. This is the “go-to” device when real estate is involved. Litigation attorneys call it the “queen of guarantees.”

KOHN: I just want to touch briefly upon obtaining a pledge over the shares of stock issued by the Mexican subsidiary.

Often, these shares are owned by the U.S. parent and, to save transaction costs, there may be a push to have the pledge governed by U.S. law as opposed to Mexican law. By doing this, the thought is to avoid needing to engage Mexican counsel to document the pledge. We strongly recommend against this. In order to maximize the likelihood that the pledge will be enforceable, we strongly recommend that these share pledges be governed by Mexican law.

COOPER: A couple of last thoughts on Mexican security devices. First, to increase leverage in a workout, the lender may want to consider augmenting its collateral package by obtaining personal guarantees. Personal guarantees could lessen the likelihood that the Mexican debtor will challenge enforcement by the lender. You may find that even if you are not relying on the credit of the personal guarantor, the mere existence of the personal guarantee may cause the personal guarantor to intervene and exert pressure on the Mexican debtor to cooperate with the lender. Second, several formalities (such as obtaining original signatures, translating various documents into Spanish and completing a rather involved notarization process) absolutely need to be adhered to or else the security may not be valid. These formalities should be considered when initially setting the closing timeline for the transaction; otherwise they may result in delays.

Where Do You Stand? Lien Priority

DRATT: Once a lender has obtained a lien, the lender needs to determine the priority of that lien. In other words, it needs to understand where it stands in line *vis-à-vis* the claims of other creditors. Hugo, can you describe the process?

CUESTA: In order to establish priority against third-party creditors, the lender generally needs to file a notice of its lien in the public register of commerce or property (similar to filing a UCC financing statement in the United States). Prior

to making its loan, the lender should also conduct lien searches in these registries to determine if there are other existing competing claims. These registries generally are reliable, although the operational efficiency of the registries varies from State to State. For example, the Mexico City registrar is often several weeks behind. The Mexican government recognizes how critical public registers are to international commerce and has instituted widespread modernization of all public registrars. There has been improvement in recent years. That being said, if the lender has any concerns about the registry, they should consider conducting additional due diligence to determine if there are any competing claims which may have not yet been noted on the registries.

KOHN: Filing costs can vary greatly from State to State. Generally, the filing fee is based upon the amount of the debt secured, but some filing offices recognize a cap on the filing fee and some do not. We had one situation where the filing fee in one jurisdiction was actually U.S.\$130,000, and on the same transaction in another jurisdiction the fee was just U.S.\$800 because they capped the filing fee at that amount. We ended up changing the domicile of the borrower, which was a relatively easy and quick matter in order to take advantage of the cap. As a result, the borrower was able to save a considerable amount of money.

DRATT: Hugo, can you elaborate on the labor claims that we discussed earlier?

CUESTA: As previously mentioned, certain labor claims may prime the claim of a secured lender. Preferential labor claims consist of accrued wages or salaries and accrued benefits (including vacation and severance payments) for the period of two years prior to the date of declaration of commercial insolvency of the grantor. The lender should carefully monitor these potential priming labor claims throughout the life of its loan and strongly consider instituting borrowing base reserves in the amount

of these potential claims. Additionally, as discussed previously, the use of a separate Mexican employee company structure may help mitigate these claims. There are other potential priming claims (such as bankruptcy costs) which, while important, go beyond the scope of this presentation.

Getting Out... The Importance of a Sound Exit Plan

DRATT: To have a good lien in place and understand its priority among creditors isn't enough. When trouble strikes, nothing is more important to the lender than having a comprehensive exit plan in place. Ildefonso, what is it you recommend in this regard?

ACEVEDO: A good exit plan requires being on solid legal footing, as has been discussed. It also requires that forethought be given to how a workout will be managed and who will provide the required services.

Mexico has available all of the workout-related services a lender would find in the U.S., including inspection of assets, product certifications, appraisals and asset disposition services through auctions and negotiated sales. Appraisals — (original and updates) — are performed under uniform standards of professional appraisal practice (USPAP) guidelines. Mexican companies can apply different sale methodologies for disposition of the assets, including technologies like webcast and online auctions. If the assets are very specialized, private, negotiated sales can be arranged.

Mexico is a very mature market for selling assets. Values have held well and our market for assets is probably better right now than in the U.S. Mexican companies, and other Latin and South American companies we serve from Mexico, are looking for all kinds of assets including machinery and equipment, inventory, trucks and cars.

That said, it is still prudent when dealing with a country in transition, like Mexico, to have a mature, detailed exit plan worked out as part of the transaction structure, so that all parties

can move very, very quickly if there are problems. This can extend to knowing where to move the inventory or the equipment; identifying in advance people on the ground — security people, auctioneers — who can be called upon if there's an issue; understanding who are the constituencies and what possible types of creditors might be involved; and, reviewing the potential for priming claims so reserves can be set for them where appropriate.

Getting Out...Enforcement

DRATT: There's a lot of discussion about the Mexican courts and the quality of the courts. Hugo, can you give us all some perspective into the courts and how they vary from jurisdiction to jurisdiction in Mexico, and how a lender can improve its chances with the courts?

CUESTA: The general impression, particularly outside of Mexico, and sometimes in Mexico as well, is that our court system is not the best. This impression is based on the fact that there have been problems in some jurisdictions as regards to the efficiency, delays and influence by local individuals or organizations. But, in the last few years, there has been improvement in the efficiency and transparency of Mexican courts.

It is important to note that the quality of Mexican courts varies significantly from State to State. States with larger court system budgets, commonly in the central and northern parts of Mexico, have more efficient court systems. The largest Mexican business cities are where the majority of the industrial and lending activity has occurred and thus their courts are more experienced with commercial lending matters.

Additionally, federal courts in Mexico are often viewed as being more efficient than the state courts in Mexico, and there is often a right of appeal if a lender feels it's not getting a fair deal in the state court. The lender can actually include provisions (except when it comes to issues with respect to real estate) in its loan documents appointing the courts of a particular jurisdiction, even if

that is not the jurisdiction in which the borrower is located.

COOPER: As such, it is important that the lender carefully consider, at the outset of the transaction, in which court enforcement proceedings are likely to be held and assess risk accordingly. Where possible (such as by inserting appropriate choice of venue clauses in the loan documents), lenders should take steps to direct enforcement proceedings to jurisdictions that are well tested. Additionally, as previously discussed, lenders should consider the use of the *fideicomiso* (i.e., a guarantee trust) to allow for non-judicial enforcement where appropriate and should maintain, at all times, a detailed exit plan.

CUESTA: We have been involved in a number of enforcement actions in Mexico on behalf of lenders. While each matter is different and outcomes can never be guaranteed, the outcomes that we have seen generally have been positive for lenders. In our experience, lenders have been able to realize on the Mexican collateral as long as the collateral package has been properly structured, all formalities have been followed and the lender timely implements an effective exit plan. Additionally, in cases where we have seen enforcement challenged by the Mexican grantor, where fraud against creditors has occurred, the use of criminal actions and/or enforcement against personal guaranties has often worked. All that being said, quite a few commercial debtor/creditor disputes in Mexico are resolved through out-of-court settlements, rather than through judicial procedures.

KOHN: As a practical matter, one of the main themes that we've tried to stress during this presentation is the importance of carefully monitoring the collateral, so as to be in a position to get your hands on the collateral quickly if a problem arises. If you have a Mexican co-lender or other representative in the deal, that could help — it's good to have someone on the ground.

CUESTA: Bottom line, while enforcement in Mexico may not be as straightforward as it sometimes is elsewhere, if the suggestions that we made today are implemented, regarding due diligence with respect to the borrower and the collateral, properly selecting and structuring the security devices, monitoring the status of the borrower and the collateral, and having an effective exit plan ready to implement, a positive outcome of the Mexican venture should be expected.

Closing Remarks

DRATT: I would say that in looking at the evolution of cross-border asset-based lending over lots of years, we find as a general matter that it is pressure coming from borrowers that tends to create movement in this area. As borrowers have come to their lenders and said, "Look, I've got collateral in this jurisdiction or that jurisdiction, and I need you to consider it," lenders have taken a harder look. Ultimately, lenders will find ways to develop patterns and formats for lending into other countries. That's what we're seeing in Mexico right now, and we think that there are a lot of opportunities for lending in Mexico. More and more U.S. borrowers are asking their lenders to consider doing so and recent improvements in Mexican secured transactions laws are helping this process. **TSL**

Note: A lengthy question and answer session followed the presentation.

This article has been prepared for discussion purposes only and does not constitute, and shall not be relied upon as, legal advice in any respect.