

AN INTRODUCTION TO SECURED REAL ESTATE TRANSACTIONS IN MEXICO*

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A foreigner engaging in secured real estate transactions in Mexico must comply with various constitutional and administrative requirements. Before engaging in such activity, he must obtain permits from the government¹ and have the proper immigration status.² Remembering that there are a host of other constitutional and statutory limitations placed upon the foreigner, I will consider various types of secured real estate financing available under Mexican law.

Article 2964 of the *Civil Code for the District and Federal Territories of Mexico* sets forth the general principle of debtor's liability: "The debtor is liable for the fulfillment of his obligations with all his property, except such as, in accordance with law, is inalienable or not subject to attachment."³

With regard to installment credit obligations, when there is a default, the creditor must obtain a court decree to foreclose on the debtor's property. Before foreclosure is possible, however, the debtor must actually own the property and if he has sold it or if there are other creditors with preemptive claims or claims with higher priorities, foreclosure

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¹ In order to acquire interests in realty in Mexico, a foreigner first must obtain permits from the Ministry of Foreign Relations (*Secretaría de Relaciones Exteriores*). CONSTITUCIÓN art. 27, § 1, in 4 DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES (RIGHTS OF THE MEXICAN PEOPLE: MEXICO THROUGH ITS CONSTITUTION) 572-73 (1967). For an English translation, see PAN AMERICAN UNION, CONSTITUTION OF MEXICO, 1917, at 10 (1968). He must also obtain a permit from the Ministry of the Interior (*Secretaría de Gobernación*). LEY GENERAL DE POBLACIÓN art. 71 (D.O. Dec. 27, 1947), in EDICIONES ANDRADE, EXTRANJERÍA, TURISMO Y POBLACIÓN 247 (2d ed. 1964).

Hereinafter, all citations to the Mexican Constitution will be to the particular article followed by the page on which it may be found in *Derechos del Pueblo Mexicano*. All citations to *Ley General de Población* will be to the particular article followed by the page on which it may be found in *Ediciones Andrades*.

² See Gutierrez, *Investment in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, *supra*, at 270, 279-80.

³ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2964, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO CIVIL 507 (Porrua ed. 25th ed. 1970). Hereinafter, all citations to the *Código Civil* will be to the particular article followed by the page on which it may be found in *Leyes y Códigos de México*.

The same principle of debtor's liability is set forth in the codes of each of the Mexican states. See, e.g., CÓDIGO CIVIL PARA EL ESTADO LIBRE Y SOBERANO DE SONORA art. 3418, in COLECCIÓN DE LEYES MEXICANAS: SERIE LEYES DEL ESTADO DE SONORA 535 (1955).

will be barred. A prudent creditor who foresees and plans against these eventualities may resort to various types of security devices under Mexican law.

In civil law countries or countries whose legal systems have been greatly influenced by Roman law, there is a classical division of secured transactions into personal and real guarantees. The division is not based upon the nature of the collateral, but upon the nature of the creditor's rights. If he has a right only against the debtor or his surety, the guarantee is personal and the creditor is known as a general or unsecured creditor (*acreedores quirografarios*).

The guarantee is real if there is a specific lien or other right in rem impressed upon the property of the debtor or of a third party. After the foreclosure or sale of such property, the creditor obtains a preference over other creditors. He may also enforce his right of attachment (*secuestro*) against the res, be it realty or personalty, unlawfully sold by the debtor.⁴ This preference and the tracing of collateral have been described as accessory real rights to the principle right to payment of the obligation.⁵

Of the various secured transactions involving real estate in Mexico, the most important are the pledge (*anticresis*), the mortgage (*hipoteca*), the conditional sale (*venta con reserva de dominio*) and the trust (*fideicomiso*). Each of these types of security agreements will be examined briefly.

THE PLEDGE (ANTICRESIS)

The *anticresis*,⁶ a possessory security interest in real property,⁷ performs the function that the pledge (*prenda*) performs for loans secured by personalty. Although it is of far less practical importance than the *prenda* because it is used only rarely, a basic familiarity with it helps to complete one's understanding of the Mexican law of secured real estate transactions.

For an *anticresis* to be valid and enforceable, it must satisfy certain requirements. As a "real contract," it requires the transfer of possession of the property to the creditor.⁸ When the amount of the indebtedness

⁴ See E. PALLARES, *DICCIONARIO DE DERECHO PROCESAL CIVIL* 50 (6th ed. 1970).

⁵ 3 G. RIPERT & J. BOULANGER, *TRAITÉ DE DROIT CIVIL D'APRES DE TRAITÉ DE PLANIOL* 1 (1958).

⁶ Regulation of the *anticresis* is no longer included within the *Civil Code of 1928*. The textual discussion is based on the rules of the *Civil Code of 1884*. The *Civil Code* of some states, such as Puebla, adopt the provisions of articles 1810 to 1822 of the *Civil Code of 1884*.

⁷ For a general historical description of the *anticresis* in the French legal system, which has had a substantial impact on Mexican law, see G. MARTY, *DERECHO CIVIL: GARANTIAS ACCESORIAS* 114 (J.M. Cajica, Jr., transl. 1952).

⁸ *CÓDIGO CIVIL DE 1884* art. 1810, in *COLECCIÓN DE CÓDIGOS Y LEYES FEDERALES: PROMULGADO EN MARZO DE 1884*, at 249 (3a. ed. 1904); *CÓDIGO CIVIL DE 1870 PARA EL DISTRITO FEDERAL Y LA BAJA CALIFORNIA* art. 1927, in 9 DUBLAN, MANUEL Y JOSÉ MARÍA LOZANO, *LEGISLACIÓN MEXICANA O COLECCIÓN COMPLETA DE LAS DISPOSICIONES LEGISLATIVAS EXPEDIDAS DESDE LA INDEPENDENCIA DE LA RE-*

exceeds 500 pesos, the *anticresis* must be executed as a public deed.⁹ In order to be enforceable against third parties, it must also be recorded in the land registry for the district where the property is located.¹⁰

Once executed and recorded, the *anticresis* allows to creditor to apply income from the property against any interest and principal on the obligation.¹¹ The creditor also has the right to administer the property and in the absence of an express agreement, is empowered to act as a general manager to carry on acts "of administration."¹² Contracts which the creditor enters into are valid for the duration of the *anticresis* but may not extend for a longer period, unless there is an express agreement between the creditor and the debtor to the contrary.¹³

While the creditor may retain possession of the collateral until he is fully paid, this right is subordinated to rights of third-party mortgagees whose mortgages were recorded prior to the *anticresis*.¹⁴ The creditor has the right to transfer enjoyment (*usufructo*) and administration of the collateral, except as otherwise agreed,¹⁵ and he is entitled to defend his rights with possessory remedies.¹⁶ Moreover, he may sell the property and apply the proceeds to any principal and interest due.¹⁷

The *anticresis*, however, also imposes duties on the creditor. He must pay taxes and charges levied against the collateral,¹⁸ and make any necessary repairs and incur whatever expenditures are needed to preserve the property. Income from the property may be used to offset these expenditures.¹⁹ Thus, the *anticresis* imposes on the creditor the duty of administration that is to his benefit only to the extent that it preserves his security.

The *anticresis* also has the disadvantage of unduly encumbering the transferability of property. The *anticresis* embodies a right of enjoyment, analogous to that in a life estate, and not a right of guarantee as does the mortgage. Thus, the rights of a purchaser of the property would be subordinate to those of the holder of the *anticresis*. In order to extin-

PÚBLICA 322 (1879).

Hereinafter, all citations to the *Código Civil de 1884* will be to the particular article followed by the page on which it may be found in *Colección de Códigos*. All citations to *Código Civil de 1870* will be to the particular article followed by the page on which it may be found in *Legislación Mexicana*.

⁹ LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL Y TERRITORIOS art. 54, in EDICIONES ANDRADE, CODIFICACIÓN NOTARIAL 20 (3d ed. 1966).

¹⁰ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 3003, *op. cit.* at 517. For an English translation, see O. SCHOENRICH, THE CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES OF MEXICO 581 (1950).

¹¹ CÓDIGO CIVIL DE 1884 art. 1810, *op. cit.* at 249.

¹² *Id.* art. 1812, *op. cit.* at 249.

¹³ *Id.* art. 1813, *op. cit.* at 249.

¹⁴ *Id.* art. 1814, § I, *op. cit.* at 249.

¹⁵ *Id.* art. 1814, § II, *op. cit.* at 249.

¹⁶ *Id.* art. 1814, § III, *op. cit.* at 249.

¹⁷ *Id.* art. 1821, *op. cit.* at 250.

¹⁸ *Id.* art. 1815, § II, *op. cit.* at 249-50.

¹⁹ *Id.* art. 1816, *op. cit.* at 250.

guish the *anticresis*, not only must the creditor be reimbursed, but the term of the *anticresis* must have expired.²⁰

The *anticresis*, therefore, creates conditions inconsistent with the rational economic utilization of resources. Once the creditor possesses the collateral, his natural concern is to obtain the greatest possible benefit. Consequently, the preservation of the property is of little interest to him, or at least less than it would be to its owner. Thus, property delivered to creditors under an *anticresis* contract frequently deteriorates to a deplorable state by the time the contract expires.²¹

For these reasons, the *anticresis* has been almost universally replaced by the mortgage (*hipoteca*) in present practice. Nevertheless, the *anticresis* offers one distinct advantage because it allows the creditor to receive the income from the collateral directly and apply it against the interest and principal of the obligation.

THE MORTGAGE (HIPOTECA)

A "[m]ortgage is a right in rem on property which is not delivered to the creditor, and giving him the right, in case of nonfulfillment of the guaranteed obligation, to be paid with the value of such property, in the degree of preference established by law."²² Unlike the *anticresis*, the mortgage allows the debtor to retain the possession and enjoyment of the property. Nonetheless, if the debtor defaults, the creditor may demand the sale of the collateral and apply the proceeds to outstanding indebtedness according to his degree of preference.²³ The creditor may also trace the collateral or its monetary value (*derecho de persecusión*) and sell it even if it is held by a third-party purchaser.²⁴

²⁰ 2 M. PLANIOL & G. RIPERT, TREATISE ON THE CIVIL LAW § 2505, at 406-07 (La. State Law Inst. transl. 1959).

²¹ 3 RIPERT & BOULANGER, *supra* note 5, at 21-22.

²² CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2893, *op. cit.* at 494.

²³ *Id.* arts. 2893 & 2981, *op. cit.* at 494 & 510; CÓDIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL Y TERRITORIOS art. 591, para. 1, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO DE PROCEDIMIENTOS CIVILES 144 (5th ed. 1963). See also CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2916, para. 1, *op. cit.* at 498.

The former *Civil Code of 1870* provided that a mortgage "is a right in rem created over immovable property or over its in rem rights." CÓDIGO CIVIL DE 1870 PARA EL DISTRITO FEDERAL Y LA BAJA, CALIFORNIA art. 1940, *op. cit.* at 323. The present Civil Code does not limit the scope of the mortgage to immovable property or to rights in rem over immovables. It is very difficult, however, to find an instance of a mortgage over movable or personal property being regulated by Mexican law because such property is not easily traceable through the mortgage mechanism. *E.g.*, LEY DE NAVEGACIÓN Y COMERCIO MARÍTIMOS arts. 121-26, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS 498-99 (19a ed. 1969). See also Rivera, *Observaciones a la Ley de Navegación y Comercio Marítimos*, 15 REV. FAC. MEX. 189-206 (1965). Thus, apart from the very minor exceptions listed in Article 2898 of the *Civil Code*, it may be stated that in spite of the Code's broad definition only immovable property and fixtures attached to such property may be mortgaged.

²⁴ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2894, *op. cit.* at 494. For an English translation, see SCHOENRICH, *supra* note 10, at 554.

In our discussion we shall only cover one type of mortgage, the so-called "conventional" or contractual mortgage (*hipoteca voluntaria*).²⁵ Professor Marty, a leading French authority in the field, has listed the requirements for the conventional mortgage. There must be an obligation guaranteed by the mortgage, and consequently there is no mortgage without the underlying principal obligation.²⁶ The mortgage, therefore, is an accessory right because its very existence depends upon a principal debt.²⁷ It is transferred with and terminates with the obligation.²⁸ If the principal obligation is extinguished by a novation, however, the mortgage securing it may be preserved so that it guarantees the new debt from its original date with the same degree of priority.²⁹

A mortgage nonetheless may be valid even though the principal obligation does not pre-exist its execution. A mortgage may guarantee a future obligation even if its operation is contingent upon the occurrence of a later event.³⁰ In the extension of a line of credit or the opening of credit agreement, for example, the obligor is not truly a debtor until there has been a delivery of funds. The eventual repayment, however, might be guaranteed by a mortgage from the moment there is an agreement to extend credit.

Under the principle of specification of the guarantee, which applies to both the obligation and the guarantee, mortgage rights must pertain to specific amounts due and may only affect property which is clearly designated.³¹ This principle prevents the operation of the so-called "general mortgages"³² which purported to establish a lien over a debtor's entire estate to secure one or more of his debts.

The mortgage is only valid for an amount no greater than that for which it is executed. This protects the debtor's credit potential because if a mortgage could secure existing debts and future advances, third parties would not know the extent to which the collateral was subject to unpaid obligations and new lines of credit would be difficult to obtain.

The specification of the property probably is not as important as is the specification of the debt. Even if all of his assets were subject to a mortgage, a debtor's credit potential would not necessarily be hampered if the amount of the obligation were known with certainty. Any potential

²⁵ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2920, *op. cit.* at 499. See SCHOENRICH, *supra* note 10, at 560.

²⁶ MARTY, *supra* note 7, at 128.

²⁷ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2927, *op. cit.* at 500. See SCHOENRICH, *supra* note 10, at 561.

²⁸ Rafael Rojina Villegas, *Contratos*, in 4 COMPENDIO DE DERECHO CIVIL 441, 443 (3a ed. 1968).

²⁹ The creditor may retain the old mortgage and apply it to the new obligation. CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2220, *op. cit.* at 388. See SCHOENRICH, *supra* note 10, at 428.

³⁰ *Id.* art. 2921, *op. cit.* at 499. See SCHOENRICH, *supra* note 10, at 560.

³¹ *Id.* art. 2895, *op. cit.* at 494. See SCHOENRICH, *supra* note 10, at 554.

³² *Id.* art. 2919, *op. cit.* at 499. See SCHOENRICH, *supra* note 10, at 559.

creditor could easily determine if the debtor's property was sufficient to secure a new mortgage. Nevertheless, because of the uncertainty created by the old "general" guarantees, the specification of the mortgage guarantee is required by the Mexican *Civil Code*.³³ Moreover, because realty subject to a "general mortgage" cannot be transferred as easily as unencumbered property or property subject to a lien the amount of which is readily determinable, the specification of the mortgage guarantee removes a serious obstacle to transferability.

The mortgagor may only encumber property that he can sell or otherwise convey.³⁴ This requirement must be read in conjunction with those provisions which state that a person may only sell his own property,³⁵ and that the sale of another's property is null and void, with the responsibility for any ensuing damages falling upon the seller if he acted in bad faith.³⁶ These provisions clearly apply to mortgages as well as to sales.

Similarly, parties to a mortgage must have the same degree of capacity required of those who sell property, and other rules applicable to the sale of realty or valuable personalty should also be considered. For example, neither an emancipated minor³⁷ nor the parents of an unemancipated minor³⁸ can sell or encumber such property belonging to the minor without first obtaining judicial approval to do so.

A mortgage, whether it be a private document or a public deed, must be executed in writing. If the mortgage is for an obligation of more than 500 pesos, a public deed must be executed before a notary public;³⁹ if the obligation is a lesser amount, the mortgage may be exe-

³³ The specification of the mortgage and the specification of the debt are recurring themes in the *Código Civil para el Distrito y Territorio Federales*:

Art. 2895. A mortgage can apply only to property especially designated.

Art. 2912. When several properties are mortgaged to secure a credit, it is obligatory to determine for what part of the credit each property is liable, and each one of them may be released from the encumbrance by paying the part of the credit which it guarantees.

Art. 2913. When a mortgaged property susceptible of convenient division is divided, the mortgage and lien shall be equitably distributed among the several parts. For that purpose, the owner of the property and the mortgage creditor shall reach an agreement; and if such agreement be not obtained, the distribution of the lien shall be made by judicial decision, after hearing experts.

Art. 2919. A mortgage is never tacit, nor general; and in order to produce effects against a third person, it always requires registration. It is contracted voluntarily, in agreements, and of necessity, when the law requires a person to give such guaranty with respect to specific property. In the first case it is called voluntary; in the second, necessary.

³⁴ *CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES* art. 2906, *op. cit.* at 496. See SCHOENRICH, *supra* note 10, at 556.

³⁵ *Id.* art. 2269, *op. cit.* at 395. See SCHOENRICH, *supra* note 10, at 437.

³⁶ *Id.* art. 2270, *op. cit.* at 396. See SCHOENRICH, *supra* note 10, at 437.

³⁷ *Id.* art. 643, § 2, *op. cit.* at 160. See SCHOENRICH, *supra* note 10, at 138.

³⁸ *Id.* arts. 435-36, *op. cit.* at 124. See SCHOENRICH, *supra* note 10, at 97.

³⁹ *LEY DEL NOTARIADO PARA EL DISTRITO Y TERRITORIOS* art. 54, in *EDICIONES ANDRADE, CODIFICACIÓN NOTARIAL* 20 (3d ed. 1966).

cuted in the form of a private document before two witnesses, and there must be as many copies as there are contracting parties.⁴⁰

The mortgage does not require either a transfer of title or possession of the collateral and the debtor or the surety who provided it continues to be its owner and possessor. Other attributes of ownership, such as the rights of administration, enjoyment and disposition, are also retained. There are, nevertheless, some restrictions on the scope of these rights⁴¹ in that the mortgagor may not lease his property nor accept advance rental payments for a period of time exceeding that of the mortgage, any such agreement being null and void. When the mortgage does not have a fixed period, the mortgagor may not agree to a prepayment of rents, nor may he grant a lease for more than a year for rural property or two months for urban land.⁴² On the other hand, a clause prohibiting subsequent mortgages is void,⁴³ so the debtor retains the right to dispose of the collateral or create other rights in rem on it.

The transfer or disposition of a mortgage is governed generally by the same rules applicable to assignment of debts. Accordingly, the debtor must be notified⁴⁴ and the assignment must be recorded in the land registry to affect third party rights. Any assignment in which there has not been compliance with the notification requirements will not be perfected as to debtors who claim lack of notice. Registration is not mandatory, but, a simple recording can avoid conflicts and uncertainty insofar as third party rights are concerned.⁴⁵

In those cases governed by Article 2058 of the *Civil Code*,⁴⁶ the transfer might also be effected by subrogation. Thus, if a creditor were to pay a mortgagee, he would then have a legal interest in the fulfillment of the original mortgage obligation. This might occur if a legatee⁴⁷ or devisee paid a mortgagee to avoid the foreclosure, if an heir paid a debt of the decedent's estate, or if the purchaser of realty paid a pre-existing mortgagee.⁴⁸

Under Article 2918 of the *Civil Code*,⁴⁹ an action on a mortgage must be brought within ten years from the time it could have been brought according to the recorded date in title. Thus, a separate statute of limitations for the mortgage is not necessary because a mortgage action

⁴⁰ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2058, *op. cit.* at 366. See SCHOENRICH, *supra* note 10, at 402.

⁴¹ *Id.* art. 2914, *op. cit.* at 497-98. See SCHOENRICH, *supra* note 10, at 558.

⁴² *Id.* para. 2, *op. cit.* at 498. See SCHOENRICH, *supra* note 10, at 558.

⁴³ *Id.* art. 2901, *op. cit.* at 495. See SCHOENRICH, *supra* note 10, at 555.

⁴⁴ *Id.* art. 2926, para. 1, *op. cit.* at 500. See SCHOENRICH, *supra* note 10, at 561.

⁴⁵ Villegas, *supra* note 28.

⁴⁶ CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art. 2058, *op. cit.* at 366. See SCHOENRICH, *supra* note 10, at 402.

⁴⁷ *Id.* art. 1443, *op. cit.* at 272. See SCHOENRICH, *supra* note 10, at 294-95.

⁴⁸ Villegas, *supra* note 28, at 441-43.

⁴⁹ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 2918, *op. cit.* at 498.

See SCHOENRICH, *supra* note 10, at 559.

cannot survive the lapse of an action on the principal obligation.⁵⁰

A mortgage right is extinguished either by the satisfaction of the principal obligation,⁵¹ the so-called consequential extinction, or by "direct" extinction⁵² which occurs as a result of a statute of limitations or nullity rule affecting the mortgage itself.⁵³ The extinction of a mortgage presupposes the complete disappearance of the lien, and when extinguished, the mortgagor may require the registry to cancel the recording of the lien.⁵⁴

CONDITIONAL SALE (COMPRVENTA CON RESERVA DE DOMINIO)

Although the conditional sale represents a radical departure from the seller's traditional duty to transfer ownership to the buyer, it is now a very common transaction in Mexico. In the conditional sale, the title does not vest in the buyer until he has paid the full purchase price,⁵⁵ and the purchaser may not transfer the property during this time because he does not have title to it.⁵⁶ Likewise, the seller may not dispose of it until the period for the payment of the purchase price has elapsed,⁵⁷ because he must preserve the right of ownership so that he can transfer the property to the purchaser.

The seller has the right to repossess the property from a third party other than the purchaser even though he could not repossess from the purchaser himself. During the term of the contract, a "preventive note" (*anotacion preventiva*) will be recorded in the land registry. Consequently, during the conditional period, neither purchaser nor seller may dispose of the property or transfer title to it.

If the seller repossesses the property because of a default in payment,⁵⁸ seller and buyer must return each other to the status quo ante. The seller, however, may collect rent for the property's use in an amount established by contract or the court and is entitled to compensation for its deterioration. The purchaser, in turn, is entitled to the legal rate of interest on the sums he has paid. Any agreement which imposes more stringent obligations upon the purchaser is null and void.

⁵⁰ Villegas, *supra* note 28, at 443-45.

⁵¹ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 2941, § 2, *op. cit.* at 503. See SCHOENRICH, *supra* note 10, at 564.

⁵² *Id.* art. 2941, §§ I, III-VII, *op. cit.* at 503.

⁵³ Article 2941 merely lists the various causes of extinction and does not distinguish between them. See Villegas, *supra* note 28, at 447.

⁵⁴ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 3032, *op. cit.* at 525. See SCHOENRICH, *supra* note 10, at 589.

⁵⁵ *Id.* art. 2312, *op. cit.* at 403. See SCHOENRICH, *supra* note 10, at 445. See also Villegas, *supra* note 28, at 147.

⁵⁶ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 2315, *op. cit.* at 403. See SCHOENRICH, *supra* note 10, at 445. See also Villegas, *supra* note 28, at 149.

⁵⁷ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 2313, *op. cit.* at 403. See SCHOENRICH, *supra* note 10, at 445. See also Villegas, *supra* note 28, at 148.

⁵⁸ CÓDIGO CIVIL PARA DISTRITO Y TERRITORIO FEDERALES art. 2314, *op. cit.* at 403. See SCHOENRICH, *supra* note 10, at 445.

Some writers feel that the mortgage affords the same security as the conditional sale at a lower cost.⁵⁹ At least in theory, this is incorrect because the conditional sale affords more protection than the mortgage. In the event of the purchaser's bankruptcy, the seller in a recorded conditional sale may separate the property sold by initiating an action for the segregation of the bankrupt's assets.⁶⁰ He may then recover the property upon payment of the amount paid by the purchaser, plus interest, and less rental value and deterioration.⁶¹ The mortgagee, however, is not afforded this right to the segregation of assets,⁶² even though his lien would give him priority over other creditors.

THE TRUST (FIDEICOMISO)

The same historical evolution that has increased the importance of commercial law, brought about the enactment of one of the most important statutes for Mexican bankers and lawyers: the General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*).⁶³ Credit transactions are generally designated in Mexican banking terminology as "active" or "passive." In an active transaction the bank is the creditor of its customer, while in a passive transaction the bank acts as its customer's debtor. There are also the so-called neutral transactions in which banks engage in trust transactions (*fideicomisos*). Despite the fact that *fideicomisos* are regulated by the General Law of Negotiable Instruments,⁶⁴ they are not negotiable instruments nor are they necessarily credit transactions.

There are three parties involved in each *fideicomiso*: the settlor (*fideicomitente*), the trustee (*fiduciario*), and the beneficiary (*fideicomisario*). The *fideicomitente* may be any person with the necessary capacity to convey property for the purpose intended under the trust.⁶⁵ In the case of security trust (*fideicomiso de garantía*), the type of trust to which I shall refer exclusively from now on, the capacity is that required for the exercise of powers of administration, and when stipulated, that

⁵⁹ See, e.g., 4 R. PIÑA, ELEMENTOS DE DERECHO CIVIL 53 (1961).

⁶⁰ LEY DE QUIEBRAS Y SUSPENSIÓN DE PAGOS art. 158, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS 412 (19a ed. 1969). Hereinafter, all citations to *Ley de Quiebras y Suspensión de Pagos* will be to the particular article followed by the page on which it may be found in *Código de Comercio*.

⁶¹ *Id.* art. 161, *op. cit.* at 145.

⁶² *Id.* art. 263, *op. cit.* at 436.

⁶³ (D.O. Aug. 27, 1932), in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS 229-336 (19a ed. 1969). Hereinafter, all citations to *Ley General de Títulos y Operaciones de Crédito* will be to the particular article followed by the page on which it may be found in *Código de Comercio*.

For a general treatment of the trust under Mexican law, see Batiza, *The Evolution of the Fideicomiso (Trust) Concept under Mexican Law*, 11 MIAMI L.Q. 478 (1957).

⁶⁴ LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO arts. 346-59, *op. cit.* at 330-34.

⁶⁵ *Id.* art. 349, *op. cit.* at 330-31.

of representation and disposition.

The *fiduciario* is the person entrusted with the task of carrying out the purposes of the *fideicomiso*. Under a peculiarity of Mexican law only a credit institution may act as a trustee.⁶⁶ The *fiduciarios* generally are required to accept all trusts, but may decline in extreme circumstances.⁶⁷ They must act with the degree of diligence expected of "a good father of a family" (*buen padre de familia*),⁶⁸ and are liable for damages caused by their negligence.⁶⁹ The fiduciary has available all the rights and actions essential for the fulfillment of the *fideicomiso*, except for any limitations imposed by the *fideicomiso* itself.⁷⁰ Because the powers are determined by the trust and the instructions of the settlor,⁷¹ the security trust usually includes special powers that allow the trustee to dispose of the property.

The *fideicomisario* is the person entitled to the benefits of the trust. While the settlor and beneficiary frequently might be the same person, in the security trust the beneficiary must be someone other than the settlor. *Fideicomisarios* must have the capacity to receive the benefits of the *fideicomiso*, and, thus, foreign beneficiaries must satisfy the same constitutional limitations applicable to other real estate transactions in which foreigners enjoy beneficial interests.

A *fideicomiso* may be created for any type of property or right except those strictly personal with the owner.⁷² Thus, either movable or immovable property, as well as their appurtenant rights, may be included in a *fideicomiso*. When dealing with immovable property, however, the fiduciary must obtain, prior to the creation of the trust for a foreigner, a permit from the Ministry of Foreign Relations of the type required of any foreign corporation when acquiring title to land.⁷³

Only minimal formalities are required for creation of a *fideicomiso*. It must be in writing and comply with the statutory requirements for any transfer.⁷⁴ Thus, if realty worth more than 500 pesos is involved, the *fideicomiso* must be executed in a public deed.⁷⁵ A typical use of a se-

⁶⁶ *Id.* art. 350, *op. cit.* at 331. See also LEY GENERAL DE INSTITUCIONES DE CRÉDITO Y ORGANIZACIONES AUXILIARES, in EDICIONES ANDRADE, CÓDIGO DE COMERCIO REFORMADO 648 *et. seq.* (12th ed. 1964).

⁶⁷ LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO art. 356, *op. cit.* at 333.

⁶⁸ This standard is the approximate equivalent of the common law standard of diligence required of one in a fiduciary capacity. See 1 PLANIOL & RIPERT, *supra* note 20, § 2814, at 661.

⁶⁹ LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO art. 356, *op. cit.* at 333.

⁷⁰ *Id.*

⁷¹ LEY GENERAL DE INSTITUCIONES DE CRÉDITO Y ORGANIZACIONES AUXILIARES art. 45, § XI, in EDICIONES ANDRADE, CÓDIGO DE COMERCIO REFORMADO 649 (12th ed. 1964).

⁷² LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO art. 351, para. 1, *op. cit.* at 331.

⁷³ CONSTITUCIÓN art. 27, § 1, *op. cit.* at 572. See also LEY ORGÁNICA DE LA FRACCIÓN I DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 2, in EDICIONES ANDRADE, EXTRANJERIA, TURISMO Y POBLACIÓN 248 (2d ed. 1964).

⁷⁴ LEY GENERAL TÍTULOS Y OPERACIONES DE CRÉDITO art. 352, *op. cit.* at 332.

⁷⁵ LEY DEL NOTARIADO art. 54, *op. cit.* at 20.

curity trust would be for a seller and purchaser to agree to sell the property and transfer fiduciary title to a bank to be held in escrow until the purchase price is paid and then transfer title to the purchaser. In case of nonpayment, the *fiduciario* is normally empowered either to return title to the settlor or to sell the property and apply the proceeds of the sale to the remainder of the purchase price with any balance to the purchaser. Unlike the other transfers, the transfer to the fiduciary institution does not create tax liability. Only when the trust is finally executed, bringing about the transfer of title to the purchaser, will the normal taxes for the transfer be assessed.⁷⁶

CONCLUSION

We have briefly examined the most important of the secured transactions involving real estate in Mexico. The *anticresis* is used very seldom because the conditions which its use imposes are incompatible with the facts of economic life.

The mortgage, unlike the *anticresis*, allows the debtor to retain both title to and possession of the collateral, but gives the creditor rights to guarantee satisfaction of the underlying obligation. At the same time, the principle of specification protects the debtor from the establishment of a lien over his entire estate, including assets which he acquires subsequent to the assumption of the obligation. Thus, not burdened with a general mortgage, the debtor can retain his credit potential and avoid serious obstacles to the transferability of the mortgaged property.

In the commonly used conditional sale, when property is sold to the purchaser on other than a cash basis the purchaser acquires possession but title is retained by the seller until the full purchase price has been paid. During the period for payment, neither the seller nor the buyer can dispose of the property. While the mortgage may afford similar protection at a lower cost, an advantage to the seller in a conditional sale is that in the event of the buyer's bankruptcy, the seller, unlike the mortgagor, may assert a right to have the property segregated from the bankrupt's assets and to recover it upon return of any payments made by the buyer plus interest, less the rental value and costs of deterioration.

When a security trust is established, a credit institution acts as a trustee or fiduciary agent for a creditor who might wish to obtain either the security of a reversion of title, as would a seller who has not received the purchase price, or of a privileged right to the proceeds in the case of a sale of property as would a mortgagee in a typical mortgage situation. The beneficiary of the trust must be someone other than the settlor for he is the counterpart of the creditor in the other secured transactions.

⁷⁶ LEY DE HACIENDA DEL DEPARTAMENTO DEL DISTRITO FEDERAL art. 445 (D.O. Dec. 31, 1941 & Jan. 17, 1942), in EDICIONES ANDRADE, IMPUESTOS DEL DEPARTAMENTO DEL DISTRITO FEDERAL 135 (7th ed. 1964).

One final point must be made. The transactions I have described might appear to be very similar to those which are in use in the United States. There is, however, danger in assuming that the effect of the transactions is the same in both countries. This speech has merely attempted to provide an overview of the substantive law of secured real estate transactions in Mexico. It must be remembered that this substantive law is meaningless unless the protections it seeks to provide are considered in conjunction with the law of the land registry. The enforceability and priority of rights created by the substantive law depend largely upon the complex provisions which govern the recording of the transactions involved in the land registry.⁷⁷

COMMENTARY FROM THE VIEWPOINT OF AN AMERICAN ATTORNEY

Mitchell New Delman*

Although I speak only as an Arizona lawyer, my experience with Mexican real estate transactions leads me to suggest that you should not attempt to do anything on your own in Mexico simply because you happen to be an Arizona lawyer. You are still a layman in Mexico, and you still need the assistance and counsel of Mexican lawyers. Hopefully, from what you learn in this seminar you will be better able to communicate your problems to Mexican lawyers and to understand their responses.

One thing that must be remembered is that the notaries' and the land registry fees are substantial in Mexico. Transfer taxes, for example, can be as high as 5 percent of the purchase price for urban land and 2 percent for rural land. The decision as to which method to use to acquire or sell property will be influenced largely by attempts to avoid the immediate payment of the notaries' fees and the registration taxes. Remembering that the execution and registration of the deed are costly, I would like to review some of the methods that I have seen used for acquiring property in Mexico, comparing the costs to the buyer with the risks taken with each of them.

The first is a promise to buy in the future (*promesa de compra o venta*) under which payment of the notarial fee and transfer tax is postponed. The risk in such a method is the lack of registration and serious problems may arise if the seller breaches. In such cases, the innocent party must go to court and prove that there was a promise to buy in the future, obtain the execution of the deed (*escritura*), and register it.

With the lease and sale (*arrendamiento con opción de compra*), which

⁷⁷ For a consideration of the peculiarities of the Mexican land registry system, see Kozolchik, *The Mexican Land Registry: A Critical Evaluation*, *infra* at 308. See also Igartua, *The Public Registry of Property in Mexico*, 11 *MIAMI L.Q.* 457 (1957).

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also postpones notarial fees and transfer taxes, title vests in the buyer after the rent has been paid. This is a type of rental contract with an option to buy.

The third method, a contract of sale guaranteed by a mortgage (*compraventa e hipoteca*), requires an immediate payment of notarial fees and transfer taxes. Title is vested in the vendee upon execution because it is a sales contract. In a default action, however, the mortgagee can assert his priority to the proceeds of the bankrupt's estate, subject, of course, to taxes and workmen's claims for wages even though such claims arose subsequent to the default action.

The fourth available method is a contract of sale with a rescission clause (*venta con pacto resolutorio*) which is subject to the immediate imposition of notarial fees and transfer taxes. Here again, title passes immediately. If there is a default, each party's initial consideration is returned to him, but the vendor is entitled to reasonable rental for the period of possession.

The fifth method, also requiring immediate payment of fees and taxes, is a conditional sale or a contract of sale with a reservation of title (*venta con reserva de dominio*). This type of contract generally contains the rescission clause used in the *venta con pacto resolutorio* but differs from it in that title passes to the vendee only upon payment of all installments.

QUESTIONS AND ANSWERS

Question: I understand that foreigners can make loans secured by a realty mortgage in the forbidden zone. Instead of the double corporation method for obtaining a foreign investor's control over property in the forbidden zone, could one also obtain a security mortgage so that if the government intervenes the foreign investor could say that he had a valid mortgage on the property and, therefore, assume realization of his investment within a five year period?

Lic. Rivera: Yes, I think you can establish such a mortgage, and it may be of some value, but the mortgage could make the lender liable for state and federal taxes on the interest received. If no interest were stated, it would be assumed that the rate was at least 6 percent and taxes would be assessed accordingly.

Question: Does Mexican law recognize the spendthrift trust as we know and understand that concept in the United States?

Lic. Rivera: We do have a similar institution in Mexico. It requires that the owner of the goods first be declared incompetent by a judge. Second, the person appointed to administer the estate of the incompetent must agree to put the goods in trust.

Question: Without that procedure are the interests of the spendthrift and the settlor alienable to other creditors?

Lic. Rivera: Yes, but the procedure that courts have to follow is the following: First a list is made up showing the debts that existed prior to the creation of the trust. This list will have to be registered so that the goods in trust continue to guarantee such debts. Second, after the establishment of the trust, obligations incurred by the spendthrift will not be guaranteed by the goods that are already in trust. Consequently, these goods will not be affected by acts of the spendthrift.

Question: How would the following situation be regarded under Mexican law? The seller enters into a land trust with a foreign national as the buyer. The foreign national, the buyer, then subdivides the property into multiple lots and sells undivided beneficial interests in the trust to American citizens.

Lic. Rivera: The foreigner would first have to obtain a permit from the Mexican Ministry of Foreign Relations. If the land was located in the forbidden zone, a request for a permit would be denied. If the land was located elsewhere, and if a permit was issued, the transaction could possibly be carried out.

Question: Can second mortgages, or second deeds of trusts, be created under Mexican law and, if so, how do you establish the priority of liens?

Lic. Rivera: Yes, they can definitely be created, and the priority of liens will be established by time of registration. The first to register has priority.

Question: Under what circumstances may lawyers act as notaries public and notaries public act as lawyers in the execution of the various agreements described by Lic. Gutierrez and Lic. Rivera?

Lic. Rivera: This depends on state law. In Sonora and in some other states, for example, it is possible for a notary public to practice as an attorney, except in matters related to the execution of deeds where he can only act as a notary. A notary public attests to the execution of a deed before him; if a problem should arise at a later date concerning the interpretation of such a deed, the notary public would not be allowed to intervene as a lawyer for either party. In Mexico, generally, a notary public has to be a lawyer, but this varies from state to state since each state has its own notarial laws. In Mexico City, which is in the Federal District, a notary public is forbidden to practice as an attorney; he is permitted to practice only as a notary public. In the state of Sonora and in many other states, you can act as counsel on any of the described agreements as long as they were not executed before you.

Question: Mention has been made of a mortgagee's right of preference in the event of bankruptcy. Is this preference anything less than the right to have the property sold and the proceeds applied until the mortgage debt is paid in full before all the creditors participate in the proceeds?

Lic. Rivera: Yes, it is something less. According to the Mexican law of bankruptcy, before the payment of a mortgage certain other preferred creditors must be paid. For example, any workman has a privileged claim and any expenses incurred during bankruptcy because of the death of the bankrupt have priority over the mortgage. Moreover, under certain situations, the payment of taxes will get preference. Once such privileged creditors have been paid, the mortgagee will have priority over other creditors.

Question: Does Mexican law recognize joint tenancy with right of survivorship?

Lic. Rivera: No, we do not have the right of survivorship in Mexican law. The closest you can come to having the right of survivorship is having a preemptive right in a situation where you have, for example, husband and wife or partners to the acquisition of the other party's share. But, this is as far as you can go with the rights of ownership if it is undivided.

Prof. Kozolchyk: I would like to dissent from the opinions held by Lic. Rivera and what appears to be the prevailing segment of legal opinion in Mexico. The reason usually given for the impossibility of establishing a joint tenancy with a right of survivorship is that it amounts to creating an in rem right that will vest in a *mortis causa* situation. Such vesting, it is said, requires a *mortis causa* disposition, such as a will or a court adjudication. In other words, a simple contractual stipulation allegedly cannot transfer property automatically upon the death of one of the contracting parties.

Frankly, I fail to see why death cannot be deemed a condition for a certain type of performance in a contract entered into by, for example, husband and wife on one side and a bank on the other. Moreover, I know of no reason why the bank's obligation of repayment in a savings account cannot be regarded as an obligation subject to alternative and exhaustive claims by either one of the depositors. This is what some banks in civil law jurisdictions, including those in Mexico, describe as the "I or You" ("Y/O") accounts. It would seem to me that the contractual performance by the bank is conceptually separate and distinct from the transfer of property upon death, which is the subject matter of what is described in civil law countries as "universal succession."

I believe that the opponents of the joint tenancy with right of survivorship are saying that it would be against the principle of universality or totality of succession to resort to devices other than those which expressly affect the succession in the eyes of the law. Without taking any position on the testamentary nature of joint tenancy with right of survivorship agreement, I would like to suggest that nothing should preclude a court from giving effect to such an agreement if its enforcement does not conflict with the adjudicative rules on testate or intestate succession.

These rules, in Mexico and in most civil law countries, establish minimum and maximum shares for different classes of heirs and also leave a margin of discretion to the testator concerning the size of these shares. Thus, if the survivor would, under the succession rules, not be denied what the joint tenancy provides, the joint tenancy agreement should be allowed to stand as an expression of the testator's discretion.

Question: Is the land registry system at all analogous to the Australian Torrens system, and is there any equivalent to title insurance in the United States?

Lic. Rivera: There is nothing similar to the Torrens system in Mexico. The registrar simply records the title and does not pass upon its intrinsic validity, as he does under the Torrens system. This will make it easier for you to understand the importance of the function of a notary public in the acquisition of land. In checking back to the last transfer, he advises the parties as to the effect of the document they are entering into and about the apparent quality of their title.

Prof. Kozolchyk: I fully agree with Lic. Rivera. Under the Torrens system, once you have the certificate issued by the land registry, you have title. It is as valid outside the registry as in the registry's books. You may sell the land, mortgage it or otherwise transfer it, and these transactions will have an almost irrefutable validity. The state stands behind the certainty of the certificates.

But how does the Mexican land registry system, a system that is much less certain than the Torrens system, stack up against title insurance in the United States? The view has been expressed that it is a comparable institution to title insurance because the notary public has to examine the chain of acquisition that would warrant the validity of the present deed. Such an examination, it has been suggested, might provide the equivalent to title insurance because if each grantor/grantee situation had that assurance by a notary you are likely to have an uninterrupted chain of notarial guarantees.

The problem is, however, that the guarantee given by the notary does not cover all possible clouds of title existing in the land registry. As a rule, he is only saying that with regard to the last transaction in the chain, the grantor apparently has the authority to convey. The notary is not passing judgment upon earlier transactions or other facts in the registry which may affect the grantee. The grantee can only claim the protection given to third parties in good faith on the basis of the lack of notice in the registry.

Likewise, the notary is not responsible for a faulty recording in the registry that may give rise to substantial discrepancies in the size of the property and which may even create imaginary estates. Finally, it is hard to visualize the standing that would allow a grantee of, for example,

the tenth deed in a chain of transactions to bring an action against a notary public before whom earlier deeds were executed. Needless to say, if recovery can be had only from notaries and the notary responsible for the defect is no longer alive, there can be no recovery at all. Thus, my conclusion is that there is no equivalent in Mexico to the United States title insurance.

Question: How can adverse possession affect the notary's search?

Lic. Rivera: In regard to real estate, there will be a need to search for a period longer than the three years required for adverse possession of personal property. In Mexico, it is usually five or ten years, when possession is "peaceful," public and in good faith. On the other hand, certificates on the state of title by the land registry purport to cover a 20-year period.

Question: On the foreclosure of the various types of security interests can there be a deficiency judgment as we know it in America? If the collateral were sold and failed to bring sufficient funds to pay off the indebtedness, and if the security instruments were ancillary to the main obligation would there be any provision to cover the deficiency?

Lic. Rivera: According to Article 2964 of the Civil Code, the general principle is that any debtor responds for his obligations with all his goods except those goods exempted by law. If you have a secured obligation and the foreclosure does not provide enough proceeds to pay the debt, you can levy against other property of the debtor until you obtain complete payment. You must remember, however, that the other property may be subject to rights of third parties.

Question: In the United States, we have loans of various types with relatively standard durations. On residential property, for example, the duration of a mortgage is usually 20 to 30 years. What are the periods in Mexico?

Lic. Rivera: In Mexico, it can be five, ten or fifteen years. Usually 10-year financing prevails with lending institutions.

Question: What percentage of the total construction price could one borrow on the guarantee of the land?

Lic. Rivera: Normally 50 percent. You would have to obtain an appraisal of the land and give details of future construction. The whole situation will then be taken into account, and an institution will lend normally 50 percent of the total value. The ratio is so common that it is called the two-for-one.

Question: Will Mexican banks customarily make a loan where the person borrowing the money has a 10-year lease on the property?

Lic. Estrella: No, generally they will not.

Question: Are there any usury laws in Mexico?

Lic. Estrella: There is a so-called "maximum" rate of interest of 9 percent per year, but parties may stipulate a higher rate. If such a rate is deemed exorbitant by a court it will reduce it to the maximum rate. The prevailing interest rate is now approximately 13 percent.