

ARGENTINA

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1. SECURED TRANSACTION: A BASIC DESCRIPTION

For purposes of Argentine legal interpretation, a secured transaction may be taken to mean a legal interest held by a creditor in real and/or personal property owned by a debtor or a third party, which is acquired by a contract in order to secure payment or performance of an obligation and entitles the creditor upon failure of the debtor to pay or perform an obligation to take possession of the property and to sell it in order to satisfy the obligation.

Within the above definition, creditors may be granted through the following security interests: mortgages, pledges (including registered and floating pledges), security assignments, trusts and antichresis.

However, certain assets may be exempt or the creation of a particular security interest may be limited in accordance with the nature of the assets involved and/or the underlying strategic sectors and/or activities in which they are employed (*i.e.*, public entities, energy, telecommunications, and military sectors).

(a) Mortgages

This security interest on real property is created by complying with certain legal formalities required for its granting by the *National Civil Code*. Accordingly, to be valid and binding, a mortgage on real property must be recorded in a public deed drafted by a public notary (its provisions specifically identifying both the property and the amount of payment due or of the obligation secured) and for the perfection of the security, the public deed must be duly filed and registered with the appropriate Registry of Real Property (“*Registro de la Propiedad Inmueble*”).

(b) Pledges

Under the provisions of the Argentine Civil and Commercial Codes, the pledge is granted by a public or private instrument. This security does not require registration since the pledged property is delivered to the creditor or to a third party in escrow, until cancellation of the guaranteed debt or fulfillment of the obligation. Therefore, there is no discussion about perfection of this security interest.

On the contrary, decree-law 15,348/46 (as ratified by law 12,962 and as further amended) provides for the creation of registered pledges where the secured asset may remain in possession of the debtor. This type of security may only be granted to certain creditors such as the State, cooperatives, corporations, warehouses, farmers’ associations, merchants, banks authorized to operate in Argentina, international financial institutions of which Argentina is a member, and foreign merchants, provided in the latter case that (i) the pledge falls on imported goods; and (ii) that the pledge secures the unpaid balance of the purchase price. As the pledged personal property is neither transferred nor delivered to the creditor since the debtor remains in possession of the movable assets, then the registered pledge only become effective *vis-à-vis* third parties upon its filing with the Chattel Mortgage Registry (“*Registro de Créditos Prendarios*”).

In case of a pledge over the stock-share of a company, this security interest will only become effective against the local company and other third parties if the lien was duly informed to the issuing company and registered in the company’s stock registry book.

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(c) Forms

Mortgages as well as registered pledges must be filed with the appropriate registry office with specific forms provided to that effect.

(d) Expiration / Renewal

The registration of a mortgage on real property will automatically expire after 20 years of recorded in the absence of renewal (section 3,151, *National Civil Code*). This security may be renewed by the creditor without the debtor's consent.

Mortgages on vessels of more than ten tons must be renewed every three years. If the vessel is built under a promotional loan granted by the Merchant Marine's National Fund, the mortgage will last for the same period as the loan, without need of periodical renewal.

Mortgages over aircrafts will automatically lapse after seven years of recorded in absence of renewal.

Finally, the effects of the registration of a pledge will generally expire after five years of recorded in the absence of renewal. They may be periodically renewed for identical terms.

2. INTERNATIONAL LETTERS OF CREDIT

Argentina has been using Letters of Credit for more than 20 years in order to guarantee certain obligations.

Indeed, they are a recommended means of protection. These letters of credit are common, and regularly used, instruments of protection for several deals in international business transactions.

There are not any special formal requirements. However, it should be highlighted that letter of credits are not transferable, unless this is expressly provided within the text of the letter of credit and the previous approval or waiver of the guarantor is obtained.

3. STATUTORY LAWS

Under Argentine law, there are no other security interests than those created by law, as it is set forth by sections 2,502, 2,503 and 3,876 of the *National Civil Code*.

The following statutory laws cover the types of securities most commonly used in Argentina:

1. The *National Civil Code* governs mortgages on real property (sections 3,118 to 3,198). This is a federal law applicable nationwide.
2. The *Aeronautical Code* (Law 17,285, sections 52 to 57) governs mortgages over aircrafts in Argentina. This is a federal law applicable nationwide. Please bear in mind that under Argentine rules of conflict of laws, the validity of an aircraft mortgage is determined by reference to the law of the flag. In this respect, Argentina will recognize mortgages that are established abroad to the extent that such foreign state recognizes mortgages established in Argentina.
3. The *Admiralty Law* (Law 20,094, section 499 to 514) governs mortgages over vessels in Argentina. This is a federal law applicable nationwide. Please bear in mind that under Argentine rules of conflict of laws, the validity of a vessel mortgage is determined by reference to the law of the flag. In this respect, Argentina will recognize mortgages that are established abroad to the extent that such foreign state recognizes mortgages established in Argentina.

4. The *National Civil Code* governs “civil” pledges which are defined as pledges of chattel used as collateral for “civil” obligations (sections 3,199 to 3,238). This is a federal law applicable nationwide.

5. The *National Commercial Code* governs “commercial” pledges which are defined as pledges of chattel used as collateral for “commercial” obligations (sections 580 to 588). This is a federal law applicable nationwide.

6. Decree-Law No. 15,348/46 governs “commercial” registered pledges, where the secured asset remains in the debtor’s possession. This is a federal law applicable nationwide.

7. Federal Law 9,644 governs the “agrarian” pledge.

8. Both the *National Commercial Code* and the *Argentine Corporate Law* (section 215, Law 19,550) govern pledges over shares of a local company. These are federal laws applicable nationwide.

9. The *National Commercial Code* and *Law of Negotiable Bonds* (Law 23,576) govern securities over negotiable bonds.

10. Federal Law 24,441 regulates security trusts.

Finally, please note that procedure codes are provincial legislation. Although there is a *National Civil and Commercial Procedure Code* (Law 17,454 as further amended) that is applicable to cases under federal jurisdiction, there are also 23 provincial procedure codes that regulate enforcement actions of secured interests within its own jurisdictions. Despite the number of procedure legislation, the rules for the enforcement of secured interests are very similar from province to province.

4. TYPES OF PERSONAL PROPERTY

As a general rule, ordinary goods may be secured through a private security agreement. This security does not require registration since the pledged goods would be delivered to the creditor or to a third party in escrow, until cancellation of the guaranteed debt or fulfillment of the obligation.

(a) Motor Vehicles and Other Titled Items

Motor vehicles may be secured by pledges on titles. These securities may be created by means of a public or private agreement. The pledge agreements must be then filed for registration with the appropriate office of the National Vehicle Registry in order to become effective *vis-à-vis* third parties.

(b) Inventory

Inventory may need special requirements to create a “floating lien” or floor plan lien to cover new inventory as it arrives (sometimes referred to as after acquired property).

There is no legal definition of “inventory” within the Argentine legal system. Nevertheless, certain goods may be collectively considered as an “inventory” and may be secured through an individual pledge. We must stress that its registration will depend on the type of asset forming part of such “inventory”.

(c) Accounts Receivable Considerations

Accounts receivable considerations may be secured through the creation of a pledge. Creditors may or not choose to register the pledge agreement before the appropriate chattel mortgage registry, which will impact on its effectiveness *vis-à-vis* third parties. However, in order to be enforceable against the debtor, the creditor must serve a written notice to the debtor.

(d) Proceeds and Products Derived from Collateral Considerations

The creditor is entitled to collect the products derived from the collateral, always acting on behalf of the debtor and to sole purpose of applying them to the cancellation of interests (if any) or otherwise to the payment of the principal amount (section 3,231, *National Civil Code*).

In principle, the lien would not cover any future or additional advances. It would depend upon what the parties had agreed upon in the respective pledge agreement.

(e) Possessory Liens

The creditor is entitled to retain possession of the pledged assets until the total debt (*i.e.*, principal, interests and conservation expenditures) is completely cancelled (section 3,229 of the *National Civil Code*)

(f) Fixtures and Equipment Considerations

Securities over movable goods collectively considered as fixture and equipment may be obtained through a pledge. Creditors may or not choose to register the pledge agreement before the appropriate chattel mortgage registry, which will impact on its effectiveness *vis-à-vis* third parties.

(g) Instruments, Chattel Paper and Intangibles Considerations

Negotiable bonds and other instruments may be secured by a private pledge agreement. Chattel papers may also be secured by a private pledge agreement. Intangible assets (*i.e.*, patents, trademarks, copyrights, etc.) may be secured through the creation of pledges by private agreements. These pledge agreements must be then filed for registration with the National Industrial Property Institute ("*Instituto Nacional de Propiedad Industrial*") in order to become effective *vis-à-vis* third parties.

(h) Proceeds from Sales of Products Considerations

In view of the nature and the operational aspects of cash accounts, we understand they cannot be secured by means of a pledge. However, other mechanisms can be implemented such as the execution of a security trust or the assignment of its funds as collateral to a certain commercial transactions

(i) Farm Products or Other Assets Categories

Securities over growing crops and timber are authorized by the *National Civil Code*, which also provides for certain priority rights in sections 3,888, 3,909, 3,911 and 3,912.

Federal Law 9,644 provides for an "agrarian pledge" that secures the following assets: (i) agricultural machinery, implements and tools; (ii) animals and their products; (iii) personal property employed for rural activities; (iv) products and crops corresponding to the year in which the pledge is created; and (v) timber.

A registered pledge under the provisions of decree-law 15,348/46 may also be used to secure crops and timber, but as we have already stressed, this *security* will only be granted to certain creditors, such as the State, cooperatives, corporations, warehouses, farmers' associations, merchants, banks authorized to operate in Argentina, international financial institutions of which Argentina is a member, and foreign merchants, provided in the latter case that (i) the pledge falls on imported goods; and (ii) that the pledge secures the unpaid balance of the purchase price.

(j) Special Considerations for Commercial Good vs. Consumer Goods

Argentine law does not make any difference between commercial and consumer goods for the purposes of perfection of the security interest.

(k) Lien Can Be Created by Possession of the Goods, Without Written Security Agreement or Instrument

In principle, a pledge may be perfected by the possession of the goods without any written agreement. However, section 581 of the *National Commercial Code* and section 3,217 of the *National Civil Code* establish that said security interest (*i.e.*, not executed in a written instrument) will not become effective *vis-à-vis* third parties.

5. LEASING OF GOODS

Leased goods can be secured neither by the lessor nor by the lessee. Under the provisions of law 25,248, regulating leasing agreements in Argentina, the lessee may use the leased goods in accordance with the purposes established by the parties in the applicable lease agreement, but he or she is not entitled to sell, encumber, or transfer the leased goods.

In Argentina, the lessor only grants the right to use a particular property to the lessee, against the payment of a rent and gives the lessee an option to purchase the leased property for a specific price at a certain period of time. Therefore, as we mentioned above, the lessee does not have the right to sell, encumber, secure, or transfer the leased goods as they are still property of the lessor.

6. PRIORITY OF LIENS

With regards to mortgages, priority is given according to the chronological order in which each mortgage is duly registered at the Registry of Real Property. For example, a first mortgage over a real estate property will grant its creditor a first priority right over the underlying real estate asset as from the date upon which the mortgage is executed before a notary public, provided that the filing for registration takes place within 45 days. The holder of a first degree mortgage will be given priority over other competing mortgages on the same property.

In connection to “civil” and “commercial” pledges, the following rules apply: (i) if the pledges are created over the same asset at a concurrent time, their proceeds will be distributed to holders pro-rata (sections 3,920 and 3,934, *National Civil Code*), but otherwise (ii) priority will be given according to the chronological order in which the pledges have been created (section 3,210, *National Civil Code*).

Finally, section 7 of Decree-Law 15,348/46 forbids the debtor from granting a second registered pledge over the same assets without prior consent given by the original secured creditor. As to the priority rights, please note that upon foreclosure of the registered pledge, the proceeds shall be applied, first, to pay taxes and expenses incurred in the protection of the collateral, and then, to cancel the principal and interests of the secured debt.

The government by itself has no priority over other creditors on the same collateral.

(a) Bankruptcy

The automatic stay triggered by the initiation of insolvency proceedings by the debtor and the declaration of bankruptcy require that secured creditors file a proof of claim of their credits and their guarantees for them to be entitled to enforce their security during the course of the bankruptcy proceedings.

Unlike unsecured credits, interests continue to accrue (even after the initiation of insolvency proceedings or the declaration of bankruptcy) up to an amount not exceeding the value of the security.

The bankruptcy court may determine a “suspect period” of up to two years prior to the declaration of bankruptcy. Such period depends on the date when insolvency was first evidenced, which is finally determined by the bankruptcy court. Certain acts that occur during such “suspect period” could be declared

ineffective *vis-à-vis* other creditors (*i.e.*, when a security interest is obtained for a debt that is non-matured and that was originally unsecured).

In connection to priority of liens, the Argentine *Bankruptcy Law* classifies creditors in the following groups in order to determine which creditors will be paid before other creditors when the debtor's assets are not sufficient to pay debts owed to all creditors. First, assets of the company that are subject to special priorities will be liquidated and their proceeds will be distributed to the relevant creditors to the extent of their claims. Secondly, the company's remaining assets will be liquidated and their proceeds will be distributed to creditors in the following order: (i) creditors of the bankruptcy estate and employees with respect to certain labor claims; (ii) creditors with a general priority will collect their claims over the first 50 per cent of the remaining amount (labour claims with a general priority will collect first, up to the full amount of these claims, even if they exceed the first 50 per cent; the remaining creditors with a general priority will divide the remainder of the first 50 per cent on a pro-rata basis); (iii) unsecured creditors and general priority creditors (to the extent their claims were not fully satisfied by the first 50 per cent) will collect on the second 50 per cent on pro-rata basis; and (iv) any remaining amount will be distributed to subordinated creditors in the manner agreed among such creditors and the debtor.

Creditors with a special priority are those whose priority relates to specific assets. Special priority creditors may collect their credits (generally only the principal amount) exclusively from the proceeds of the underlying assets. The claims of special priority creditors that exceed the proceeds obtained from the underlying asset will be treated as claims without a priority. The following credits have a special priority on the proceeds of the assets indicated in each case:

- (i) credits relating to the construction, improvement or maintenance of a given asset have a special priority with respect to such asset (as long as the asset remains in the debtor's state);
- (ii) credits for compensation owed to workers in the six months prior to bankruptcy or reorganization and credits arising out of indemnification due to work accidents, severance payments and contributions to unemployment funds (including interest for a period of two years from the date the credits become due) have a special priority over the debtor's goods, raw material and equipment that are related to the facilities where the worker has rendered his services;
- (iii) taxes applicable to certain assets have a special priority over such assets;
- (iv) credits secured with a mortgage, pledge, or warrant, and credits corresponding to bonds or debentures with special or floating security (including costs, interest accrued for two years prior to bankruptcy, and compensatory interest accrued after bankruptcy) have a special priority on the assets securing such credits;
- (v) lien possessors have a special priority on the assets possessed;
- (vi) certain credits regulated by the *Admiralty Law*, the *Aeronautical Code*, the *Law of Financial Entities* and the *Insurance Law* have a special priority on the assets described in these statutes.

Creditors with different special priorities with respect to the same asset will be paid in the order provided in (i) to (vi) above, with the exception of credits described in items (iv) and (vi), the collection of which is governed by specific rules. In addition, credits of lien possessors will have priority over other credits with a special priority if the possession commenced before the creation of the security interest. Credits contained in the same item will share on a pro-rata basis in the liquidation of the applicable assets.

The following credits enjoy a general priority:

- (i) credits for compensation and family allowances owed to workers for six months and those arising out of indemnification due to work accidents, severance payments, contributions to unemployment funds and any other labour-related credits (including court costs and interests for a period of two years from the date the credits become due);
- (ii) credits for social security, family allowance and unemployment fund debts;
- (iii) credits for taxes;

- (iv) credits with respect to invoices duly acknowledged by the debtor as payor under such invoices for amounts up to Ar\$ 20,000 per creditor.

(b) Purchase Money Lien / Blanket Lien

There is no specific priority contemplated for a money lien over a blanket lien covering the same asset.

7. RECOVERY / REPOSSESSION OF COLLATERAL

Argentine law provides for a variety of secured interests that entitle the creditor to summary executory proceedings (“*procesos ejecutivos*”). There is no “self help repossession” available under Argentine law.

In case the creditor does not return the collateral upon the payment of the secured debt, the debtor will have to initiate judicial proceedings demanding the restitution of the assets.

In the event the debtor obtains a favourable judicial ruling at court, then the defendant (creditor) should voluntarily comply with the judge order and return the collateral to the debtor. If not, then a court officer appointed for said purpose will carry out the judicial order

The debtor is entitled not only to an accounting of collateral which is recovered by the creditor, but also to any exceeding amount resulting from the foreclosure proceedings.

The *National Commercial Code* provides that unless agreed with the debtor upon a special sale proceeding, the creditor must pursue the sale of the pledged assets by public auction (section 585, *National Commercial Code*). The proceeds of such auction will be applied to cancel the debt.

In case of a pledge over a company’s shares, negotiable instruments, or other commercial papers traded at any stock market, such collaterals will have to be sold through a broker at the quoted price the securities had the day following the debtor’s default on its obligations.

Private sale is allowed under Argentine law as long as the creditor and debtor agreed upon it.

The creditor may seek the recovery of the balance amount in the same foreclosure action in case the collateral results to be insufficient to cancel the total debt. However, the creditor will have no preference right with respect to other assets of the debtor.