Chapter 10

MEXICO

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I INTRODUCTION

i The ship finance industry

For more than 70 years the state-owned Petróleos Mexicanos (PEMEX) has been vested with the Constitutional mandate to conduct upstream, midstream and downstream oil and gas activities in Mexico. This mandate includes the exploration and development of offshore oil fields in the Gulf of Mexico, commencing with the Cantarell oil field in the late 1970s. Since then, the ship finance industry in Mexico has been driven by the needs of PEMEX and its contractors, who require a modern fleet of offshore support vessels, platform support vessels, anchor-handling tug supply vessels and offshore subsea construction vessels to support the production platforms that operate on the shallow waters off the coast of the state of Campeche.

Cabotage shipping laws in Mexico restrict offshore maritime operations to companies that have majority Mexican investment participation. In this context, the offshore shipping industry is controlled by Mexican contractors that tap into the global shipping markets through joint venture or charter arrangements. Financing for these operations has been either local or, when involving international finance, the preferred structures (particularly in the case of larger vessels) have been non-Mexican flag security interests.

ii Recent changes

Over the past few years, there has been a tendency to use security structures governed by Mexican law in the financing of vessels servicing offshore operations in Mexico. One of the reasons for this has been increasingly tighter cabotage regulations, which essentially force vessels to fly the Mexican flag unless it can be shown that the vessel type is of an 'extraordinarily specialised' nature.

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The other – very potent – incentive that has increased the appetite for the use of Mexican law-governed security structures in ship financings has been the amendments to the Mexican Constitution of 20 December 2013, which were followed by a new legal framework for the hydrocarbons sector enacted during 2014. This Constitutional and legal reform essentially opens participation to private investment throughout the oil and gas sector, which will coexist with PEMEX. Accordingly, the players in international ship finance have been more willing to use Mexican law security structures to accommodate the needs of local offshore contractors – that are still bound by cabotage restrictions – while gaining a foothold in the expanding Mexican offshore market.

II LEGISLATIVE FRAMEWORK

i Domestic and international law and regulation

Pursuant to Mexican law, the parties to any agreement may choose to be governed by a foreign law, provided that choice is valid.

If the choice of foreign law under a financing agreement were to be upheld as a valid choice of law, a Mexican court, with proper jurisdiction and applying Mexican law, should give effect to the express choice of foreign law contained in the financing agreement.

As for the jurisdiction clause, we note that for a submission to jurisdiction to be valid in Mexico, the following requirements need to be complied with:

a all parties expressly submit to a specific jurisdiction (or jurisdictions), which may be:
- the corporate domicile of any of the parties;
- the place where the obligations under the relevant agreement are to be fulfilled; or
- the place where the subject matter of the agreement is located; and

b expressly waive their rights to any other jurisdiction to which any of them may be entitled to by reason of their present or future domicile or otherwise.

In other words, a financing agreement documenting the granting of a loan for the acquisition of a ship may be governed by foreign law and its submission to foreign jurisdictions will be valid provided that such provisions comply with the aforementioned requirements.

Under Mexican law a judgment rendered by a foreign court pursuant to a legal action instituted before that court in connection with the provisions of a financing agreement, would be enforceable in a competent court of Mexico if in compliance with specific rules applicable to the enforcement of judgments[2] entered by foreign courts as contained in Article 1347A of the Commerce Code and other applicable provisions of the Mexican Federal Code of Civil Proceedings.

2 *Inter alia*, that any judgment rendered outside Mexico may be enforced by Mexican courts, provided that: (1) the judgment is obtained in compliance with the legal requirements of the jurisdiction of the court rendering the judgment and in compliance with all legal requirements of the relevant document; (2) the judgment is strictly for the payment of a certain sum of money, based on an *in personam* (as opposed to an *in rem*) action; (3) the judge or court rendering the judgment was competent to hear and judge on the subject matter of the case in accordance with accepted principles of international law that are compatible with Mexican law; (4) service of process is made personally on the defendant; (5) the judgment does not contravene Mexican law, public policy of Mexico, international

ii Specific practices

The general road map for a ship financing may include:

a a loan or financing agreement, entered into by and between lender and borrower (the agreement could be governed by Mexican or foreign law);

b the creation of a security interest on the Mexican-flagged ship by means of a ship mortgage or a security trust agreement (STA);[3] and

c extra-judicial procedures, which a lender would be entitled to initiate in the case of an STA upon an event of default under the loan agreement, or judicial foreclosure proceedings set out in the Navigation Law, as described in Section IV, *infra*.

III SECURITY AND ENFORCEMENT

i Financing of contracts

Whenever structuring a secured or supported financing, a detailed case-by-case analysis must be undertaken to determine and implement the most appropriate form of security interest; however, there are two types of collateral structures that are most often used in Mexico for the financing of ships: the ship mortgage and the STA.

Ship mortgages

Ship mortgages in Mexico are governed by the rules contained in the Law of Navigation and Maritime Commerce (the Navigation Law) in the absence of a valid designation of a foreign applicable law. Under a ship mortgage, the mortgagor (borrower or guarantor) creates a security interest in a ship to secure the payment of the secured obligations for the benefit of the mortgagee. The security interest created in the ship covers (unless expressly agreed otherwise) assets affixed to the ship as well as its fittings and appurtenances.

The parties to a ship mortgage on a Mexican-flagged ship must enter into a written agreement before a civil notary public or commercial notary public in Mexico and subsequently register the deed of mortgage with the Mexican Maritime Public Registry (the Maritime Registry). The registration is required to have an enforceable mortgage with regard to third parties and to determine its ranking with respect to other mortgages. In the case of

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treaties or agreements binding upon Mexico or generally accepted principles of international law; (6) the applicable procedure under the laws of Mexico with respect to the enforcement of foreign judgments (including the issuance of a letter rogatory by the competent authority of the jurisdiction requesting enforcement of the judgment and the certification of the judgment as authentic by the corresponding authorities of the jurisdiction in accordance with the laws thereof) is complied with; (7) the action in respect of which the judgment is rendered is not the subject matter of a lawsuit among the same parties, pending before a Mexican court; (8) the judgment is final, non-appealable and conclusive in the jurisdiction where obtained; and (9) the courts of the jurisdiction recognise the principles of reciprocity in connection with the enforcement of Mexican judgments in that jurisdiction.

3 Additional collateral could be constituted, depending on the characteristics of the parties to the financing (e.g., Mexican or foreign share pledges, as the case may be, on the ship owner, and commercial or floating lien pledges).

ship mortgages created on a ship that is flagged in a country other than Mexico, Mexican law will recognise its perfection if the applicable formalities in the other jurisdiction are complied with, and provided that the mortgage is duly recorded in the relevant registry.[4]

Mexico is not a party to the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, but it has followed the international tendency contained in the Convention to have a limited list of claims that will rank senior to the ship mortgage in the event of foreclosure. Thus, the Navigation Law sets out a list of maritime liens that will be recognised as priority (in the following order) by Mexican courts over the ship mortgages in the event of foreclosure.

a wages and other amounts payable to crew members in connection with their services on board the ship, including repatriation expenses and social security contributions;

b indemnifications for death or bodily injury caused directly by the operation of the ship;

c salvage fees;

d fees owed for the use of port infrastructure, marine signalling, waterways and pilotage; and

e indemnifications for physical loss caused in tort to third parties resulting from the operation of the ship (excluding losses caused to cargo).

Except for wages and social security amounts payable to crew members and port infrastructure, the other maritime liens listed above should be covered by the protection and indemnity (or P&I) insurance and ship's hull insurance that is in place.

Security trust agreements

Under an STA, the trustor (borrower or guarantor) transfers title to certain assets in favour of a Mexican trustee to secure the payment of the secured obligations. Generally, Mexican banking institutions act as trustees under STAs.

Structuring and perfecting an STA entails the execution and delivery of a written STA by the trustor, the first place beneficiary (e.g., lender) and the Mexican trustee before a civil notary public or commercial notary public in Mexico. In this case, were a ship to be transferred to the Mexican STA (i.e., a moveable asset),[5] the STA must be registered, for perfection purposes, with the Maritime Registry.[6]

Under an STA, the actual legal title to the ship is transferred to the Mexican trustee for all legal purposes (but not for tax purposes). The trustor, however, would retain a secondary beneficial interest in the ship so that, upon satisfaction of the secured obligations, legal title to the ship would revert to the trustor.

4 Mexico is a Contracting State of the United Nations Convention on the Law of the Sea, which sets out the general framework for ship registries and ship registration.

5 Pursuant to Article 78 of the Navigation Law, a ship and its devices are considered moveable assets.

6 In the event assets transferred to the trust agreement include moveable assets, the security trust agreement must be registered in the Sole Registry of Liens over Moveable Assets to have an enforceable security with regard to third parties.

Also, the trustor or a third party may retain possession of the ship,[7] to utilise it in the ordinary course of its business, although only the Mexican trustee (acting upon instructions of the original beneficiary (the creditor) of the STA) is legally entitled to transfer, encumber or otherwise dispose of the ship.

Collection rights of contracts under which the ship provides services can be assigned and transferred to the Mexican trust estate. In such cases, all payments arising from the collection rights would be directly paid into trust accounts opened and maintained by the Mexican trustee for the benefit of the original beneficiary. All amounts deposited in the trust accounts can count towards the payment of the secured obligations pursuant to the transaction documents (including principal and interest payments under the corresponding loan) and, provided there is no event of default under the transaction documents, excess cash can be disbursed to borrower on a periodically basis.

The most relevant obligation imposed on a Mexican trustee by statute is to observe and perform its duties and obligations as expressly set out in the STA acting pursuant to the diligence standard of a *bonus paterfamilias*, to achieve the purposes of the trust, for the benefit of the first place beneficiary. Although no specific definition of the standard of *bonus paterfamilias* is provided by statute or court precedent, the general consensus of the doctrine (i.e., legal authors) define it as the standard of care that a 'diligent owner' would exercise in dealing with its own assets and affairs – similar to the degree of care that any person (e.g., an agent) would be required to exercise when dealing with those of another person.

ii Enforcement

As a general rule, self-help remedies are not enforceable in Mexico. The taking of possession, entry, removal, sale, transfer or other disposition of property or similar actions in Mexico pursuant to remedial provisions may not be carried out in Mexico without judicial intervention, under due legal process consistent with Mexican law provisions, including, without limitation, that the defendant has the right to be heard and fails to prevail in court. Extra-judicial foreclosure procedures are, however, available under certain collateral structures, such as STAs.

Depending on the type of collateral (e.g., maritime mortgage or STA), the lender will have to comply with specific requirements to foreclose the collateral granted in its favour, as described in Section III.iv, *infra*.

iii Arrest and judicial or extra-judicial sale

Ship mortgage

Generally, a ship mortgage must be enforced through the judicial foreclosure proceedings set out in the Ninth Title of the Navigation Law. As mentioned, the 'private power of sale' remedy traditionally available in certain jurisdictions is not available in Mexico.

A ship arrest feature is contemplated in the Navigation Law, allowing for the attachment of the ship so that it remains within the jurisdiction of the Mexican courts while the mortgage foreclosure process takes place. The arrest procedure entails the issue of an *ex parte* court order in an expedited fashion, which includes the request for assistance for its implementation by the Mexican navy and the Ministry of Transportation and Communications through the corresponding harbour master. In the event that the ship is carrying out operations at sea

7 Which for all legal purposes should be considered a depositary.

within Mexican territorial waters, the arrest may be performed through a dispatch supported by the Mexican navy granting the right to appoint a depository of the ship, which can be implemented through a substitute captain until the ship returns to a Mexican port.

Provided that the procedure for the foreclosure of the ship mortgage has been commenced, the mortgagee should not be required to post a bond for attaching the ship, as a bond is not expressly required in connection with ship mortgage foreclosure proceedings. Moreover, the parties can also agree, in terms of the mortgage, to waive any requirement to post a bond. The ship owner, in turn, would need to post a bond issued by a Mexican-authorised bond institution to be able to release the ship from the arrest. There is scant regulation or precedent on the amount of the bond as the judge has discretionary powers to determine the amount, but in any event it should be an amount that covers the liability of the mortgagor with respect to the mortgagee.

The Mexican federal courts have exclusive jurisdiction over maritime claims, including ship mortgage foreclosure procedures. Except for certain specific rules applicable to ship mortgage foreclosures as set out in the Navigation Law, the general procedural rules contained in the Code of Civil Procedures for the Federal District, the Federal Code of Civil Procedures and the Code of Commerce apply. In such a case, to enforce the ship mortgage in Mexico while the ship is located in Mexican ports or Mexican waters, it is essential that the ship mortgage contains a forum-selection clause providing for jurisdiction of Mexican courts.

Timing for the various stages related to the ship-mortgage foreclosure procedure are hard to predict, as the same will depend on specific factual circumstances that must be assessed on a case-by-case basis and on the tactics that the mortgagor may implement for delaying and challenging the foreclosure. Only as an indicative time frame, it may take between one and two weeks to arrest the ship, while taking of possession may require an additional month. Finally, although the ship-mortgage foreclosure procedure is designed to move rather quickly, if aggressively defended by the mortgagor, it can in practice be time-consuming.[8]

A ship mortgage was traditionally the best way to get a security interest on ships before the introduction of the STA, but (1) title to the ship remains with the borrower, (2) foreclosure under this structure may be time consuming; and (3) in the event of insolvency the relevant creditors will have to appear before the courts to exercise their rights as secured creditor.

Security trust agreements

By statute, to the extent the parties have so expressly agreed in a special section within the STA, if an event of default occurs and the trustor fails to remedy the default within the period expressly provided (often limited to approximately three working days from the date of receipt of the corresponding foreclosure notice), the Mexican trustee (acting pursuant to the instructions of the first place beneficiary) will proceed to sell or otherwise distribute all or a portion of the trust estate pursuant to the extrajudicial foreclosure procedure expressly set out in the STA. The statute expressly provides that no judicial intervention is required for such a sale and distribution procedure to be followed and concluded by the Mexican trustee. The proceeds of any such sale or distribution would be applied by the Mexican trustee to the payment of the secured obligations, after covering expenses related to the sale or distribution of the trust assets (e.g., trustee and related fees and expenses).

8 If the foreclosure is opposed and then appealed in the various instances, completion of the proceedings including the judicial auction could take some years.

The extra-judicial foreclosure procedure and arrangements for the sale of the ship should include the following minimum requirements (these procedures and arrangements must be signed separately by the parties to the STA):

a The Mexican trustee must initiate a foreclosure procedure upon receipt of a written notice from the original beneficiary specifying the nature of the event of default and requesting that the Mexican trustee initiate the foreclosure procedure (the default notice).

b The Mexican trustee must deliver a written notice to the trustor notifying receipt of the default notice and attaching a copy thereof (the foreclosure notice).

c Upon receipt by the trustor of the foreclosure notice, the trustor has the right to challenge the foreclosure only by:

- payment of the secured obligations in full;
- presenting clear, unambiguous written evidence of compliance and satisfaction of the defaulted obligations described in the default notice; or
- presenting clear, unambiguous written evidence of the term extension or novation of the secured obligations;

d If the trustor fails to pay the secured obligations in full or to prove compliance and satisfaction of the defaulted obligations, or if applicable, the term extension or novation of the secured obligations, the Mexican trustee should continue with the foreclosure of the trust estate pursuant to the extrajudicial procedure set out in the STA.

e Specific periods of time apply, agreed to by the parties for the different stages of the foreclosure procedure.

It is not uncommon that the trustor initiates a legal action to delay foreclosure of the trust estate. Although by statute, a trustor has the right to challenge the foreclosure of the STA only with respect to the matters described in the foregoing paragraph, it could nevertheless also use (and potentially abuse) the court system to delay the foreclosure, by challenging other matters, such as the absence of an event of default, the lack of corporate authority, due authorisation or authority of the legal representatives of the parties, due process, or similar matters. While some injunctive relief may be ordered by a court, if the Mexican trustee acts as provided in the STA and applicable law,[9] it would be difficult for a trustor to prevail and prevent the foreclosure of the ship pursuant to the foreclosure process expressly set out in the STA.

The STA has certain unique advantages, particularly a more efficient extra-judicial foreclosure procedure, and bankruptcy remoteness.

9 Mainly, the Mexican General Law of Negotiable Instruments and Credit Transaction, which regulates trust agreements in general, and security trust agreements in particular; and the Mexican Credit Institutions Law, which regulates Mexican banking institutions.

iv Insolvency issues

Ship mortgage

In the event of the insolvency of the mortgagor, the mortgagee will have a priority security interest over the ship and will be entitled to collect, within the insolvency proceeding, any amounts owed to it from the proceeds of the sale of the mortgaged assets, with priority over other creditors of the mortgagor, except for:

a labour claims related to unpaid wages for the year prior to the declaration of insolvency;
b litigation expenses related to the defence and foreclosure of the mortgaged assets;
c expenses related to the preservation and sale of the mortgaged assets; and
d uniquely privileged creditors (i.e., burial expenses and expenses related to the illness that caused the death of the mortgagor, in the case the mortgagor is an individual) and holders of maritime liens.

Security trust agreements

As previously mentioned, a Mexican trust is not a separate legal entity, but rather an agreement pursuant to which a person acting as trustor of the trust transfers certain assets to a trustee (acting solely in that capacity), specifically for the purposes set out in the trust agreement and for the benefit of one or more beneficiaries of the trust. Unless otherwise expressly set out in the agreement, legal title to the assets is transferred by the trustor of the trust to the trustee for all legal purposes (although not necessarily for tax purposes).

Provided that rules supporting the legality of the transfer of the ship to the security trust are complied with,[10] the transfer should not be contestable by the trustor, its present or future creditors, nor any liquidator or administrator in the event of the trustor's insolvency proceeding. Moreover, the ship should not, as a legal matter, be deemed part of the assets of the trustor and, as a result, the ship should not be subject to attachment by any creditor of trustor.

Pursuant to the Insolvency Law, the operation of the STA should not be legally impaired by the insolvency proceeding of the trustor and, therefore would remain subject only to the purposes set out in the STA (i.e., payment of the secured obligations). Furthermore, pursuant to the Insolvency Law, in the event of an insolvency proceeding of the trustor or the institution acting as Mexican trustee, the ship that forms part of the estate of the STA should not be considered part of, or consolidated into, the estate of the trustor or of the institution acting as Mexican trustee, as applicable.

10 The rules include: (1) the due authorisation by all necessary corporate action of the execution, delivery and performance of the STA by each party thereto; (2) the due execution and delivery of the STA by each party thereto in a public deed; (3) that, on the date that the ship (i.e., trust estate) was transferred to the Mexican trustee, the trustor was the sole, legal and beneficial owner of the ship, free and clear of any liens, conditions, limitations or restrictions on ownership of any kind; (4) that, on and prior to the date on which the ship was transferred to the Mexican trustee pursuant to the STA, the trustor was not insolvent as provided in the Insolvency Law; (5) that the trustor received a fair market consideration or benefit of the loan being secured by it pursuant to the STA; and (6) that the transfer of the ship by the trustor to the Mexican trustee does not (or will not) constitute or is not (and will not be) deemed to constitute, a fraudulent conveyance as provided in the Insolvency Law; then, in a properly presented and validly decided case.

IV CURRENT DEVELOPMENTS

Almost a historical paradox, oil prices have slumped just as the long overdue energy reform in Mexico is in the works. Weak oil prices coupled with massive cuts from PEMEX's budget have shifted the financial strategy of the Mexican oil giant towards substantial cost-saving. While production from the oil fields awarded during 2015 to private investors will lag by at least a couple of years, PEMEX has announced that production will decline by approximately 100,000 barrels per day (bpd) until stabilising at an average production of 2,130 million bpd.

Against this backdrop, PEMEX's notorious delays in paying suppliers has adversely impacted the operational and financing capabilities of offshore contractors. Although PEMEX has put in place factoring facilities to pay overdue receivables, many of the small and medium offshore contractors have already defaulted under their ship financing facilities and are pressed on cash flow. To make matters worse, PEMEX contractors' dire straits will not be offset by new business, as the Mexican oil company has indicated that it will not invest in projects that are not profitable in light of forecast oil prices.

Unless PEMEX's strategies to regularise payments to contractors quickly reverse the current tendency, the second half of 2016 could see a wave of insolvencies in the sector that will put to the test financing structures such as those described above. Hence the relevance of recent developments in Mexican insolvency law, as outlined below.

i Developments in policy and legislation[11]

In January 2014 the Mexican Insolvency Law was amended. The amendments were, in part, motivated by the suspect cramdowns imposed on creditors by related parties in the Vitro insolvency and the drawn-out Mexicana de Aviación insolvency, which had raised creditors's concerns about the protection of their rights.

The main features of the amendments are laid out below:

a If the recognised claims of subordinated creditors (including certain unsecured related party claims) represent a quarter or more of the total recognised claims, the subordinated claims will not be taken into account for the voting in a reorganisation plan.

b Judges may not extend any term set forth in the Insolvency Law. The mediation stage of the insolvency procedure may not exceed 185 days with two possible extensions of 90 days, which may not be extended by the court. If a valid reorganisation agreement has not been made by the end of these periods, the insolvent entity will be declared bankrupt.

c An insolvent entity may file an insolvency petition with a pre-agreed reorganisation plan, and a court may declare a company insolvent without an inspector's insolvency opinion.

d Debtor-in-possession (DIP) financing was introduced. Lenders can obtain 'super-priority' in an insolvency if the financing is granted with the prior authorisation of the court or mediator, and contravenes no resolution issued by the court or authorisation granted by the mediator.

11 Some of the following text is a revised version of an article originally published as Pedro Velasco de la Peña, Rodrigo Castelazo de la Fuente and Christian Dorantes Picazo, 'Testing The Amendments To The Mexican Insolvency Law', (Corporate Livewire, 24 March 2016), available at: www.corporatelivewire.com/top-story.html?id=1241, accessed 25 April 2016.

ii Recent cases

Since the amendments to the Insolvency Law came into effect, certain test cases, particularly in the housing sector, have been tried. They are summarised below.

a Desarrolladora Homex: in June 2014, Homex and 70.01 per cent of its recognised creditors filed insolvency petitions with pre-agreed reorganisation plans. In July 2015, following negotiations between Homex and its recognised creditors that lasted over a year, the insolvency judge approved Homex's reorganisation plan, which concluded its insolvency.

b Corporación Geo: during April 2014, an insolvency judge declared the legal insolvency of Geo and 15 subsidiaries, initiating mediation of insolvency proceedings with pre-agreed reorganisation plans. After over a year of negotiations, Geo and 74.43 per cent of its recognised creditors agreed on a reorganisation plan and in June 2015, the insolvency judge approved the conclusion of the proceeding.

c Urbi Desarrollos Urbanos: in late 2014, Urbi and 15 subsidiaries filed insolvency petitions with pre-agreed reorganisation plans. Following over a year of negotiations, Urbi and 63.83 per cent of its recognised creditors agreed on the reorganisation plan and in February 2016, the insolvency judge approved the conclusion of the proceeding.

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