



VENEZUELA

## Real Property Security

### Security Interests in Immovables and Related Property

Contributed by

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#### A. Introduction

##### 1. Instruments traditionally designed for security

The principal traditional instrument under Venezuelan law for providing a security interest in immovables, or real property, is the mortgage.<sup>1</sup> It is the only instrument that offers a true guarantee that is privileged over the claims of most other creditors. In addition, however, other forms of quasi-security interests have been used or developed and also provide a form of collateral in immovables. These include antichresis,<sup>2</sup> a contract with the right to repurchase or to redeem the property sold (referred to herein as a “redemption contract”),<sup>3</sup> financial leasing in the case of realty<sup>4</sup> and a chattel mortgage

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<sup>1</sup> The basic norms on mortgages are Arts. 1877 to 1912 of the *Código Civil*, last modified in 1982, published in the Official Gazette, Extraordinary, No. 2.990 of July 26, 1982 (“Civil Code”).

<sup>2</sup> Antichresis (*antichresis*) is an agreement whereby an obligor yields the product of the affected land to the creditor for the purpose of canceling a debt. The basic norms on antichresis are in Arts. 1855 to 1862 of the Civil Code.

<sup>3</sup> The basic norms on redemption contracts (*retracto convencional*) are in Arts. 1534 to 1545 of the Civil Code.

<sup>4</sup> In Venezuela financial leasing is reserved to qualified banking and other financial institutions governed by the banking law. The norms on financial leasing are in Arts. 117 to 124 of the *Ley General de Bancos y Otras Instituciones Financieras* (General Law of Banks and Other Financial Institutions), published in the Official Gazette, Extraordinary, No. 5.555 of November 13, 2001 (“Bank Law”).

on the entire business assets (*establecimiento mercantil*)<sup>5</sup> of the obligor, which in this context also covers immovables. Of these, the traditional real property mortgage, the chattel mortgage on the entire business assets, and a financial lease involving real property are the more common. Antichresis is an old civil law concept that is rarely used while the redemption contract involves potential complexities for the seller/repurchaser.

## 2. The use of title for security purposes

### a. Transfer of title to the creditor (sale/leaseback)

Of the five types of security interests mentioned, the only two that could be assimilated to a sale and leaseback would be the redemption contract and a financial lease. In the case of the former, the vendor would sell the property to the buyer, who in turn would lease the sold property back to the vendor. The vendor and the purchaser would then acquire all of the rights and duties of a lessor and lessee, respectively, under Venezuelan law, except that the contractual right of the vendor to repurchase the property from the purchaser, in accordance with the provisions of the Civil Code and their particular contract, would not be extinguished.

The situation of a financial lease would be the generally standard relationship for this type of transaction whereby the financial institution would acquire title to the property desired by the financial lessee, who would occupy the property while essentially paying the purchase price and financing charges, and who would have a

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<sup>5</sup> The basic norms on chattel mortgages on an *establecimiento mercantil* are Arts. 25-34 of the *Ley de Hipotecas Mobiliarias y Prenda sin Desplazamiento de la Posesión* (Law of Chattel Mortgages and Liens Without the Taking of Possession), published in the Official Gazette, Extraordinary, No. 1.575 of April 4, 1973 (“Chattel Mortgage Law”).

contractual right to acquire title to the property upon the payment of the balance of the financing or the final purchase amount contemplated in the financial lease.

b. Retention of title by the creditor (lease-purchase)

Under Venezuelan law the only two types of situations that would be similar to a retention of title by the creditor would be as described in point 2.a, above.

3. Uniform comprehensive security (e.g. floating charge)

The concept of a uniform comprehensive security essentially does not exist under Venezuelan law. The closest analogy to this would be in the case of a mortgage, where by law the mortgage is deemed to extend to all improvements, construction and other enhancements to the mortgaged property.<sup>6</sup>

4. Limitations on alien/non-resident interests in immovables

Venezuelan law does not establish any limitations with respect to the rights of foreign parties in the case of mortgages or antichresis. However, there are possible restrictions on foreigners acquiring or owning real property in certain areas of the country. Accordingly, these restrictions would affect redemption contracts and financial leases.

The restrictions on property ownership by foreigners have been based on considerations of national security. The present law on this matter<sup>7</sup> stipulates that the

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<sup>6</sup> Art. 1880 of the Civil Code.

<sup>7</sup> *Ley de Seguridad de la Nación* (Law on the Security of the Nation), published in the Official Gazette No. 37.594 of December 18, 2002, as complemented by Decree No. 1.100, *Reglamento Parcial No. 2. de la Ley Orgánica de Seguridad y Defensa sobre las Zonas de Seguridad* (Partial Regulation No. 2 to the Law on Security and Defense of Security Zones), published in the Official Gazette No. 33.469 of May 14, 1986.

so-called security zones, in which the ownership rights of foreigners are restricted, were to be established by specific regulations governing the situation in each of said security areas. Accordingly, in order to know the particular restrictions or prohibitions that apply in a determined area it is necessary to consult the regulations for that area.

Traditionally, foreigners were only prohibited from owning land in the areas adjacent to the national borders, lakes and rivers, military installations and basic industries.

However, beginning in 2002 the government created a series of special security zones in mainly urban areas with a view to protecting government buildings and principal roadways. As a general proposition, though, these regulations have not been fully developed and nor have they been strictly enforced.

## **B. Creation**

### **1. Basic elements of a security right**

#### **a. Obligations to be secured**

A mortgage can be used to secure any valid obligation, whether present or future, although in the case of the latter it is essential that the future obligation is contemplated and comes into existence at least simultaneous to the creation of the mortgage. A contract of antichresis can only exist in the case of present obligations, as the legal doctrine does not contemplate a situation of future or eventual obligations. The redemption contract would normally only serve as a security of a present obligation, as the right of redemption would have to arise prior to the initial sale of the property. In the case of a financial lease, this instrument is used solely to finance the presumed acquisition of a specific property and so to secure a present obligation.

#### **b. Assets to be encumbered**

A mortgage may cover property that is actually owned by the obligor or by a third party guarantor, provided that there is no conflicting or prior encumbrance.<sup>8</sup> A mortgage may not be constituted over future property, that is property that is not yet owned by the mortgagor.<sup>9</sup> The mortgage extends, by operation of law, to any improvements, subsequent construction or other enhancements to the property.<sup>10</sup>

In the case of real property mortgages, the property that may be subject to a mortgage includes real property and any construction thereon that is classified as real or immovable property, the usufruct thereof (except for the legal usufruct accorded to the ancestors of the mortgagor), and the rights of a grantor in a property ceded for a lengthy period under a emphyteusis (*enfiteusis*).<sup>11</sup> The purchaser of a property under a redemption contract may also grant a mortgage on the purchased property. In the case of a chattel mortgage covering all of the business assets, the mortgage would cover essentially the same security rights in the real property as a conventional mortgage.

A contract of antichresis may only cover a real property that is capable of generating proceeds for the creditor, such as agricultural or mining property. In this context, the redemption contract and the financial lease can only involve a specific real property.

### c. Proceeds

A mortgage must be for a specific amount. The mortgage provides the mortgagee with a privilege over the mortgaged property vis a vis all other creditors,

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<sup>8</sup> Art. 1877 of the Civil Code.

<sup>9</sup> Art. 1893 of the Civil Code.

<sup>10</sup> Art. 1880 of the Civil Code.

<sup>11</sup> Art. 1881 of the Civil Code.

except for the legal priorities established in the Civil Code.<sup>12</sup> It does not give the mortgagee the right to acquire the property but rather to execute the mortgage and to have the property sold via judicial auction. The mortgagee is entitled to collect the amount of the indebtedness from the proceeds of the sale up to the amount of the mortgage, plus execution expenses provided that these have been specified in the mortgage document. In the event that the sale of the mortgaged property does not cover the amount of the indebtedness, the mortgagee/creditor may bring a subsequent collection claim against the obligor.

The creditor under a contract of antichresis is only entitled to the proceeds produced by the land. These are to be applied first to the payment of interest and then to the amortization of principal.<sup>13</sup> In the case of a redemption contract, the seller who repurchases the property must pay the purchaser/reseller the price paid by the purchaser/reseller, plus the expenses of the sale/resale transactions, the cost of all repairs and the cost of all improvements that have increased the value of the property,<sup>14</sup> but not any other increase in the market value of the property. In the case of a financial lease, the proceeds are as stipulated in the financial lease contract.

## 2. Security agreement

### a. Definition

In the case of real property, a security agreement of the types described either gives the beneficiary a privilege over the property, or the proceeds thereof, as collateral for a credit (mortgages and antichresis) or allows the creditor to hold title to the

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<sup>12</sup> These include expenses made for the benefit of all creditors in the case of an attachment, judicial custodianship or auction, and certain real estate taxes, registration fees and inheritance taxes. See Arts. 1874 and 1875 of the Civil Code.

<sup>13</sup> Art. 1855 of the Civil Code.

<sup>14</sup> Arts. 1534 and 1544 of the Civil Code.

property until the debt has been fully paid (redemption contract or a financial lease). A security agreement is a formal contract that in order to be considered as such must comply with the respective legal requirements and formalities for each type of agreement.

b. Minimum contents

A mortgage document must specify the obligation being guaranteed, including the form of payment, specifically identify the property being mortgaged and evidence the ownership thereof by the mortgagor, and stipulate the amount of the mortgage, which is generally for a sum greater than the underlying financial obligation.<sup>15</sup> The mortgage document must be registered in accordance with the legal formalities in order to be deemed to be a valid mortgage. Generally, the mortgage document will contain a number of other contractual terms and conditions related to possible uses of the property, insurance, improvements on the property, other mortgages on the same property, and so forth.

A contract of antichresis must likewise specify the obligation and payment terms, identify the property involved and evidence ownership on the part of the debtor. The contract may not have a duration of over 15 years. It must be signed before the public registry with jurisdiction over the property.<sup>16</sup>

In the case of a redemption contract, this repurchase right must be agreed upon prior to the sale of the property to the creditor/purchaser. The redemption right must stipulate the financial terms and conditions of the transaction, the obligation of the

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<sup>15</sup> It is common practice to increase the value of the mortgage by 20% to 30% in anticipation of the expenses of execution.

<sup>16</sup> Art. 1862 of the Civil Code.

seller/repurchaser to pay for all repairs and improvements, and the right of the creditor/purchaser to retain title to the property in the event of default. The maximum term of a redemption contract is five years, although it may be renewed.<sup>17</sup> The sale and transfer of the property must be registered in the corresponding civil registry.

A financial lease over real property involves the acquisition of the property, and the registration thereof, by the owner/lessor, along with a financial lease contract that specifies all of the terms and conditions of the financial transaction, including in particular the right of the lessee to acquire title to the property upon the payment of the final amount under the financial lease.

#### c. Formalities

Mortgages must be registered in the civil registry with jurisdiction over the property being mortgaged and where ownership, or other encumbrances on the property, are also registered. If a mortgage is not duly registered it does not have the legal effect of a mortgage. The contract of antichresis must be signed at the corresponding property registry and a marginal note added to the title document at the registry. In the cases of a redemption contract and a financial lease the ownership of the property by the creditor/purchaser and by the financial lessor must be duly registered at the corresponding property registry.

#### d. Effects

The effects of properly drawn contractual documentation and due registration serve to perfect the security rights of the respective creditors under these different types

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<sup>17</sup> Art. 1535 of the Civil Code.



of security instruments. Any defects in the documentation or in the registration will, in most instances, void the effect of having created a security right on behalf of the creditor, even though the defective documentation may serve to evidence the obligation on the part of the debtor. However, in this case the creditor would be reduced to the position of an unsecured creditor.

### 3. Additional requirements

#### a. Introduction

Each of the types of security instrument referred to herein implies particular characteristics and requirements, either applicable to the creditor or the debtor, as indicated in this chapter.

#### b. Right of disposition of grantor

In the case of mortgages, as a general proposition the mortgagor conserves the right to sell or to encumber the property, although subject to the rights of the mortgagee. In the case of a credit that is conditioned on, or coupled with, the constitution of a mortgage, the Civil Code expressly prohibits a contractual stipulation that would have the effect of preventing the obligor from selling or encumbering the property.<sup>18</sup> However, this prohibition does not extend to mortgages created to guarantee other types of obligations. Moreover, it is customary to stipulate in the mortgage document that if the mortgagor wishes to sell or encumber the property it must first request the express authorization of the mortgagee under penalty of having the term of the obligation accelerated and the having the debt become immediately due and payable. Otherwise, there are no legal provisions with respect to the ability of the mortgagor to constitute

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<sup>18</sup> Art. 1267.

additional encumbrances over the same property, which is rather limited by the practicalities of the value of the property and the complexities this creates for parties with a security interest inferior in rank to that of a first mortgagee.

Contracts of antichresis do not, in principle, prohibit the obligor from selling or otherwise encumbering the property, although this may be restricted by contractual convention between the parties. However, by virtue of the requirement that the creditor has the right to be in possession of the property and to take any proceeds from the land granted to it by the contract of antichresis tends to reduce the interest of third parties.

In the case of a redemption contract the seller/obligor may not further dispose of ownership or rights in the property, as title has transferred to the creditor/purchaser. On the contrary, it is the purchaser that may sell or encumber the property during the period of the option in favor of the debtor, and the debtor may, upon satisfaction of the obligation, exercise its redemption right against any third party purchaser or mortgagee, even if the contract with such third party makes no mention of the redemption right of the original vendor/repurchaser.<sup>19</sup>

Under financial lease contracts the rights of the lessee/purchaser would be strictly limited by the terms of the contract and would normally be limited to the rights of a lessee only.

### c. Transfer of possession, publicity, control

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<sup>19</sup> Art. 1538 of the Civil Code.

In addition to the rights of mortgagors indicated above, a mortgagor may also, in principle, lease the mortgaged property. In this respect, the Civil Code only establishes that the lease of a mortgaged property may not be for an indeterminate period without the consent of the mortgagee; however, in the event of a lease of this nature by law the term of the lease is reduced to the end of the calendar year when the mortgage expires or, in the case of an agricultural property, until the crops have been harvested, if this period goes beyond the end of the calendar year.<sup>20</sup> The current law on the leasing of real property,<sup>21</sup> however, tends to undermine the security rights of a mortgagee in the cases of most types of properties,<sup>22</sup> by virtue of the complexities and relatively lengthy time that is required to terminate leases of properties and to evict the tenants. Accordingly, as a practical matter a mortgage will generally stipulate that if the mortgagor wishes to lease the property this may only be done with the express consent of the mortgagee under penalty of having the credit become immediately due and payable.

As for publicity and control, in the case of any form of sale or an encumbrance in the form of a mortgage, this would have to be registered in the same property registry as the first mortgage in order to be valid. However, leases are only required to be registered if they have a term of over six years.<sup>23</sup> In this respect, then, Venezuelan law does not provide effective publicity and control procedures. Accordingly, mortgagees are advised to establish express covenants in their mortgage documents, as well as to

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<sup>20</sup> Art. 1581 of the Civil Code.

<sup>21</sup> *Decreto con Rango y Fuerza de Ley de Arrendamientos Inmobiliarias* (Decree-Law on the Leases of Real Property), published in the Official Gazette, Extraordinary, No. 5.398 of October 26, 1999 (the "Lease Law").

<sup>22</sup> The Lease Law only excludes from its terms unconstructed urban and suburban land, rural farms, unincorporated business premises, hotels and other tourist facilities, and hostels. See Art. 3 of the Lease Law.

<sup>23</sup> Art. 1920(5) of the Civil Code.

remain aware of the situation of a mortgaged property. Otherwise, mortgagees must rely on their legal rights as established in the law and in their contracts.

In the case of a contract of antichresis, in principle the creditor is in possession of the property, which would tend to obviate the possibility of the debtor to lease it or otherwise transfer possession to a third party. In this respect, the antichresis is a form of possessory lien involving real property and, indeed, several of the provisions of the Civil Code with respect to possessory liens involving chattels also apply to antichresis.<sup>24</sup>

As noted, in the cases of a redemption contract and a financial lease, the creditor is the owner of the property and so the debtor has no right to transfer possession during the term of the respective contracts.

### **C. Publicity**

#### 1. Public registration for security in immovables

##### a. Title transactions v. security transactions

Of the five types of securities in immovables discussed in this chapter, three involve transactions in securities and two transactions involving title to the immovable. The former are the real property and business assets chattel mortgages, and the antichresis. The transactions involving title, that is ownership of the immovable as security, are the redemption contract and the financial lease.

##### b. Consensual v. non-consensual security rights

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<sup>24</sup> Art. 1860 of the Civil Code makes reference to Arts. 1843, 1852 and 1853 with respect to liens.

All of the security instruments discussed in this chapter are consensual in nature. However, with respect to immovables, the Civil Code also establishes what are termed “legal” and “judicial” mortgages. The former operate in favor of i) the vendor or other transferor of an immovable with respect to the obligations arising from the act of property transfer; ii) co-heirs, partners or co-shareholders in property belonging to an estate, a company or other legal entity; and iii) minors or others under the care of a guardian.<sup>25</sup> In contrast, judicial mortgages arise from a final court decision awarding a sum of money to be paid by a defendant to a plaintiff, which gives the latter a mortgage over the tangible assets of the debtor for up to twice the amount of the judgment credit.<sup>26</sup> In addition, there are certain privileges established by law that may be considered to be non-consensual security interests. These include certain expenses incurred for the benefit of all creditors and certain property taxes and registration fees.<sup>27</sup>

#### c. Notice v. document filing

Under Venezuelan law only the proper filing and registration of the security document is sufficient to create a security interest. Regardless of any notification, if the respective document is not properly registered, the security instrument is deemed not to have legal validity as such.

#### d. Timing of registration

In the case of mortgages the rule in Venezuela is that the first to file has priority. In the event that the debtor has granted more than one mortgage over the same property, and the respective mortgage documents do not make reference to the other mortgage(s), then the priority among the different mortgages is decided on the basis of the order of

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<sup>25</sup> Art. 1885 of the Civil Code.

<sup>26</sup> Arts. 1886 to 1889 of Civil Code.

<sup>27</sup> See Arts. 1874 to 1876 of the Civil Code.

registration, with the first to register collecting first up to the maximum amount of that mortgage. In the case of a contract of antichresis, in principle there can be only one such contract, as there can be only one party in possession and one beneficiary of the proceeds of the property involved.

e. Required content of registered notice

Once a security instrument has been registered it is considered to be a public document, as well as a public act. Accordingly, under Venezuelan law no other form of notice is required or traditionally given.

f. Private registration or publication

The civil registries where security instruments must be registered to be considered by law to be such are public entities. There is no concept in Venezuelan law of private registration. Security instruments may be signed privately or before a notary public, but this only gives rise to obligations as between the parties, as well as the right to proceed to registration. Otherwise, there is no obligation to publish the fact of a privately signed or publicly registered security instrument, as the fact of registration is deemed to be sufficient public notice.

g. Registration and enforcement

Security instruments that are not duly registered are not deemed, under Venezuelan law, to be security instruments. Thus, only properly registered security instruments are entitled to be enforced as such.

## 2. Debtor dispossession and equivalent control mechanisms

a. Debtor dispossession as a substitute for registration

The concept of debtor dispossession as a substitute for registration does not exist in Venezuelan law; there must be registration in order to create one of these types of security instruments. Notwithstanding, the fact of possessory rights is important with respect to these security instruments and should be established in the respective documents. For example, in mortgages it is traditional for the mortgagee to require that it consent to any change in possession by the mortgagor as a condition for not calling the obligation. In the case of an antichresis the creditor normally must occupy the property, although this may be through agents of the creditor. Under the sale with the right of redemption, the vendor/debtor has sold the property and the purchaser/creditor may freely dispose of it, albeit it is permissible to lease it back to the vendor/debtor.<sup>28</sup>

b. Quality of possession

Under a mortgage, the mortgagor continues in possession as the owner of the property. Under an antichresis, the debtor remains the owner of the property, but cedes possession to the creditor. In the cases of a sale with the right of redemption and financial leases the creditors are the owners of the property; in the former the vendor/debtor may or may not continue to have possession as a tenant, whereas in the latter this would normally be the case.

c. Symbolic possession

In all cases the rights of possession should be appropriately documented to safeguard the interests of the creditors. Accordingly, mere symbolic possession should not arise.

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<sup>28</sup> Art. 1545 of the Civil Code.

d. Third-party notice or control

In the case of mortgages, it is, in principle, not important that a third party have notice of the mortgage or be in control of the property, as the mortgage runs with the property even over the rights of a third party.<sup>29</sup> However, under certain circumstances the rights of a lessee of the property may cause complications with respect to executing the mortgage. A third party should not interfere in the case of an antichresis, given that the creditor has the right to possession until the debt is satisfied.<sup>30</sup> In the case of a sale with the right of redemption under certain circumstances the rights conveyed on a lessee by the Lease Law may conflict with the rights of the vendor/repurchaser, given that the Lease Law grants a lessee a right of first refusal if the property is to be sold. Accordingly, in this case a third-party lessee should be notified of the repurchase option in favor of the vendor/debtor. Likewise, this same provision of the Lease Law in favor of a lessee could also affect the purchaser/creditor, given that if the vendor/debtor does not exercise its option to repurchase within the time period stipulated, the sale is deemed irrevocable.<sup>31</sup> However, it may be noted that the Bank Law expressly exempts financial leases from the application of these aspects of the Lease Law.<sup>32</sup> In general terms, though, it is important for creditors with a security interest in real property to be mindful of the effects of the Lease Law and to attempt to regulate leases of the property in their contractual documentation.<sup>33</sup>

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<sup>29</sup> Art. 1877 of the Civil Code.

<sup>30</sup> Art. 1861 of the Civil Code.

<sup>31</sup> Art. 1536 of the Civil Code.

<sup>32</sup> Art. 123 of the Bank Law.

<sup>33</sup> The Lease Law covers only certain properties, including urban and suburban properties intended for habitation and/or the operation of commercial, industrial, professional and educational activities, whether leased or subleased. Excluded from coverage are urban and suburban land without buildings, agricultural lands, and hotels and tourism resorts, among others. In addition to the various rights accorded to lessees, the covered properties are also subject to rent control regulations. Generally, see Arts. 1 to 5 of the Lease Law.



### 3. Third-party effects of publicized and unpublicized security rights

As stated above, all of the forms of security instruments must be registered in order to have effect vis a vis third parties. An unregistered, and therefore unpublicized, security instrument is not deemed to be such under Venezuelan law and would have the effect of only documenting the obligation between the parties, but would not be binding on third parties.

#### **D. Filing system**

##### 1. Key design issues

###### a. Notice filing

The civil registries for immovables are governed by the Public Registries Law;<sup>34</sup> however, the registration of chattel mortgages is also regulated by the provisions of the Chattel Mortgage Law.<sup>35</sup> In the case of mortgages, antichresis and the transfer of property, it is necessary to present the respective document to the jurisdictional civil registry, obtain a calculation of the fees and pay these, whereupon the mortgage, antichresis or transfer will be registered. Additionally, in the case of a chattel mortgage in favor of a foreign financial institution, or in favor of companies or individuals, it is also necessary to present the prior authorization of the Superintendency of Banks or of the respective sectoral ministry, as the case may be, to constitute the chattel mortgage.<sup>36</sup>

###### b. Authority to file and signature

In the cases of mortgages, antichresis and sales with the right of redemption, the debtors must have the legal capacity to transfer or to grant rights over the property. In

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<sup>34</sup> *Decreto con Fuerza de Ley de Registro Público y del Notariado* (Decree Law on Public Registries and Notaries), published in the Official Gazette No. 37.333 of November 27, 2001 (Public Registries Law).

<sup>35</sup> See Arts. 78 to 86 of the Chattel Mortgage Law.

<sup>36</sup> See Art. 19 of the Chattel Mortgage Law.

the case of a financial lease, the parties must have the legal right to acquire the property. In the cases of mortgages and antichresis only the debtor has to sign the documents, which is also the case of the financial lessor, whereas in the sale with the right of redemption both parties need to sign. In most cases the contractual document can be signed before a notary public and then presented to the registry or the parties that need to sign may do so at the registry.

c. Grantor or asset-based index

The registry is based on the property, not on the grantor.

d. The filing process

As described previously.

e. Duration of effectiveness of a filed notice

Registration becomes effective vis a vis third parties from the moment it is signed and/or filed at the registry and will remain effective for as long as the term of the respective contractual rights. However, note that the redemption right under a contract with the right of redemption is limited to five years, unless extended by the parties, and an antichresis is limited to 15 years in all cases.

2. Other basic elements

a. Public access to database

The civil registries are open to the public and the databases may be freely consulted.

#### b. Fees

The fees to register a mortgage, an antichresis and the transfer of title to a property include the amounts charged by the registry and tax stamps. The fees charged by the registries include, or may include, i) a flat fee depending on the nature of the document, ii) an amount for each witness (if any), iii) a charge for certified copies, and iv) a charge for expedited service.<sup>37</sup> In addition, prior to the promulgation of the current Public Registries Law the government imposed a tax on the registration of documents dealing with real property, among others. However, as this law left for separate regulation the establishment of the tax structure for registration matters, and as this regulation has not yet been issued, no taxes are presently payable on the registration of security interests and transfers involving real property.<sup>38</sup>

#### c. Public or private operator

All of the registries are public offices.

#### d. Effect of registry error and allocation of risk

It is unlikely that an error could occur at a registry, given that the document to be registered is provided by the parties, the description of the property involved must coincide exactly with that at the registry, and the original document, once checked by

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<sup>37</sup> Of these charges, the first three are relatively minor and would not normally exceed about US\$150; however, the fee for expedited service (same day up to nine days) could be quite significant, as it is calculated as a percentage of the tax that was traditionally charged on registrations (see footnote 38), with a higher cost applying in the case of more prompt registration (for example, as much as 12% of 1% of the value of the property in the case of title registrations).

<sup>38</sup> Following the promulgation of the Public Registries Law in 2001, which repealed the previous law with the tax rates that had been applicable, the registries nevertheless continued to apply the previous rates under the assumption that the government would shortly establish a new rate structure. However, by a decision of the Constitutional Chamber of the Supreme Tribunal of Justice (Decision No. 61 of May 24, 2002), the registries were prohibited from continuing to charge any tax until the rates are established by law. It may be noted that the present elimination of this tax has substantially reduced the cost of transactions involving real property, as the registration of mortgages or other forms of guarantee for an amount over approximately US\$25,000 were taxed at the rate of 0.25% of the amount of the guarantee, and title registrations of properties valued at more than the same amount were taxed at the rate of 1% of the stated value.

the registry officials, is kept at the registry and recorded in the books thereof, with the parties receiving only certified copies, including of the marginal note indicating the encumbrance. Nevertheless, in the event of a filing error by the registry a debtor who resold or newly encumbered a property that was previously sold or encumbered would be liable in damages to the original creditor, as well as to the affected third party. The registry would also be liable for any damages caused. Notwithstanding, the rights so acquired of a third party acting in good faith would be deemed to be valid, regardless of the possible fraud of the debtor.

e. Proof of content of database

The manner to obtain evidence of the contents of the database is to request a certification of possible transfers and encumbrances. Once issued, this certification is binding on the registry up to the date thereof, but it does not cover transfers or encumbrances that are then being processed. Depending on the volume of activity of the registry, it may take up to ten days or so for the registry to issue the certificate, so it is conceivable that there could be a time gap.

f. Non-discrimination

By virtue of being official offices open to the public, in principle there is no discrimination whether as to access or as to the documents on file.

## **E. Priority**

### 1. The concept of priority and its importance

Venezuelan law recognizes the concept of priority among secured creditors, especially in the case of mortgages. Thus, mortgages may have different degrees, which

may be established in the mortgage documents, but which is also based on the order of registration.<sup>39</sup> A higher degree of mortgage will collect prior to a lower degree and once a higher degree has collected, the order of the remaining mortgages moves up in the order of priority. Moreover, a higher degree mortgagee may assign its mortgage to another creditor of the same mortgagor.<sup>40</sup> In contrast, the concept of priority does not pertain to the other forms of security instrument. In the case of antichresis, the contract extends to all of the product of the land, so the debtor may not grant an additional antichresis over the same property. In the cases of a sale with the right of redemption and a financial lease, only the seller/repurchaser or the financial lessee, or their successors, may avail of the respective contract rights. Evidently, though, the matter of priority does not affect the privileges established by law.

## 2. Priority rules

### a. First-to-file priority rule

Venezuela is a first-to-file jurisdiction. This is the case with respect to all of the security instruments under discussion, regardless of whether a mortgage, an antichresis or a property transfer.

### b. Priority based on possession or control

Possession or control is not relevant to the matter of priority, except perhaps in the case of antichresis where the creditor is to take control of the affected property in order to perfect the security interest. However, the legal doctrine is not settled with respect to whether the creditor must remain in permanent possession in order to conserve its right.

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<sup>39</sup> Art. 1897 of the Civil Code.

<sup>40</sup> Art. 1883 of the Civil Code.

### c. Alternative priority rules

The only other rules pertaining to priority are with respect to legal privileges and the right of mortgagees or property owners to assign their rights under their respective contracts. Regarding privileges, see point C.1.b, supra. As noted, a mortgagee may assign its mortgage to another creditor of the same mortgagor/debtor. Likewise, a purchaser under a redemption contract, or a financial lessor, may normally (unless restricted by contract) assign its interest to a third party.

## 3. Types of competing claimants

### a. Other consensual creditors

The only other consensual creditors in the case of a mortgage would be other mortgagees, depending on the degree of the mortgage held by each. In principle, there would not be other consensual creditors in the cases of the other security instruments, unless there were permitted by contract.

### b. Unsecured creditors

Unsecured creditors may bring a legal action against the mortgaged property. However, this would have the effect of accelerating the execution of the mortgage with the result that any unsecured creditors could not collect from the proceeds of the sale of a mortgaged property until the mortgagee has collected the full, or maximum, amount of its credit from such proceeds. In the event of a suit brought by an unsecured creditor that affects a mortgaged property, all mortgagees would be notified thereof. If upon the execution of the mortgage and the subsequent judicial sale thereof, proceeds from the sale remain these would enter the estate of the debtor to be divided among the

unsecured creditors that have joined the suit against the debtor. In the case of antichresis, even though the debtor remains the owner of the property, the creditor with a right of antichresis may remain in possession of the land until its debt is paid. In the cases of a sale with a right of redemption and a financial lease, the creditor is the titular owner of the property, so unsecured creditors would have no claim against such property. However, unsecured creditors could seek to have the court enforce the redemption right or the rights of the financial lessee for the benefit of the mass of creditors.

c. Sellers of encumbered assets

As noted previously, a mortgage follows the property, so the mortgage continues to be valid regardless of ownership of the property. Normally, mortgagees seek to control conveyances by obligating their authorization, although this is not permitted when the mortgage was made a condition of the credit.<sup>41</sup> In the case of antichresis, the owner of the property may sell it, but subject to the rights of the creditor with the antichresis. In the cases of a sale with a right of redemption and a financial lease, the owners of the property may sell it, but subject to the rights of the repurchaser/debtor or the financial lessee.

d. Buyers of encumbered assets

The purchaser of a mortgaged property must respect the rights of the mortgagee. Said purchaser may free itself of the mortgage by i) paying the sum due to the mortgagee, ii) paying the amount of the guarantee, or iii) abandoning the property. Depending on the circumstances, the third-party purchaser may have rights against the

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<sup>41</sup> Art. 1267 of the Civil Code.

mortgagor/vendor.<sup>42</sup> In all of the other cases of security instruments, the third-party purchaser must respect the rights of the contracting parties, that is the beneficiary of the antichresis, the vendor/debtor in the case of a sale with the right of redemption, and the financial lessor.

e. Judgment or execution creditors

In the case of mortgages, creditors distinct from the mortgagee may seek to execute their judgment against the mortgaged property but only after the mortgagee has first collected the amount of its credit, except in the case of creditors with privileges over the secured credit. In the case of antichresis, a judgment creditor could execute against the property, although this would not affect the rights of the party holding the antichresis, for which reason it would be likely to affect the value of the party for a third party. In the event of a judgment against the purchaser of a property with a right of redemption or against a financial lessor, the party acquiring the property in a judicial auction would still be obligated to honor the rights of the repurchaser/debtor and the financial lessee.

f. Statutory (preferential creditors)

Preferential creditors over those holding security interests would be those stipulated in the Civil Code<sup>43</sup> and in other laws.<sup>44</sup> In the case of mortgages, in principle said creditors with statutory privileges would collect prior to the mortgagee. However, in order for this to occur the privileged creditor would have to sue the debtor as part of

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<sup>42</sup> See Arts. 1899 to 1906 of the Civil Code.

<sup>43</sup> Arts. 1874 to 1876 contemplate expenses incurred in the case of attachment, custody or judicial sale for the benefit of all creditors, certain taxes and other expenses.

<sup>44</sup> The *Ley del Trabajo* (Labor Law), published in the Official Gazette, Extraordinary, No. 5.152 of June 19, 1997, establishes certain privileges over secured property for the salaries and other benefits of employees of a debtor; see Art. 160. However, note that the *Código Orgánico Tributario* (Tax Code), published in the Official Gazette No. 37.305 of October 17, 2001, provides that taxes other than those stipulated in the Civil Code do not take priority over rights of mortgagees; see Art. 68.



the action to execute the mortgage, as such privileged creditors are not otherwise notified of the execution action. Accordingly, if they do not participate, they would not be entitled to collect. In the other cases of security interests, the privileged creditors would likewise be entitled to defend their privileged status and to collect amounts due to them, but provided they participate in any such lawsuits and subject to the rights of the other parties involved.

g. Creditors adding value (crops, buildings, improvements)

In the case of mortgages, the basic principle is that the mortgage extends to all construction or other improvements on the mortgaged property.<sup>45</sup> Given that the mortgage is a public document, accordingly, even if the improvements are made by a third-party possessor, in principle they should be for the benefit of the mortgagee. Notwithstanding, the Civil Code also recognizes certain rights on the part of a third-party possessor that enhances the value of the property.<sup>46</sup> In the case of antichresis it must be presumed that any added value, with respect to the product of the land, would only be added by the beneficiary of the antichresis, as it is the only party that has the right to such product to be applied to the cancellation of its credit. Otherwise, in the cases of a purchase with a right of redemption and a financial lease, the principal creditors in these cases are the owners of the property, even though they are obligated to transfer the property to the vendor/repurchaser or the financial lessee, upon fulfillment of the conditions of the respective contracts. Hence, any such improvements would be for the benefit of the subsequent transferees.

h. Insolvency administrators

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<sup>45</sup> Art. 1880 of the Civil Code.

<sup>46</sup> Art. 1905 of the Civil Code.

Insolvency administrators of the estates of debtors having previously granted valid security instruments may not modify the rights of the secured interests, except to create a privilege with respect to certain expenses in the interest of all creditors.<sup>47</sup>

Rather insolvency administrators may only proceed to permit the execution of mortgages and otherwise deal with the assets of the debtor, but without affecting the rights of secured creditors.

#### 4. Priority in future advances and after-acquired property

Venezuelan security interests are limited to the property covered by the security instruments, except in the case of construction or improvements on mortgaged property. Moreover, security interests may only be established over property currently owned by the corresponding party or, in the cases of sales with a right of redemption and financial leases, that is promptly acquired following the subscription of the respective contracts. Accordingly, future advances or after-acquired property may only be added to the security instrument by the modification thereof. Notwithstanding, if the mortgaged property declines in value so as to not cover the amount of the guarantee, the mortgagee may demand additional security from the debtor, or the payment of its credit.<sup>48</sup>

#### 5. Priority in proceeds

In the case of mortgages, the mortgagee has the right to execute the mortgage, have the property sold at a judicial auction and to collect the amount of its credit from the proceeds of the sale, subject only to any privileges that may be claimed. Of course, the mortgagee will only be entitled to collect in the order of the degree of its mortgage. A mortgagee is not entitled to keep the mortgaged property, although it may i) accept it

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<sup>47</sup> Art. 1874 of the Civil Code.

<sup>48</sup> Art. 1894 of the Civil Code.

in payment of the debt or ii) participate in the judicial sale paying the purchase price with part or all of its credit, plus paying any additional amount if the sales price is higher than the amount of the credit.<sup>49</sup> In the case of antichresis, the beneficiary thereof has the sole right to remain in possession of the property and to retain all of the product of the land up to the amount of its credit, plus interest thereon. In the case of a sale with the right of redemption, the vendor/repurchaser must pay the purchaser/reseller not only the amount of the original purchase, but also the cost of all repairs, improvements and other charges included in the contract. In the case of a financial lease, the lessee must comply with the terms of the lease contract and, in the event of default, the lessor may sue to rescind the contract, sequester the property and then sell it to a third party in the context of an expedited judicial procedure.<sup>50</sup>

#### 6. Voluntary alteration of priority: subordination agreements

A mortgagee may assign its higher degree of mortgage, accepting a lower degree, or it may assign its mortgage entirely.<sup>51</sup> In the cases of the other forms of security interests, the law does not contemplate an alteration of priority, that is the creditor would have to assign all of its security interest.

#### 7. Relevance of priority prior to enforcement

In the case of a mortgage the degree of mortgage held by a mortgagee is quite relevant, given that a second or lower mortgagee cannot require a first mortgagee to execute its first mortgage. Therefore, a lower mortgagee has no option other than to wait until the credit of the first mortgagee has been paid, in which case the second

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<sup>49</sup> It may also be noted that as an alternative legal action a mortgagee may sue the debtor for collection of the debt without suing for the execution the mortgage, although given that the mortgage is a specific guarantee of the debt, it would be more normal for the mortgagee to seek to execute on the mortgage.

<sup>50</sup> Art. 122 of the Bank Law.

<sup>51</sup> Arts. 1883 and 1882, respectively, of the Civil Code.

mortgagee would become the first mortgagee, and so forth, or until the debtor defaults with respect to the first mortgagee and said mortgagee acts to execute the mortgage. In the other cases of security instruments, the beneficiaries have first priority by definition.

## **F. Pre-default rights and obligations of the parties**

### 1. Party autonomy

#### a. The principle

#### b. Limitations

### 2. Default rules

#### a. Meaning

#### b. Policy objectives

#### c. Types of default rules

Under Venezuelan law, and within the limitations prescribed by public policy,<sup>52</sup> the contracting parties are essentially at liberty to establish any lawful terms and conditions as they may freely bargain. Accordingly, there are essentially no special rules of default established in the law<sup>53</sup> and rather the parties may by contractual convention determine the events of default by either party, provided that none of these are contrary to public policy.

## **G. Default and enforcement**

### 1. Default

#### a. The meaning of default

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<sup>52</sup> Adherence to, and the obligation not to violate, public policy is a general legal obligation. In this context, public policy is deemed to be legal norms that would be binding on the parties.

<sup>53</sup> One exception to this is Art. 1215 of the Civil Code, which establishes that in credit contracts in general, not limited to the types of security instruments discussed here, if the debtor becomes insolvent, or through its own acts has reduced the value of any collateral, or has failed to constitute promised guarantees, then the debtor loses the benefit of the credit term.

Default would normally be the noncompliance by one of the parties of any of its obligations established in the security instrument and defined as an event of default.

b. Cure of default

There are no provisions in Venezuelan law dealing with a cure of a default situation that has not otherwise been established by contractual convention by the parties. If the parties have validly done so, said contractual provisions may be enforced by the courts. However, there is no obligation on the part of a creditor to permit a defaulting debtor to cure the default, absent a contractual obligation to this effect.

c. Notice of default

Once a default has occurred, the creditor would not normally, absent a contractual provision to this effect, be required to notify the debtor and rather could proceed directly to a judicial action, in which case the court would then be responsible for effecting notice to the debtor/defendant in accordance with the corresponding judicial procedures.

d. Judicial or administrative review

Venezuelan law does not permit “self-help” remedies in the case of security instruments. Accordingly, the creditor is obliged to commence a legal action in the courts, or before an arbitral tribunal if the parties had so agreed in those situations where arbitration is permitted.<sup>54</sup> In the cases of real property mortgages, antichresis and sales with the right of redemption the judicial procedures would be governed by the norms of

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<sup>54</sup> In principle, arbitration may not be used in Venezuela for the execution of a mortgage or for other legal actions that are reserved for adjudication by the courts. Hence, even though a dispute regarding a financial obligation could be arbitrated, the execution of a guarantee could not be. See Art. 3 of the *Ley de Arbitraje Comercial* (Commercial Arbitration Law), published in the Official Gazette No. 36.430 of April 7, 1998.

the Code of Civil Procedure.<sup>55</sup> In the case of chattel mortgages on business assets, the principal procedural norms are contained in the Chattel Mortgage Law<sup>56</sup> and in the case of financial leases the principal norms are stipulated in the Bank Law,<sup>57</sup> but in both cases, however, as supplemented by the general norms of the Code of Civil Procedure.

## 2. Options following default

### a. Judicial action to enforce the security right

In principle, judicial actions to enforce mortgages are to be expedited procedures in which the debtor is, once notified, given a brief period<sup>58</sup> in which to pay the obligation. In addition, the debtor/defendant is, in principle, limited to the defenses that it may present.<sup>59</sup> Based thereon, the court is to decide within approximately eight court sessions with respect to proceeding to execute the mortgage by announcing the judicial sale of the mortgaged property. Notwithstanding the procedural rules for the expeditious execution of a mortgage, frequently the mortgagor can manage to have the court agree to hear other evidence that the mortgagor may wish to introduce, which has the effect of converting the expedited procedure into an ordinary lawsuit, with the additional stages and possibilities for procedural delay that this may entail.

In the cases of lawsuits on the enforcement of contracts of antichresis and sales with the right to repurchase, these necessarily take the form of an ordinary procedure

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<sup>55</sup> *Código de Procedimiento Civil*, published in the Official Gazette, Extraordinary, No. 4.209 of September 18, 1990.

<sup>56</sup> See Arts. 67 to 73.

<sup>57</sup> See Art. 122.

<sup>58</sup> In the case of the execution of a real property mortgage the debtor is required to pay the indebtedness within a period of four court sessions after which the court is to order the attachment of the property (see Art. 662 of the Code of Civil Procedure); in the case of a chattel mortgage the court may order attachment upon the filing of the complaint and could proceed to a judicial auction in as soon as eight court sessions following notification to the debtor (see Art. 70 of the Chattel Mortgage Law).

<sup>59</sup> In principle, these are limited to claims that the debt was paid, the term extended or that the claim is based on false or erroneous documentation (see Art. 663 of the Code of Civil Procedure).

governed by the norms of the Code of Civil Procedure. In these cases, the court has the authority to determine damages or to enforce the contract, as the case may be.

The resolution of financial lease contracts are also to be the object of expedited procedures, as established in the Bank Law, although these suits are otherwise generally governed by the norms of the Code of Civil Procedure.

b. Freedom of parties to agree to the enforcement procedure

In principle the parties may not privately negotiate the terms of the enforcement procedure, which is established by law and through the courts. Notwithstanding, the parties may attempt to negotiate a settlement of the debt or other dispute, which may then be presented to the court for its approval and the homologation thereof as a final judgment by the court. Thereafter if the parties do not fulfill the terms of the settlement agreement, the non-defaulting party may petition the court to proceed directly to judicial enforcement thereof.

c. Encumbered assets in full satisfaction of the secured obligation

In the case of mortgages, except for any privileges that may have priority, the mortgaged property may be sold in satisfaction of the debt. However, the proceeds of the sale will only be delivered to the creditor up to the amount of the obligation, plus execution costs, established in the mortgage, with any remainder being for the benefit of the debtor or other creditors. In the event that the mortgaged property does not result in sufficient proceeds to satisfy the debt, the mortgagee then has an unsecured claim against the mortgagor for the balance.

In the case of antichresis the creditor has up to 15 years, assuming that the contract is for up to that period, in which to collect its credit based on the product of the land. Thereafter the creditor would have to pursue some other form of collection procedure.

In the cases of a sale with a right of redemption and a financial lease, the creditors are the owners of the properties. In the case of the former, if the vendor/debtor does not exercise its right to repurchase, the property remains free and clear with the purchaser/creditor. In the case of a financial lessor, if the lessee defaults on the contract the lessor may then rescind the contract and sell the property to a third party.

d. Redemption of the encumbered assets

The mortgagor may lift the encumbrance on the mortgaged property by paying the indebtedness to the mortgagee. Under Venezuelan law the mortgagor may prepay the debt, although this may incur any penalty stipulated in the mortgage document. In the case of antichresis the debtor may likewise negotiate an early payment of the indebtedness and thereby terminate the contract. In any event, the beneficiary of the antichresis is not entitled to retain possession of the property and the product thereof beyond the collection of the amount owed. In the case of a sale with the right of redemption, the vendor/debtor may redeem the property sold by exercising its repurchase right, including the payment of any other sums owed to the creditor. In the case of a financial lease the lessee may accelerate the payment of the lease/purchase amounts due, plus any early payment penalty, under the contract and then take ownership of the property.

e. Authorized disposition by the grantor



In the case of mortgages the mortgagor may, except as restricted by contractual convention between the parties, transfer, lease or encumber the property to a third party. The only restriction that is typically imposed by the mortgagee is to require its prior consent under penalty of accelerating the payment of the debt. In the other cases of antichresis, sale with a right of redemption and financial lease the debtor would not be able to dispose of the rights of the creditor without the consent of the creditor and the corresponding modification of the contract.

f. Removing the encumbered assets from the grantor's control

In the case of mortgages the mortgagor may remain in control of the property until the court ordering the execution of the mortgage declares an attachment of it. Thereafter the mortgagor may remain on the property until it is sold in a judicial auction.<sup>60</sup> However, in the event that the mortgagor had leased the property to a third party, the rights of the lessee must be respected by even a good faith purchaser in the judicial sale. In the case of antichresis the creditor should have control of the property for the duration of the antichresis. In the case of a purchase with a right of redemption, the creditor becomes the owner of the property so the vendor/debtor could only continue to have control over it in the event that the purchaser leased it back to the vendor, in which case the rights of the vendor would be determined by the terms of the lease. In the case of a financial lease, the lessee is in control of the property as a lessee, but only under the terms of the financial lease, which is exempt from the provisions of the Lease Law. Moreover, in the event of a default by the lessee the Bank Law contemplates an expedited procedure for the eviction of the lessee.

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<sup>60</sup> Art. 537 of the Code of Civil Procedure.

g. Sale or other disposition of the encumbered assets

In principle, the mortgagor may sell the mortgaged property to a third party, subject to the mortgage. Likewise, the mortgagor may cede the property to the mortgagee in total or partial cancellation of the debt. Otherwise, the mortgagee may not sell or otherwise dispose of the mortgaged property, as this solely corresponds to the court executing the mortgage.

In the case of antichresis the owner of property may sell it to a third party, but subject to the rights of the beneficiary of the antichresis. Said beneficiary may not assign its rights of antichresis to a third party without the consent of the debtor.

The purchaser of a property subject to a right of redemption may sell the property, even though the third-party purchaser would still be subject to the right of redemption on the part of the original vendor/debtor. In the case of a financial lease, normally the lessor would be entitled to assign its rights to a third party, but subject to the obligations of the financial lease.

h. Allocation of proceeds of disposition

If a mortgagor sells the property prior to the execution of the mortgage, the proceeds are for it. Upon execution, and except for any privileges that would be paid first, the proceeds are allocated to the first mortgagee up to the limit of its credit, then to any subsequent mortgagees or to the mass of unsecured creditors. In the case of antichresis the proceeds from the sale of the land would be for the owner. In the case of a purchase with a right of redemption or a financial lease the proceeds of a disposition

would be for the then owner. In all of these latter cases the rights of the other party would have to be respected by the party acquiring the property.

i. Finality

With respect to mortgages, in principle the execution of a mortgage and the judicial sale of the property are only to occur once there is a definitive decision against the debtor. Notwithstanding, by virtue of the intention of the legislator to provide for an expedited procedure in the case of the execution of mortgages, it is possible that the court could order the judicial sale of the property prior to the issuance of a final decision against the debtor,<sup>61</sup> that is if the lawsuit becomes an ordinary legal proceeding and is delayed due to procedural requirements. In this event if the property had been sold and then the suit is resolved in favor of the mortgagor, nevertheless the sale will be deemed to be valid and irreversible, and the mortgagor would then have to pursue legal actions against the mortgagee for whatever damages may allegedly have been caused.

In the case of a dispute over a contract of antichresis or a purchase with a right of redemption, the resolution thereof would be subject to ordinary legal procedures and so would be final upon the conclusion thereof. Likewise, in the case of the rescission of a financial lease, notwithstanding the expedited procedure contemplated in the Bank Law, this would be under the regular mercantile courts and so would be final upon the decision of the court.

3. Judicial proceedings brought by other creditors

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<sup>61</sup> Art. 635 of the Code of Civil Procedure.

Third-party creditors can attempt judicial actions against either the contracts creating security interests or against the properties involved. However, provided that the debtor is not judicially declared insolvent and the properties subject to recapture as part of the estate of the bankrupt debtor,<sup>62</sup> and provided that the documents are properly drafted and registered, any claim by a third-party creditor would be subject to the priority rights of a holder of a valid security interest. It would only be in the case of a defect in the security interest that would essentially void it as such that a third-party creditor could bring a valid claim against a secured property prior to collection by the security beneficiary.

## **H. Security rights in insolvency proceedings**

### **1. Inclusion of encumbered assets in the insolvency estate**

Encumbered assets are included in the insolvency estate of a bankrupt debtor.<sup>63</sup> However, the consequences for the creditor and debtor are distinct depending on the type of security interest. In the case of mortgages, the security interest of the mortgagee is generally excluded from the treatment accorded to the assets available to the mass of unsecured creditors, that is the mortgage is deemed to be a privileged credit and so may be enforced by the mortgagee up to the amount of the guarantee constituted by the mortgage, albeit within the context of the bankruptcy proceeding. A right of antichresis, on the other hand, is only deemed to be a privileged security over the product of the land until it is otherwise disposed of by the bankruptcy court.

Accordingly, the creditor with a right of antichresis may retain possession of the property and continue to collect the product thereof during the period of the bankruptcy

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<sup>62</sup> See point H.1, *infra*.

<sup>63</sup> The norms on voluntary bankruptcy, or reorganization (*estado de atraso*) and involuntary bankruptcy (*quiebra*) are contained in Arts. 898 through 1081 of the *Código de Comercio* (Commercial Code), last modified and published in the Official Gazette, Extraordinary, No. 475 of December 21, 1955.

proceeding, but only until the land is sold. Thereafter the antichresis creditor joins the mass of unsecured creditors for the balance of any debt due to it.

In the case of a sale with a right of redemption, the property would not be included in the insolvency estate as title to it has passed to the creditor. However, the insolvency estate would retain the repurchase option held by the debtor and so could exercise it, although as a practical matter this would rarely occur. Likewise, in the case of a financial lease, the rights of the lessee could pass to the insolvency estate, provided that this were permitted by the lease contract, but this would entail the estate continuing to fulfill the conditions of the financial lease contract. Generally, though, the insolvency or bankruptcy of the financial lessee would be a contractual cause for default under the lease contract and would allow the financial lessor to seek rescission of the contract. Normally under this circumstance, the sums paid by the lessee would be retained by the lessor as a penalty for default.

## 2. Limitations on the enforcement of security rights

With respect to mortgagees, the law establishes certain limitations on the enforcement of their security rights. A mortgagee is not able to collect interest on the debt from the date of the declaration of involuntary bankruptcy from any assets other than the proceeds of mortgaged property once the mortgage is executed.<sup>64</sup> Mortgagees are to be convened by the bankruptcy court to meetings of the mass of creditors, but if they exercise the right to vote in such meetings they are deemed to have renounced the benefit of their privileged position.<sup>65</sup> Also, while mortgagees are entitled to collect up to the full amount of their credit, plus costs, from the proceeds of the sale of the

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<sup>64</sup> Art. 944 of the Commercial Code. This prohibition, however, does not apply in the case of voluntary bankruptcy or reorganization.

<sup>65</sup> Art. 1011 of the Commercial Code.

mortgaged property, they cannot control whether said property will be sold first or only during, or subsequent to, the liquidation of the unsecured portion of the insolvency estate. If the unsecured portion is sold first, mortgagees will be credited with their pro rata share in proportion to the amount of their credit in relation to all other creditors, after which their mortgaged properties will be liquidated.<sup>66</sup>

### 3. Participation of secured creditors in insolvency proceedings

Mortgagees may attend meetings of the mass of creditors or of representatives thereof, but they may not vote thereat under penalty of losing their privileged position. This prohibition does not apply in the case of creditors with a right of antichresis or to the other secured creditors discussed here, as they are not deemed to have a security interest in assets of the debtor subject to liquidation.

### 4. Validity of security rights and avoidance actions

As a general proposition, security rights based on proper contracts that are duly registered would only be deemed to be invalid, and thus subject to an avoidance action, if they are constituted on assets of the debtor after the date determined as that of the effective cessation of payments by the debtor, or within the ten days prior thereto, by virtue of obligations incurred by the debtor prior to this period of ten days before the date of cessation of payments (known as the “recapture period”).<sup>67</sup> Otherwise, the only grounds for voiding a security interest would be for some impropriety with respect to the security instrument or the relationship between the creditor and debtor, or for some other improper cause.

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<sup>66</sup> Art. 1048 of the Commercial Code.

<sup>67</sup> Art. 945 of the Commercial Code.

## 5. Relative priority of security rights

As noted, in the case of a mortgage neither the voluntary nor involuntary bankruptcy of the mortgagor affects the priority of the rights of the mortgagee, even though the exercise of the rights of the mortgagee becomes subject to the decisions on execution of the bankruptcy court. The beneficiary of an anticresis is only deemed to have a priority right over the product of the land for such time as it is in possession of the land, after which the beneficiary loses its priority status.

## 6. Security rights in reorganization proceedings

A situation of voluntary bankruptcy or court-supervised reorganization does not affect the rights of creditors with a security interest. Accordingly, a mortgagee could, notwithstanding the reorganization, proceed to execute its mortgage to the full extent thereof. Likewise, there would be no immediate effect with respect to a creditor with a right of anticresis.<sup>68</sup> Also, in principle, there would be no effect on the situations of a purchase subject to a contract with a right of redemption or a financial lessor, unless in this latter case there is a contractual stipulation to the contrary. Nevertheless, in Venezuela, it may be noted, debtors entering into a state of voluntary bankruptcy, even though this has the effect of suspending and forestalling all collection actions against the debtor, normally lead to the involuntary bankruptcy and liquidation of the debtor.

## **I. Conflict of laws and territorial application**

1. Conflict-of-laws rules for creation, publicity and priority
2. Effect of a subsequent change in the connecting factor
3. Conflict-of-laws rules for enforcement issues

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<sup>68</sup> Art. 905 of the Commercial Code.

The basic legal principle established in the Civil Code with respect to matters involving immovables situated in Venezuela is that they must be governed by Venezuelan law.<sup>69</sup> This principle is further reinforced by the more modern Law on Private International Law.<sup>70</sup> Accordingly, as a matter of public policy in Venezuela security interests on immovables located in Venezuela would have to be created in accordance with the forms therefor established by Venezuelan law and, moreover, they would have to be governed by Venezuelan law and adjudicated in the Venezuelan courts.

At the same time, this would not mean that foreign law and jurisdiction may not be used with respect to the underlying commercial or financial transaction that gave rise to the obligation that is guaranteed by the a security interest on a Venezuelan immovable. Thus, the rights of the parties with respect to the obligation could be decided by foreign courts, or arbitral tribunals, outside of Venezuela and then brought to Venezuela for enforcement,<sup>71</sup> but if the obligation were guaranteed by a Venezuelan security interest, the scope and enforcement thereof would necessarily have to be resolved in the Venezuelan courts.

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<sup>69</sup> Art. 10 of the Civil Code provides that “Chattels or immovables situated in Venezuela shall be governed by Venezuelan law, even though foreigners have, or pretend to have, rights over them.”

<sup>70</sup> *Ley de Derecho Internacional Privado*, published in the Official Gazette No. 36.511 of August 6, 1998; see in particular Arts. 40, 46, 47, 49 and 53.

<sup>71</sup> A final foreign judgment would have to be enforced through an exequatur procedure before the Venezuelan Supreme Tribunal of Justice in accordance with the provisions of Arts. 850 to 858 of the Code of Civil Procedure. In contrast, a foreign arbitral award would be directly enforceable in any competent court of first instance, as provided in Art. 48 of the Law of Commercial Arbitration.