



Global Practice Guide

Real Estate III: Issues Relating to Finance

A Global Practice Guide prepared by the
Lex Mundi Real Estate Group

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series at:
www.lexmundi.com/GlobalPracticeGuides.

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Through close collaboration, our member firms are able to offer their clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth.

Lex Mundi – the law firms that know your markets.

About this Guide

This multi-part survey of Issues in Real Estate Investment and Finance presents jurisdictional overviews of real estate investment and financing laws in jurisdictions around the world, covering the following four general topics:

Part I -- Foreign Investment

Part II -- Ownership of Real Property

Part III -- Finance

Part IV -- Leasing

Table of Contents

Argentina	4
Australia	6
Austria	8
Bahamas	10
Barbados	12
Belize	15
Bolivia	17
Brazil	19
Bulgaria	23
Canada, Alberta	25
Canada, Nova Scotia	28
Canada, Ontario	31
Canada, Quebec	34
Channel Islands, Jersey	37
Chile	40
Colombia	42
Cyprus	44
Denmark	46
Dominican Republic	48
Ecuador	50
Estonia	52
Finland	54

Greece	57
Hungary	60
Iceland	62
Kuwait	64
Latvia	66
Lithuania	68
Malaysia	70
New Zealand	72
Norway	74
Pakistan	76
Peru	78
Poland	80
Portugal	82
Russia	85
South Africa	87
Spain	89
Thailand	94
Turkey	96
Uruguay	100
USA, Alabama	102
USA, Arizona	104
USA, Colorado	106
USA, Delaware	108
USA, Florida	110
USA, Hawaii	112
USA, Indiana	114
USA, Louisiana	116
USA, Massachusetts	119
USA, Missouri	122
USA, Nevada	124
USA, New Jersey	126
USA, Oklahoma	128
USA, Tennessee	130
USA, Virgin Islands	132

USA, Virginia	134
----------------------------	------------

Issues Relating To Finance

Argentina

Prepared by Lex Mundi member firm Marval, O'Farrell & Mairal

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A deed of mortgage is the instrument that secures a lien on real property in Argentina.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

A deed of mortgage is the instrument that secures a lien on real property. A stamp tax may be applicable in most jurisdictions (provinces) other than the City of Buenos Aires, it averages 1-1,5% of the amount of the transaction. In the City of Buenos Aires in order to register the mortgage deed in the Real Property Register, the 0.2% of the amount of the mortgage shall be paid. In Argentina.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A lien may be foreclosed either by a judicial or a non-judicial foreclosure. Non-judicial. To begin this process, the borrower needs to be in default of payment for at least 60 days. The lender will then notify the default and request the borrower to pay any owed amount within 15 days as from the date of notification. If no payment is made within the specified period, the lender may submit the credit documentation before the relevant court and request that the property be inspected to verify if it is occupied, in which case, the lender may request the judge to order the eviction of any occupant. The judge will order notice of the complaint to the borrower of the complaint filed by the lender so the borrower may interpose within 5 days any available exception (i.e. payment). Judicial. No request of payment is required in this case, unless the agreement states otherwise. The lender shall file in court a complaint for lack of payment, and a judicial officer will serve the borrower with an auction notice and payment warning. Even though both proceedings are similar, in the judicial foreclosure the borrower may interpose more defenses than in the non-judicial. In both types of foreclosure the lender may request the Real Property Registry a report on the property to verify the existence of any lien or encumbrance on the property by a third party. Once verified the conditions of the property, the lender requests the judge the appointment of an auctioneer to conduct the property sale in a public auction. At the public auction, the Lender may set off any amount owed with an offer to purchase the property. Once the sale is approved by the judge, the purchaser at the auction has to deposit the balance of the purchase price with the judge, who will then order registration of title in the name of the purchaser. Any difference between the debt and the sale price, once the Lender is repaid, and any applicable fees and taxes are paid, if any, will go to the Borrower.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

A court tax of 3% of the amount claimed, plus an additional 3% of the amount of such court tax in connection with enforcement proceedings brought before any court sitting in the City of Buenos Aires applies.

- 5. What is the customary time period for foreclosing a lien on real property?**

Technically, the non-judicial notification may take between 20 and 25 days, while the judicial notification may take between 30 and 45 days. In both judicial and non-judicial, the judgment process

may take between 60 and 90 days. If the decision is appealed, it could get extended up to 180 days, approximately. Finally the process of collecting on the defaulting loan in both types of foreclosure may take between 60 and 90 days. In practice, the whole proceeding may take approximately 3 years.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. There are no restrictions on foreign banks or other lenders to make real estate loans secured by real property in Argentina.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Under Argentine laws there is no “bright line” or “safe harbour” as to what constitutes usury interest rates in loan agreements. However, some judicial decisions have provided guidelines as to maximum interest that lenders can charge. In such sense, Chamber C of the Commercial Court of Appeals sitting in the City of Buenos Aires has recently said that “the maximum admissible interest is twice the interest rate charged by the Banco de la Nación Argentina for its ordinary discount transactions”, while Chamber D of the same court has established such maximum in “two and a half times the [interest] rate charged by the Banco de la Nación Argentina for its 30-day discount transactions”. Currently, such interest rate is 1.55% per month. Also, certain precedents from other courts within Argentina that we have found set up the maximum interest rate at 24% per year.

- 8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

None.

Contact Information

Hernan Slamenson
hs@marval.com.ar

Marval, O'Farrell & Mairal
Av. Leandro N. Alem 928, 7th floor
C1001AAQ Buenos Aires, Argentina

Tel 54.11.4310.0100 Fax 54.11.4310.0200
www.marval.com.ar

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Australia

Prepared by Lex Mundi member firm Clayton Utz

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Typically a Mortgage is the instrument used to secure a loan against real estate. Under the Real Property Act 1900 mortgages are registered on title although, strictly speaking, the mortgagee acquires a "charge" not an "estate" upon registration. Nevertheless, it is still the most commonly used and effective way to secure a debt over real estate.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There are two elements or stages to the taxation on mortgages before they can be registered on title. Firstly, mortgage duty is payable on the Mortgage itself before it will be accepted for registration. Secondly, a registration fee must be paid to Land and Property Information NSW in order for the Mortgage to be lodged and successfully registered on title.

3. **Describe manner in which a lien secured by real property is foreclosed.**

In terms of a registered mortgage, the procedure is prescribed by the Real Property Act 1900 (NSW). If the mortgagor has defaulted in paying principal or interest for six (6) months, the mortgagee may apply to the Registrar-General for an order for foreclosure.

The application must state that the required default has been made, that the land has been offered for sale by auction and that notice of the application has been served on the mortgagor, all registered mortgagees under any mortgages which have less priority than the applicant's and on any caveators who claim to be unregistered mortgagees. The Registrar-General may then issue the foreclosure order, or the Registrar-General may require the applying mortgagee to offer the land for sale as a first step and then issue the order only upon the unsuccessful sale of the land. An auction will be considered unsuccessful if the land fails to be sold or the amount offered is insufficient to satisfy the outstanding debt and expenses incurred of the sale.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

The key costs involved in foreclosing a mortgage would involve complying with the notice requirements under the Real Property Act 1900 (NSW) and the costs of offering the property for sale by auction. The key impediment to foreclosing a mortgage would be the fact that the mortgagor's right to redeem subsists right up until the time the Registrar-General makes a foreclosure order and it is recorded in the Register. Furthermore, in some cases a foreclosure order, despite being recorded in the Register, can be re-opened by a Court.

5. ***What is the customary time period for foreclosing a lien on real property?***

Firstly, the mortgagor must be in default of its principal or interest payments for six (6) months and the mortgagee must have exercised its power of sale, which in itself allows the mortgagor one (1) month to repay the monies before the mortgagee can exercise the power. Secondly, time to market and sell the property at auction need to be taken into account. This process, including the six (6) months for

default in paying rent, serving the appropriate notices on the mortgagor and offering the property for sale by auction could take the best part of a year.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. The Foreign Acquisitions and Takeovers Act 1975 (Cth) provides an exception to the requirements of the Act for taking or enforcing a security over an interest in Australian real estate. Therefore, a foreign bank is not required to make an application to the Foreign Investment Review Board in order to make a loan secured by Australian real estate.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

A provision in a Mortgage which requires the repayment of a very high rate of interest is not unenforceable merely because the rate of interest is very high. A mortgagor could only seek the assistance of a Court exercising equitable jurisdiction if the interest rate charged was excessive or oppressive in all the circumstances and as a result was unconscionable.

- 8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

When a mortgagee makes an application for foreclosure the Conveyancing Act 1919 (NSW) prescribes certain consequences which follow the order for foreclosure being made. These include, inter alia, that the right of the mortgagee to sue to recover the mortgage monies from the mortgagor, and any guarantor, is extinguished.

Contact Information

Peter McMahon
pmcmahon@claytonutz.com

Clayton Utz
Level 15
1 Bligh Street
Sydney, New South Wales 2000, Australia

Tel 61.2.9353.4000 Fax 61.2.8220.6700
www.claytonutz.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Austria

Prepared by Lex Mundi member firm CHSH Cerha Hempel Spiegelfeld Hlawati

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the method of creating a lien on real estate. The creation of a mortgage (on real estate) requires a written contract (the signatures of the parties have to be certified by a notary public or by court) and the registration of the mortgage into the land register to become effective.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

For registration in the land register, lien documents have to be concluded in writing and the signatures of the parties have to be authorized by a notary public or by court. According to the Stamp Duty Act, loan agreements are subject to a stamp duty assessed as a percentage of the loan amount. Depending on the type of the loan agreement a stamp duty in the range between 0.8 per cent and 1.5 per cent is triggered. Mortgage agreements are subject to a 1 per cent stamp duty assessed on the basis of the loan value. Austrian stamp duty can be avoided under certain conditions. Furthermore, the required registration of a mortgage in the land register triggers a registration fee of 1.2 per cent of the secured amount. Under very restrictive conditions mortgages can be assigned without payment of additional stamp duty. However, the registration fee of 1.2 per cent for the registration of the new mortgagee basically cannot be avoided.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

In order to foreclose immovable collaterals the mortgagee has to file an action and obtain a judgment against the mortgagor. Afterwards the mortgagee can commence foreclosure proceedings against the mortgagor regarding the mortgage.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

According to the Dstraint Act, the creditor has to advance the costs of the foreclosure proceedings.

- 5. What is the customary time period for foreclosing a lien on real property?**

The time frame for foreclosure proceedings, starting from the time the lender has obtained an enforceable judgment, usually is between one and two years. Foreclosure proceedings are only provided for monetary claims.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

A commercial lender from another jurisdiction can only make loans secured by collateral in Austria if the lender has obtained a license from the financial market authority (FMA) according to the Banking Act. If the lender is admitted for banking businesses in another member state of the EEA, no further license is required in Austria. However, in this case, as a precondition to be entitled to provide financial services in Austria, a notification procedure between the responsible authority of the home member state and the Austrian FMA has to be performed (the authorization for the provision of

financial services cross-border within the EEA is known as the "European Passport").

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Interest rates will be considered as usurious if they are outstandingly high and not justified. Austrian courts decided that an interest rate of 10.33 per cent p.a. cannot be qualified as usurious. The consequence of usurious interest rates is the voidness of the loan agreement. According to the Usury Act the borrower can repay the loan in installments as provided for the loan in the void loan agreement. In this case the borrower has to pay statutory interest of twice the base lending rate issued by the National Bank (OENB) as applicable at the time the loan agreement was concluded (as of July, 2008, the base lending rate amounts to 3.70 per cent). If the borrower is a consumer and the lender an entrepreneur, the Consumer Act provides for the voidness of interest clauses according to which in case of a default the consumer would have to pay an interest rate exceeding the interest rate provided for due payment for more than 5 per cent p.a.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

If the guarantor is a consumer and the lender a commercial lender, the Consumer Act provides for an obligation of the lender to inform the guarantor of the economic situation of the debtor, if the lender knows or should have known that the debtor presumably will not be able to repay the debt. Otherwise the guarantor can only be held personally liable if the guarantor had issued the guarantee despite such information. Furthermore, the Consumer Act provides a judicial mitigation right concerning the personal liability of the guarantor, if the lender knows or should have known that the guarantee is in an inequitable disproportion to the guarantor's financial ability. Furthermore, the Distraint Act provides that the minimum living wage is unseizable.

Contact Information

Peter Vcelouch

peter.vcelouch@chsh.at

Manfred Ton

manfred.ton@chsh.at

CHSH Cerha Hempel Spiegelfeld Hlawati

Parking 2

A-1010 Vienna, Austria

Tel 43.1.514.35.0 Fax 43.1.514.35.35

www.chsh.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Bahamas

Prepared by Lex Mundi member firm McKinney, Bancroft & Hughes

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Mortgages/charges or debentures are the instruments that secure a lien on real property in The Bahamas.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is a stamp tax payable of 1% of the mortgage amount before recording may be made. Additionally recording fees amount to \$4.50 per page of the mortgage instrument.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A mortgagee cannot exercise the power of sale until-

- (1) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- (2) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (3) there has been a breach of some provision contained in the mortgage deed or under the Conveyancing Law and Property Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

The court, if it thinks fit, may condition the sale upon the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

- 5. What is the customary time period for foreclosing a lien on real property?**

If there is no prior contractual agreement between the parties legislation states that foreclosure may commence 3 months after default.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Where a non-Bahamian acquires any land or an interest in land by or reason of that property becoming vested in it by virtue of any order of a court or where a non-Bahamian goes into possession of property as a mortgagee, then it shall make application to the Investments Board to have the acquisition or going into possession registered with the Investments Board and the Secretary to the Investments Board upon receipt of the appropriate fee shall register that acquisition or going into possession and issue a certificate of registration to the applicant.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

The rate of interest which may be charged by any person on any loan of money shall not directly or indirectly exceed twenty per centum per annum simple interest on loans of more than one hundred dollars, or thirty per centum per annum simple interest on loans of one hundred dollars or any less amount irrespective of the date fixed for repayment of the said loan. This restriction on interest rates is however limited to loans made in Bahamian currency and by private lenders which does not include Banks, Trust Companies or Insurance Companies.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Any contract, promissory note, bill of exchange, check, receipt or any other document entered into whereby a rate of interest higher than that authorized by the Rate of Interest Act purports to be payable either expressly or by implication in respect of any loan, shall be absolutely null and void, and no proceedings shall be entertained in any court either for the recovery of the loan or of any interest thereon. This does not apply to Banks, Trust Companies or Insurance Companies.

Contact Information

Lourey C. Smith
lcsmith@mckinney.com.bs

McKinney, Bancroft & Hughes
4 George Street, Mareva House
P.O. Box N-3937
Nassau, Bahamas

Tel 1.242.322.4195 Fax 1.242.328.2520
www.mckinney.com.bs

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Barbados

Prepared by Lex Mundi member firm Clarke Gittens Farmer

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

For land still under the common law system the following are used to create a lien on real estate to secure an indebtedness:

- a. Deed of Charge by way of Legal Mortgage;
- b. Equitable Mortgage or Memorandum of Deed Deposit;
- c. Debenture;
- d. Vendor's Lien raised in a Conveyance.
- e. Charging Order

For land in respect of which title has been declared under the registered system the following are used to create a lien on real estate to secure an indebtedness:

- (1) Charge;
- (2) Caution.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

For unregistered land there is a recording cost of US\$2 dollars for every printed page including the recording page placed on the document by the Land Registry.

For Registered Land the registration fee for any instrument effecting a dealing with the parcel is calculated on a sliding scale of fees using the Land Tax value of the property as a reference. The maximum fee payable under this scale is US\$150.00.

For both registered and unregistered land the following Stamp Duty is Payable:

- (1) Deed of Charge by way of Legal Mortgage, Debenture and Charge-
 - (a) where the sum secured does not exceed US\$250.00 the Stamp Duty payable is US\$2.50
 - (b) where the sum secured exceeds US\$250.00, the Stamp Duty payable is US\$1.50 for every US\$250.00 or part thereof of the sum secured.
- (2) Equitable Mortgage or Memorandum of Deed Deposit- the Stamp Duty payable is US\$0.50 for every US\$250.00 or part thereof of the sum secured.
- (3) Vendor's Lien- As the Vendor's Lien is usually contained in the Deed of Conveyance which transfers the property from the vendor to the purchaser there is no additional Stamp Duty payable in respect of the Vendor's Lien beyond the Stamp Duty payable on the Conveyance.

(Please note that for ease of reference the sums above have been quoted in US currency. However, all sums are payable in Barbados dollars and the exchange rate is approximately 1 US dollar = 2 Barbados dollars.)

3. Describe manner in which a lien secured by real property is foreclosed.

In Barbados the remedy of foreclosure by judicial sale is no longer used to enforce a lien/charge over property. Under the Property Act, and under the provisions of most modern mortgages and debentures, mortgagees are granted a power of sale to sell the mortgaged property once default has been made in the repayment of the mortgage or interest thereon or if there is a breach of some provision contained in the mortgage deed or under the Act.

Before a mortgagee can exercise its power of sale the Act requires:

- a. that default or breach must occur for a continuous period of one (1) month; and
- b. that the mortgagee serve a notice in writing on the mortgagor giving the mortgagor an additional one (1) month to pay the money owed or perform or observe the provision.

However, it must be noted that these requirements can be and usually are altered by the provisions of the mortgage.

Where the property is occupied it is advisable that an application to the High Court for an order for possession of the property be made before the lender exercises its power of sale.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

The costs incurred for mortgage enforcement are usually limited to Attorney's fees, the court costs associated with the application for possession and the transactional costs associated with the conveyance of the property. All such costs are borne by the borrower by deduction from the sale proceeds.

5. What is the customary time period for foreclosing a lien on real property?

Where an order of the court is required to obtain vacant possession before the mortgagee can exercise his power of sale, the customary time period for obtaining the order is 3-6 months. However, this is subject to the vagaries of the court.

The time period for the sale of the property under the mortgagee's power of sale is dependent on how long it takes the mortgagee to find a purchaser and complete the sale.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

To carry on banking business in Barbados foreign lenders must be licensed under the Financial Institutions Act. Applications for a license are made to the Minister Responsible for Financial Institutions. A license is only issued to a foreign bank if it:

- (a) has a principal place of business in Barbados; and
- (b) names an authorized agent in Barbados; and
- (c) names an alternate person to act as agent in the absence of the agent or his/her inability of to act.

A single loan by a foreign lender to a borrower secured by real estate in Barbados will not be considered carrying on banking business and no license is required for such a transaction under the Financial Institutions Act.

Exchange Control permission is required for foreign lenders to make loans secured by real property in Barbados. The request for permission is usually made by letter to the Exchange Control Authority setting out the particulars of the loan. Foreign lenders will not easily get permission to make loans secured by real estate in Barbados. If they do get permission, they will have to show the foreign currency for the loan came into Barbados. Repatriation of this foreign currency may be subject to a capital appreciation formula even in an enforcement situation. In addition, a local borrower will also require permission from the Exchange Control Authority to repay the loan in a foreign currency.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

There are no legal limits imposed on the amount of interest which may be charged on a loan secured by real property. However, in practice the Central Bank of Barbados is in the habit of lowering its own rates on discounts, rediscounts, advances, loans and overdrafts to encourage commercial banks and lending institutions to do the same.

Commercial banks and other lending institutions generally lower or raise are in the habit of lower their rates to fall within the recommendations of the Central Bank.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Savitri St. John
ssj@clarkes.com.bb

Clarke Gittens Farmer
Parker House
Wilkey Business Park
Wilkey Road
St. Michael, BB14006 Barbados

Tel 1.246.436.6287 Fax 1.246.436.9812
www.clarkes.com.bb

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Belize

Prepared by Lex Mundi member firm Barrow & Williams Attorneys-at-Law

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Liens on real estate to secure an indebtedness are in the form of mortgages, charges, auction, restriction and inhibitions.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Taxes attached to a loan secured by real estate or perfecting a lien on real property are stamp duty of 1.5% of loan amount, USD\$7.50 registration fee, and general sales tax of 10% on legal services.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Liens secured by real property are foreclosed by auctioning the property. Before auctioning, notice must be placed in the government Gazette and local newspaper for three consecutive issues then the auction is held by an auctioneer who sells the property to the highest bidder.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

A significant cost to foreclosing is the auctioneer's fee of 5% of the sale price. A significant impediment would be securing a buyer.

5. **What is the customary time period for foreclosing a lien on real property?**

Two months.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

The foreign bank or lender must be registered as an overseas company. Foreign banks and foreign lenders must acquire the Central Bank of Belize's approval in order to secure real estate loans by real property and the actual deed or mortgage or charge must be recorded.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are no legal limits imposed on the amount of interest which may be charged on a loan secured by real property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws that restrict a borrower or guarantor from being personally liable for indebtedness secured by real property except for the Companies Act which protects directors of limited liability companies from being liable for the debts of the company.

Contact Information

Tania M. Moody

tmoody@barrowandwilliams.com

Barrow & Williams Attorneys-at-Law

Equity House, No. 84 Albert Street

P.O. Box 617

Belize City, Belize

Tel 501.227.5280 Fax 501.227.5278

www.barrowandwilliams.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Bolivia

Prepared by Lex Mundi member firm C.R. & F. Rojas - Abogados

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is used to create a lien on real estate in order to secure indebtedness.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

A tax of $4 \times 1000 = 0.004$ is payable on making a loan secured by real estate, and no tax is required to perfect a lien on real property.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Real property is foreclosed as a result of a judicial public auction.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are no impediments to foreclose a lien on real property, and the only cost incurred is to create a deposit.

- 5. What is the customary time period for foreclosing a lien on real property?**

A petition to foreclose must be filed to the court, it takes approximately 7 days for proceeding to take place, if the petition is accepted the court issues an order to foreclose, and a depositary is also appointed.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

The Commerce Code allows entrepreneurs to perform occasional acts of commerce, though, if these acts become habitual acts, then a local branch or subsidiary must be established.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

The law provides a legal 6% annual interest, and a conventional 3% monthly interest that can be charged on a loan secured by real property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws that restrict the ability to make the borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Patricio Rojas

patricio@rojas-lawfirm.com

C.R. & F. Rojas - Abogados

Calle Federico Zuazo 1598

Edif. Park Inn - Piso 11 - P.O. Box 662

La Paz, Bolivia

Tel 591.2.231.3737 Fax 591.2.211.2775

www.rojas-lawfirm.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Brazil

Prepared by Lex Mundi member firm Demarest e Almeida

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

Brazilian law No. 9514/97 lists certain modalities of “right in rem” guarantees in order to secure real estate financing transactions, as follows: (i) mortgage; (ii) fiduciary assignment of credit rights deriving from real estate sale agreements (or commitments); (iii) pledge of either credit or purchase rights under real estate sale agreement; and (iv) fiduciary transfer of title to a real property (“Alienação Fiduciária de Coisa Imóvel”).

With regard to mortgages, the basic substantive provisions regarding their perfection and the rights and duties of both mortgagors and mortgagees are contained in the Brazilian Civil Code.

Under Brazilian law, a mortgage secures repayment of a debt by creating an interest in the property in favor of the mortgagee, although the property remains in the possession of the mortgagor.

Mortgages can only be created by a public deed prepared by a public notary. The perfection of a mortgage involves the recordation of the deed with the Real Estate Registry Office of the jurisdiction where the property is situated. Once recorded, the mortgage is effective against third parties, although until such time it is legally binding between the contracting parties only. Thus, the proper recordation of a mortgage would give the mortgagee preference over any prior but unregistered mortgage created on that same property.

The fiduciary guarantees resemble the American trust receipt since the trust element is the main feature of the guarantees mentioned in (ii) and (iv) of the above paragraph.

Under the fiduciary assignment of credit rights deriving from real estate sale agreements, the title to the credits is transferred to the fiduciary assignee, as security until the full payment of the debt.

The fiduciary assignee will be entitled: (i) to hold the documents evidencing the credits; (ii) to notify the debtors of the credits, in order for them to make the payment of such credits to the fiduciary assignee, rather than to the assignor; (iii) to exercise any rights and remedies to collect the credits, as well as any others granted to the assignor under the real estate sale agreement; and (iv) to receive the amounts corresponding to the assigned credits directly from the debtors of such credits.

Administrative and collection costs are deducted from the amounts received by the fiduciary assignee, and the balance should be applied to the assignor’s debt, until the amount due to the assignee is fully settled. Any amount received by the assignee exceeding the total amount of the assignor’s debt should be paid over to assignor. However, if such amounts are insufficient to cover said administrative and collection costs and the assignor’s debt obligation, the assignor will remain liable for any deficiency.

Under the fiduciary transfer of title to a real property, the borrower transfers the title of its real property to the lender in order to secure the payment of a loan or other financing agreements. The relevant fiduciary agreement must be recorded in the Real Estate Registry and the transfer of title to the real property thereunder will be subject to a “resolution clause”, which means that, upon full payment by the borrower of the loan, the borrower shall be entitled to receive the real property title in return.

So long as the guarantee is in effect, the borrower will remain in the actual possession of the real property while the lender will obtain the constructive possession of it. If the borrower fails to settle its debt, subject to certain procedures to be taken by the lender (including notification), the Real Estate Registry will record the property exclusively in the lender's name and the lender, within 30 (thirty) days thereafter, must proceed with a public auction to sell the real property, and the proceeds thereof are applied for payment of the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

Taxes payable on perfecting a lien on real property are owed to the state in which the property is located and usually are based on the amount of the transaction. Such amounts vary on a case by case basis so a survey with the competent authorities is always recommendable before accepting or creating any such liens.

3. Describe manner in which a lien secured by real property is foreclosed.

With regard to mortgages if the borrower fails to settle its debt, the lender shall file a lawsuit to collect its debt. Once granted with a favorable decision, the lender shall file an execution lawsuit through which the real estate given as collateral will be seized ("penhorado"). After the seizure, the lender will be able to choose between (i) be awarded with the seized asset (sections 685-A and 685-B of the Brazilian Civil Procedure Code); (ii) proceed with the private sale of the asset (section 685-C of the Brazilian Civil Procedure Code); or (iii) sell the asset in public auction (sections 686 to 689 of the Brazilian Civil Procedure Code). The proceeds thereof will be used to pay the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

With regard to the fiduciary transfer of title to a real property if the borrower fails to settle its debt, subject to certain procedures to be taken by the lender (including notification), the Real Estate Registry will record the property exclusively in the lender's name and the lender, within 30 (thirty) days thereafter, must proceed with a public auction to sell the real property, and the proceeds thereof are applied for payment of the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

With regard to the other guarantees, please refer to the answer to Question #1 above.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

There are no significant costs of or impediments to foreclosing a lien on real property, except for the fact that the lender will have to face a judicial dispute that is likely to be time-consuming.

5. What is the customary time period for foreclosing a lien on real property?

It is very hard for us to estimate. Court proceedings may take from months to years, depending on many factors.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No, there are no restrictions on foreign banks or foreign lenders to make real estate loans secured by real property in Brazil.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

In Brazil there is no differentiation among loans secured by real property and other types of secured financing as regards interest rate legal limits.

Former Article 192, §3, of the Brazilian Federal Constitution, enacted in 1988, established a 12.0% per year ceiling/cap on bank loan interest rates. However, since the enactment of the Federal Constitution, such rate was not enforced, as the regulation of such provision was pending. Several attempts were made to regulate the limitation on bank loan interest, but none of them were implemented.

In May 2003, an Amendment to the Brazilian Constitution, EC 40/03, was enacted which revoked all subsections and paragraphs of Article 192 of the Federal Constitution. EC 40/03 replaced these restrictive constitutional provisions with a general permission to regulate the Brazilian financial system through specific laws.

With the enactment of the current Civil Code (Law No. 10,406 of January 10, 2002), in principle the ceiling/cap of the applicable interest rate has been pegged to the rate charged by the National Treasury Office (Fazenda Nacional) or the SELIC (base rate paid by Federal Government Bonds). Despite the fact that there is presently some uncertainty as to whether the SELIC or the 12.0% per annum interest rate established in the Brazilian tax code should apply, the latter understanding (12.0% p.a.) has prevailed.

Nevertheless, Brazilian Courts have interpreted that financial institutions are not subject to the above Civil Code limitations, provided that the interest amount charged follows current market rates.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws restricting the ability to make a borrower personally liable for indebtedness secured by real property. With regard to the borrower, in the event the mortgaged property is not sufficient to pay the debt, the balance may be collected from the borrower and, as a rule, all of its assets will be subject to such collection. The only applicable exception is with regard to the homestead right ("bem de família").

Specifically regarding the fiduciary transfer of title to a real property, please note that once the property is sold and the proceeds are delivered to the lender, the balance, if any, is automatically waived and the debt is considered as totally paid.

On the other hand, a third party guarantor will never be personally liable for the debt except in the event that, together with the real property guaranty, it has granted to the lender a personal guarantee/surety ("fiança"), waiving its privilege of order.

Contact Information

Adriana Khalil Daiuto

adaiuto@demarest.com.br

Demarest e Almeida

Av. Pedroso de Moraes, 1201
Centro Cultural Ohtake
Sao Paulo, 05419-001
Brazil

Tel 55.11.3356.1800 Fax 55.11.3356.1700
www.demarest.com.br

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Bulgaria

Prepared by Lex Mundi member firm Penkov, Markov & Partners

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

The instrument used in Bulgaria is a mortgage, established by virtue of a Notary Deed. The Notary Deed on establishment of a mortgage is subject to recordation with the Bulgarian Recordation Agency.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

For the establishment of mortgage the following fees should be paid: 1. Notarial fee (which depends on the amount of the secured receivable, but cannot be higher than BGN 3,000.00); 2. Fee for recordation of the Notary Deed on establishment of mortgage in the Recordation Agency (0,1 % over the amount of the secured receivable).

- 3. Describe manner in which a lien secured by real property is foreclosed.**

The foreclosure of a lien secured by a mortgage should follow the procedure envisaged in the Civil Procedure Code as described herein below: The creditor should submit a request for issuance of an Execution Order (which is not an executive title of its own, but only a precondition for issuance of a Writ for Execution) before the respective Regional Court. If the debtor does not object against the request in a fortnight as of the date he has been notified for the submitted request, the creditor may submit a request for issuance of a Writ for execution (which usually takes about a month), by virtue of which the bailiff in charge may sell the property (which takes about month and a half as per the provisions of the Civil Procedure Code). The above described procedure may be significantly prolonged if the debtor objects against the request for issuance of an Execution Order. In this case the creditor has one month to raise his claim before the competent court and should pass through all stages of the court proceedings.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

For the issuance of an Execution Order the court collects state fee in the amount of 2% of the secured receivable. Throughout the procedure for sale of the real estate, subject of the mortgage, the creditor pays a number of taxes, which are on the account of the debtor and are collected from the sale price of the respective real estate.

- 5. What is the customary time period for foreclosing a lien on real property?**

The customary time period includes about a month for issuance of an Execution Order, another month for issuance of Writ for Execution and another month and a half for the sale of the property provided that no unexpected complications arise.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There aren't any restrictions regarding the securing of foreign entities' receivables with mortgages.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

If in the Notary Deed on establishment of the mortgage is noted that the receivable is interest-bearing, the mortgage secures the interest for the two years preceding the year of serving a writ of summons for voluntary performance on the owner, as well as the interest for the current year and for all the following years until the date of sale of the property. Apart from that, there are no restrictions regarding the exact amount of the interest.

8. **Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

As a matter of general principle the borrower is liable for indebtedness with his whole property, including, but not limited to the assets which have been subject to an established mortgage. In the light of the above, there are no specific laws restricting the personal liability of a borrower, who has secured his debt with a mortgage.

Contact Information

Vladimir Penkov
vladimir.penkov@penkov-markov.eu

Penkov, Markov & Partners
13B Tintyava Str., Floor 6
1113 Sofia, Bulgaria

Tel 359.2.971.3935 Fax 359.2.971.1191
www.penkov-markov.eu

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Canada, Alberta

Prepared by Lex Mundi member firm Blake, Cassels & Graydon LLP

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage/charge or an encumbrance is the instrument that secures a lien on real property in Alberta. A debenture can also be utilized where the debenture meets the requirements of a mortgage.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage registration tax in Alberta. A registration fee of 0.02% of the principal amount of the mortgage (or the fair market value of the real property, if such value is less than the principal amount) is charged to register a mortgage.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Where a borrower has defaulted, and the lender has given reasonable notice to the borrower, the lender has a variety of remedies to choose from. In practice, the options available to the lender in Alberta are to:

- (i) sell the mortgaged property to a third party pursuant to a court order made in a judicial sale action (Order Confirming Sale and Vesting Title);
- (ii) obtain title to the mortgaged property by means of (i) a foreclosure action (Final Order for Foreclosure), (ii) a direct sale to the lender (Order for Sale to the Mortgagee or "Rice Order"), or (iii) accepting a voluntary transfer of the mortgaged property from the borrower;
- (iii) take possession or control of the mortgaged property (i) by court order, (ii) through a receiver appointed by the lender pursuant to the provisions in the mortgage, or (iii) through a court-appointed receiver or interim receiver; or
- (iv) obtain judgment for the payment of the debt secured by the mortgage against the guarantor of the mortgage. Note: see section 8 regarding limitations on the ability of the lender to recover a judgment on the debt secured by the mortgage.

In cases where an Order for Sale, Order for Foreclosure or a Rice Order may be obtained, there is a statutory redemption period in Alberta for *National Housing Act* mortgages or for mortgages granted to individuals. In general, this time period is 6 months (1 year in the case of farm land), however this time period may be varied by the court. During this period, the mortgagor has the opportunity to redeem the mortgage by paying the arrears in full. If this period expires without the mortgagor repaying the arrears, the court may then make the appropriate order.

Where a lender opts to sell the property under a judicial sale, the lender is empowered to convey the mortgaged property to a purchaser free and clear of the interest of the borrower and any other person having an interest in the mortgaged property subsequent in priority to that of the lender. In addition, where a foreclosure action is chosen, the title can be vested in the lender free of all

subsequent encumbrances. However, where the borrower voluntarily transfers the title to the property to the lender, the subsequent priority interests are not extinguished.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Both judicial sales and foreclosure actions are often expensive, due to the need for several court appearances.

5. What is the customary time period for foreclosing a lien on real property?

Enforcement of mortgages in Alberta through the court system requires many interlocutory steps, and depending on the facts, can take several months to two years to complete. One key determinant in how long it may take to foreclose is whether there is a need for a statutory redemption period.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

In Alberta, in order to be the registered holder of a mortgage of real property, a foreign bank or corporate lender must either be registered as an extra-provincial corporation or other qualified corporate entity in the Province of Alberta, or be registered with the Office of the Superintendent of Financial Institutions of Canada as a foreign bank or foreign bank branch.

Foreign banks and their affiliates may not “carry on business” as deposit-taking institutions in Canada without complying with Canadian regulatory requirements.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Section 347 of the Criminal Code (Canada) prohibits interest that is more than 60% per annum. “Interest” is defined as including the aggregate of all charges and expenses, including a fee, fine, penalty, commission or other similar charge or expense, paid or payable for the advancing of a credit but does not include such items as insurance charges, overdraft charges or amounts on account of property taxes.

The Interest Act (Canada) contains four provisions which may have applications in certain circumstances:

(a) section 4 – whenever interest is, by written contract other than a mortgage or hypothec on real property, made payable at a rate per day, week, month or any rate for any period less than a year, no interest beyond 5% per annum is chargeable unless the contract contains an express statement of the yearly rate to which the other rate is equivalent. Where interest is based on a 360-day year or some other period of less than a year, a statement setting out the equivalent annual rate is commonly included in the mortgage loan documentation to ensure compliance with this requirement.

(b) section 6 – requires that where payments of principal and interest are “blended” (i.e. where a set amount is payable each month with the interest component decreasing as the principal component increases), the mortgage loan documentation must state the interest chargeable on principal calculated yearly or half-yearly, not in advance. Failure to do so results in no interest at all being chargeable.

(c) section 8 – states that no fine, penalty or rate of interest shall be stipulated in respect of any arrears of principal or interest secured by a mortgage on real property that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears. This section applies to mortgage loans where, for example, the interest rate is stated to

be increased upon the occurrence of a default in the payment of principal or interest. This section is not limited to increases in interest, but includes fines and penalties, such as a “bonus” of three months’ interest following default. Despite section 8, lenders are allowed to assess late payment charges if such amounts are administrative charges which represent a fair and reasonable pre-estimate of the additional administrative costs incurred by the lender upon default. Generally, amounts determined on a percentage basis are more likely to be considered a penalty than amounts expressed as a flat dollar amount.

(d) section 10 – provides that mortgages made by persons or entities other than corporations may be prepaid at any time after five years of the date of the mortgage, with the payment of three months’ interest, notwithstanding the stated term of the mortgage.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

In Alberta, the lender may not recover a judgment for the payment of money based on the covenant to pay contained in the mortgage, unless the mortgage is a National Housing Act mortgage, the mortgagor is a corporation, or the mortgage is a high-ratio mortgage which is insured by a licensed insurer of mortgages in Alberta.

Contact Information

Richard Dawson, Q.C.
rick.dawson@blakes.com

Blake, Cassels & Graydon LLP
855-2nd Street S.W.
Suite 3500, Bankers Hall East Tower
Calgary, Alberta T2P 4J8
Canada

Tel 1.403.260.9600 Fax 1.403.260.9700
www.blakes.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Canada, Nova Scotia

Prepared by Lex Mundi member firm McInnes Cooper

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage or debenture incorporating a mortgage are generally the instruments used to create a security interest in real property to secure indebtedness in Nova Scotia. A deed of trust may also be utilized in circumstances where the security interest secures the issuance of bonds or debentures.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage registration tax in Nova Scotia. Fees to register a mortgage are not based on the mortgage amount or property value.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Following default by the borrower and after having given reasonable notice to the borrower, the lender has a variety of remedies from which to choose. The lender may:

- a) obtain a court order for foreclosure, sale and possession and have the property sold at public auction conducted by the sheriff, or where the court orders by sale to a person who has made an offer to the lender.
- b) obtain title to the mortgaged property by means of (i) being the successful bidder at the auction sale, or (ii) accepting a voluntary transfer of the mortgaged property from the borrower;
- c) take possession or control of the mortgaged property (i) privately, (ii) by court order, (iii) through a receiver appointed by the lender pursuant to the provisions in the mortgage or (iv) through a court appointed receiver or interim receiver;
- d) obtain a judgment for the payment of the debt secured by the mortgage against (i) the borrower and/or any guarantor, or (ii) if there has been a change of ownership and the mortgage has been assumed, the current owner of the mortgaged property;
- e) obtain a judgment for any deficiency balance which remains outstanding following the foreclosure sale.

There is no private power of sale remedy in Nova Scotia. At the conclusion of a foreclosure, sale and possession action, the purchaser at the sale becomes the owner of the mortgaged property and all persons holding an interest in the mortgaged property subsequent in priority to that of the lender lose their interest in the mortgaged property. A voluntary transfer of the mortgaged property from the borrower to the lender does not extinguish the interest of a person holding an interest in the mortgaged property subsequent in priority to that of the lender.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

A foreclosure and sale action requires at least two court attendances and attendance at the sale resulting in significant costs of enforcement to the lender. Our *Costs and Fees Act* provides guidance to the judge in terms of the costs which may be recovered from the borrower. Such costs are within the judge's discretion to award.

5. What is the customary time period for foreclosing a lien on real property?

If the foreclosure and sale action is uncontested, the process may be completed in approximately two to three months. A contested foreclosure and sale action, on the other hand, may take up to two years to complete.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

In Nova Scotia, in order to carry on a business involving lending on the security of real estate, a person or entity must be registered as a mortgage broker under the Mortgage Brokers and Lenders Registration Act. In order to become registered, the lender must maintain an office in Nova Scotia. Foreign banks and their affiliates may not “carry on business” in Canada without complying with Canadian regulatory requirements.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Section 347 of the Criminal Code (Canada) prohibits interest that is more than 60% per annum. “Interest” is defined as including the aggregate of all charges and expenses, including a fee, fine, penalty, commission or other similar charge or expense, paid or payable for the advancing of a credit but does not include such items as insurance charges, overdraft charges or amounts on account of property taxes.

The Interest Act (Canada) contains four provisions which may have applications in certain circumstances:

- a) Section 4 – whenever interest is, by written contract other than a mortgage or hypothec on real property, made payable at a rate per day, week, month or any rate for any period less than a year, no interest beyond 5% per annum is chargeable unless the contract contains an express statement of the yearly rate to which the other rate is equivalent. Where interest is based on a 360-day year or some other period of less than a year, a statement setting out the equivalent annual rate is commonly included in the mortgage loan documentation to ensure compliance with this requirement.
- b) Section 6 – requires that where payments of principal and interest are “blended” (i.e. where a set amount is payable each month with the interest component decreasing as the principal component increases), the mortgage loan documentation must state the interest chargeable on principal calculated yearly or half-yearly, not in advance. Failure to do so results in no interest at all being chargeable.
- c) Section 8 – states that no fine, penalty or rate of interest shall be stipulated in respect of any arrears of principal or interest secured by a mortgage on real property that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears. This section applies to mortgage loans where, for example, the interest rate is stated to be increased upon the occurrence of a default in the payment of principal or interest. This section is not limited to increase in interest, but includes fines and penalties, such as a “bonus” of three months’ interest following default. Despite Section 8, lenders are allowed to assess late payment charges if such amounts are administrative charges which represent a fair and reasonable pre-estimate of the additional administrative costs incurred by the lender upon default. Generally, amounts determined on a percentage basis are more likely to be considered a penalty than amounts expressed as a flat dollar amount.
- d) Section 10 – provides that mortgages made by persons or entities other than corporations may be prepaid at any time after five years of the date of the mortgage, with the payment of three months’ interest, notwithstanding the stated term of the mortgage.

The *Interest on Judgments Act* (Nova Scotia) provides that every judgment debt shall bear interest at 5% per annum. This would include any deficiency judgment or judgment for overdue installments.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no such laws in Nova Scotia but caution should be exercised and independent legal advice should be required in certain circumstances.

Contact Information

Wayne R. Marryatt

wayne.marryatt@mcinnescooper.com

McInnes Cooper

1300-1969 Upper Water Street
Purdy's Wharf Tower II
Halifax, Nova Scotia B3J 2V1, Canada

Tel 1.902.425.6500 Fax 1.902.425.6350
www.mcinnescooper.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Canada, Ontario

Prepared by Lex Mundi member firm Blake, Cassels & Graydon LLP

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A mortgage/charge is the instrument that secures a lien on real property in Ontario. A deed of trust may also be utilized in circumstances where the lien secures the issuance of bonds or debentures.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

There is no mortgage registration tax in Ontario.

3. Describe manner in which a lien secured by real property is foreclosed.

Following default by the borrower and after having given reasonable notice to the borrower, the lender has a variety of remedies from which to choose. The lender may:

- (a) sell the mortgaged property pursuant to (i) the private power of sale provisions contained in the mortgage, or (ii) a court order made in a judicial sale action;
- (b) obtain title to the mortgaged property by means of (i) a foreclosure action, or (ii) accepting a voluntary transfer of the mortgaged property from the borrower;
- (c) take possession or control of the mortgaged property (i) privately, (ii) by court order, (iii) through a receiver appointed by the lender pursuant to the provisions in the mortgage, or (iv) through a court appointed receiver or interim receiver;
- (d) obtain a judgment for the payment of the debt secured by the mortgage against (i) the borrower and/or any guarantor, or (ii) if there has been a change of ownership, the current owner of the mortgaged property.

When a lender exercises its rights under of a power of sale or judicial sale, the lender is empowered to convey the mortgaged property to a purchaser free and clear of the interest of the borrower and any other person having an interest in the mortgaged property subsequent in priority to that of the lender. At the conclusion of a foreclosure action, the lender becomes the owner of the mortgaged property and all persons holding an interest in the mortgaged property subsequent in priority to that of the lender lose their interest in the mortgaged property. A voluntary transfer of the mortgaged property from the borrower to the lender does not extinguish the interest of a person holding an interest in the mortgaged property subsequent in priority to that of the lender.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

A sale under a power of sale is relatively inexpensive, whereas a judicial sale or foreclosure action may require several court attendances which increase the costs of enforcement to the lender.

5. What is the customary time period for foreclosing a lien on real property?

If the private power of sale remedy is selected, the process may be completed in approximately six months. A contested foreclosure or juridical sale, on the other hand, may take up to two years to complete.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

In Ontario, in order to carry on a business involving lending on the security of real estate, a person or entity must be registered as a mortgage broker under the mortgage brokerage legislation. Foreign banks and their affiliates may not “carry on business” in Canada without complying with Canadian regulatory requirements.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Section 347 of the Criminal Code (Canada) prohibits interest that is more than 60% per annum. “Interest” is defined as including the aggregate of all charges and expenses, including a fee, fine, penalty, commission or other similar charge or expense, paid or payable for the advancing of a credit but does not include such items as insurance charges, overdraft charges or amounts on account of property taxes.

The Interest Act (Canada) contains four provisions which may have applications in certain circumstances:

- (a) section 4 – whenever interest is, by written contract other than a mortgage or hypothec on real property, made payable at a rate per day, week, month or any rate for any period less than a year, no interest beyond 5% per annum is chargeable unless the contract contains an express statement of the yearly rate to which the other rate is equivalent. Where interest is based on a 360-day year or some other period of less than a year, a statement setting out the equivalent annual rate is commonly included in the mortgage loan documentation to ensure compliance with this requirement.
- (b) section 6 – requires that where payments of principal and interest are “blended” (i.e. where a set amount is payable each month with the interest component decreasing as the principal component increases), the mortgage loan documentation must state the interest chargeable on principal calculated yearly or half-yearly, not in advance. Failure to do so results in no interest at all being chargeable.
- (c) section 8 – states that no fine, penalty or rate of interest shall be stipulated in respect of any arrears of principal or interest secured by a mortgage on real property that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears. This section applies to mortgage loans where, for example, the interest rate is stated to be increased upon the occurrence of a default in the payment of principal or interest. This section is not limited to increases in interest, but includes fines and penalties, such as a “bonus” of three months’ interest following default. Despite section 8, lenders are allowed to assess late payment charges if such amounts are administrative charges which represent a fair and reasonable pre-estimate of the additional administrative costs incurred by the lender upon default. Generally, amounts determined on a percentage basis are more likely to be considered a penalty than amounts expressed as a flat dollar amount.
- (d) section 10 – provides that mortgages made by persons or entities other than corporations may be prepaid at any time after five years of the date of the mortgage, with the payment of three months’ interest, notwithstanding the stated term of the mortgage.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None in Ontario.

Contact Information

Jim Hilton
jim.hilton@blakes.com

Blake, Cassels & Graydon LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9
Canada

Tel 1.416.863.2400 Fax 1.416.863.2653
www.blakes.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Canada, Quebec

Prepared by Lex Mundi member firm Blake, Cassels & Graydon LLP

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A hypothec is the instrument that secures a lien on real or immovable property in Quebec. A deed of hypothec and issued bonds (similar to a trust deed) may also be utilized in circumstances where the lien secures the issuance of bonds or debentures or is in favor of an agent.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

There is no mortgage registration tax in Quebec.

3. Describe manner in which a lien secured by real property is foreclosed.

Following default by the borrower and after having given the prescribed 60 day prior notice to the borrower, the lender has the four hypothecary remedies prescribed by the Civil Code of Quebec from which to choose. The lender may:

- (a) sell the hypothecated property pursuant to a court order made in a judicial sale action;
- (b) sell the hypothecated property privately themselves by private agreement, a call for tenders or by public auction;
- (c) obtain title to the hypothecated property by means of (i) an action in taking payment, or (ii) accepting a voluntary surrender of the hypothecated property from the borrower; or
- (d) take possession of the hypothecated property for purposes of administration.

In addition, the lender may obtain a judgment for the payment of the debt secured by the hypothec against (i) the borrower and/or any guarantor, or (ii) if there has been a change of ownership, the current owner of the hypothecated property.

When a lender exercises its rights under judicial sale, the sale purges the property of all hypothecs. At the conclusion of a foreclosure (i.e. taking in payment) action, the lender becomes the owner of the hypothecated property and all persons holding an interest in the hypothecated property subsequent in priority to that of the lender lose their interest in the hypothecated property (other than construction lienholders and for the syndicate of co-owners lien). A voluntary taking in payment of the hypothecated property from the borrower to the lender also extinguishes the interest of a person holding an interest in the hypothecated property subsequent in priority to that of the lender.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

A sale by the creditor is relatively inexpensive, whereas a judicial sale or foreclosure (taking in payment) action may require several court attendances which increase the costs of enforcement to the lender. Where a foreclosure (i.e. taking in payment) is exercised court approval is required to proceed if the debtor has discharged more than one-half of the debt (unless the debtor has voluntarily surrendered the property); a subsequent creditor or the debtor may also require the creditor to proceed by sale instead of foreclosure.

5. What is the customary time period for foreclosing a lien on real property?

If the private power of sale remedy is selected, the process may be completed in approximately six months. A contested foreclosure or judicial sale, on the other hand, may take up to two years to complete.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

In Quebec, in order to carry on a business involving lending on the security of real estate, a person or entity that engages in mortgage loans for others must be registered as a mortgage broker under the Mortgage Brokers' Act (Quebec). This will not apply to lenders that are lending their own money. Foreign banks and their affiliates may not "carry on business" in Canada without complying with Canadian regulatory requirements.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Section 347 of the Criminal Code (Canada) prohibits interest that is more than 60% per annum. "Interest" is defined as including the aggregate of all charges and expenses, including a fee, fine, penalty, commission or other similar charge or expense, paid or payable for the advancing of a credit but does not include such items as insurance charges, overdraft charges or amounts on account of property taxes.

The Interest Act (Canada) contains four provisions which may have applications in certain circumstances:

(a) section 4 – whenever interest is, by written contract other than a mortgage or hypothec on real property, made payable at a rate per day, week, month or any rate for any period less than a year, no interest beyond 5% per annum is chargeable unless the contract contains an express statement of the yearly rate to which the other rate is equivalent. Where interest is based on a 360-day year or some other period of less than a year, a statement setting out the equivalent annual rate is commonly included in the mortgage loan documentation to ensure compliance with this requirement.

(b) section 6 – requires that where payments of principal and interest are "blended" (i.e. where a set amount is payable each month with the interest component decreasing as the principal component increases), the mortgage loan documentation must state the interest chargeable on principal calculated yearly or half-yearly, not in advance. Failure to do so results in no interest at all being chargeable.

(c) section 8 – states that no fine, penalty or rate of interest shall be stipulated in respect of any arrears of principal or interest secured by a mortgage on real property that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears. This section applies to mortgage loans where, for example, the interest rate is stated to be increased upon the occurrence of a default in the payment of principal or interest. This section is not limited to increases in interest, but includes fines and penalties, such as a "bonus" of three months' interest following default. Despite section 8, lenders are allowed to assess late payment charges if such amounts are administrative charges which represent a fair and reasonable pre-estimate of the additional administrative costs incurred by the lender upon default. Generally, amounts determined on a percentage basis are more likely to be considered a penalty than amounts expressed as a flat dollar amount.

(d) section 10 – provides that mortgages made by persons or entities other than corporations may be prepaid at any time after five years of the date of the mortgage, with the payment of three months'

interest, notwithstanding the stated term of the mortgage.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None in Quebec other than financial assistance restrictions on Quebec incorporated entities.

Contact Information

James Papadimitriou
james.papadimitriou@blakes.com

Blake, Cassels & Graydon LLP
600 de Maisonneuve Boulevard West
Suite 2200
Montréal, Québec H3A 3J2
Canada

Tel 1.514.982.4000 Fax 1.514.982.4099
www.blakes.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Channel Islands, Jersey

Prepared by Lex Mundi member firm Mourant Ozannes

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Securing an indebtedness over real estate in Jersey is by way of registering a charge ("*hypothèque*" or "*hypothec*") in the Public Registry of the Island of Jersey.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Stamp Duty is payable on the registration of a charge on real property in Jersey.

3. **Describe manner in which a lien secured by real property is foreclosed.**

The holders of a hypothec over Jersey real property can enforce their security by application to the Royal Court of Jersey for (i) a *désastre* or (ii) a *dégrévement*. The procedure for these applications is mainly Jersey statute based, but common law does play a part.

(i) *Désastre*

This is a form of bankruptcy proceeding in Jersey. Application is made to the court and can be made ex-parte (not requiring all the parties to be present) by the debtor, a creditor or the Jersey Financial Services Commission (the regulator of financial services in Jersey). There is a requirement to give the Viscount's Department (the Viscount is the Royal Court of Jersey's executive officer) 48 hours' notice of the intention to make the application to the court. Once the application is granted by the court, the estate of the insolvent debtor is vested in the Viscount whose duty is then to liquidate that estate for the benefit of the creditors who prove their claims.

(ii) *Dégrévement*

This application is usually made by a creditor (but can also be made by a debtor making voluntary cession of his property). The property of the debtor is liquidated for the benefit of certain creditors. The aim, unlike in a *désastre* where the aim is settle debts amongst the creditors equitably, is to disencumber the property.

If a creditor has obtained a judgment against the debtor and that judgment remains unsatisfied after one month, then the creditor can apply to the court for an order that the Viscount give notice to the debtor (*Acte Vicomte chargé d'écrire*) to satisfy the judgment (within two months for Royal Court judgments), failing which the debtor's property will be adjudged to be renounced. The creditor then applies to the court again for judgment that the debtor's property is renounced. The court will then appoint an *attourné* (but usually appoints two) to administer the *dégrévement*. Creditors and other interested parties are notified. The claims are listed. A *dégrévement* hearing will take place at which first the unsecured creditors (as a body) and then each secured creditor (in the reverse order of the date of their security). Each creditor is then offered the debtor's property but if they accept they take the property subject to all the other charges and claims.

Once a creditor has agreed to take the debtor's property in this way, their tenure is confirmed by further application to the court.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

In an application for a *désastre*, the applicant may be requested to undertake to cover the Viscount's costs of the *désastre*. A debtor may seek to recall the *désastre* or apply for a stay of the proceedings. There is a protection provision in the *désastre* law if the property is the matrimonial home. There may be competing or superior claims by other debtors.

In *dégrèvement* proceedings, the debtor can apply to the Court for a "*remise de biens*" which is a indulgence to the debtor whereby the debtor's property is realised under the supervision of the Court appointed Jurats of the Royal Court. A *remise de biens* is usually granted for a period of 6 months and effectively suspends the *dégrèvement* proceeding during that time. The cost of the administration of the *dégrèvement* is usually taken out of the realised estate of the debtor.

5. What is the customary time period for foreclosing a lien on real property?

Désastre application to the court may be made upon 48 hours' notice to the Viscount's Department of the intention to make the application. The actual bankruptcy may take several months to years to administer and complete.

Dégrèvement proceedings take 3 to 4 months to initiate (see notice periods in response to question 3 above) and again can take several months to years to administer, particularly if the debtor is granted the indulgence of a *remise de biens* (described above), which is usually for an initial period of 6 months.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No, there are no restrictions on foreign lenders securing their advances over real estate in Jersey. However there would be Stamp Duty payable on registration of the loan secured on the real property in Jersey.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

None. The amount of interest on the loan is a matter to be agreed between the parties.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Guarantors may be able to restrict liability by relying on the customary law defences of:

- i) "droit de discussion" - whereby a creditor must have recourse to the assets of the principal debtor before the creditor has recourse to the property of the guarantor.
- ii) "droit de division" - a creditor must divide the demand for the debt amongst the co-guarantors in just proportions.

It is usual for a creditor to require a guarantor or guarantors to waive or abandon these "droits" when entering into a guarantee arrangement.

Contact Information

Mark Harris

mark.harris@mourant.com

Mourant Ozannes

22 Grenville Street
St. Helier
Jersey, JE4 8PX

Tel 44.1534.676.000 Fax 44.1534.676.333
www.mourantozannes.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Chile

Prepared by Lex Mundi member firm Claro & Cia., Abogados

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the usual form to create a lien on real estate. Mortgage is perfected by means of a public deed recorded in the Mortgage Registry at the respective Real Estate Property Registrar.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Chile.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Liens secured by real property are foreclosed in Chile by means of a foreclosure procedure before a trial court of law. After final judgment of said court, the affected real property shall be sold in a public auction.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are not significant costs to foreclose a lien on a real property, other than the attorney's fees, which usually borders 10% of the collected amount. The main impediments to foreclose a real property are borrower's exceptions or defenses that may be filed before the trial court, which may considerably delay the foreclosure.

- 5. What is the customary time period for foreclosing a lien on real property?**

The process generally takes between two and three years.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There are no special restrictions for foreign banks and/or foreign lenders to secure its loans with real property.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Interests charged on loans secured with real property are only subject to the limit specifically set forth by Chilean Law for loans in general. This limit is equal to the Average Interest Rate --at the time of the financing agreement-- increased in a 50%. Average Interest Rate is published by the Superintendence of Banks and Financial Institutions on a monthly basis.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

José María Eyzaguirre
jmeyzaguirre@claro.cl

Claro & Cia., Abogados
Av. Apoquindo 3721, 14th Floor
Las Condes
Santiago 755 0177, Chile

Tel 56.2.367.3000 Fax 56.2.367.3003
www.claro.cl

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Colombia

Prepared by Lex Mundi member firm Brigard & Urrutia Abogados

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Mortgage is the usual instrument to create a lien on real estate whereby creditors secure indebtedness.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

The cost of executing a mortgage involves notary fees and registration tax. Notary fees range between 0.28% to 0.3% of the value of the indebtedness being secured by the mortgage. Registration tax ranges between 0.5% and 1.5% percentage of the value of the indebtedness secured by the mortgage, depending on the municipality where the mortgage is registered. The rules of the Civil Code also provide for so-called “open mortgages”, which secure any present and future obligations that a debtor owes to a creditor, up to a specified amount. On open-ended mortgages, the rate is levied on the amount disbursed under the first loan agreement.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Foreclosure with a mortgage as collateral is a judicial mechanisms governed by the Code of Civil Procedure. This proceeding seeks to enforce an obligation acquired by the debtor in favour of the plaintiff/creditor, which existence is not disputed. It is created for the event in which the debtor does not voluntarily comply with the obligation. Pursuant to Colombian law, in a foreclosure with a mortgage as collateral, the plaintiff/creditor can enforce his rights against the specific real property that secured the indebtedness. The manner in which a lien secured by real property is foreclosed is to commence a collective proceeding with a mortgage as collateral (proceso ejecutivo hipotecario) in order to sell the mortgaged assets in a public auction to obtain payment of the secured credit with the proceeds resulting from the sale. If there is not a successful bidder in the public auction, the asset is given to the mortgagee, in order to settle the indebtedness.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Usually, the most significant cost to foreclosing a lien on real property is represented by attorney's fees. The most significant impediment to foreclosing a lien on real property is the time period to obtain the foreclosure.

- 5. What is the customary time period for foreclosing a lien on real property?**

Although collection proceedings are supposed to be summary, they may be subject to substantial delays. In certain cases, depending on the nature of the defenses raised by the debtor, it may take between one to three years to obtain a judgment. If the judgment were subject to appeal, this may delay matters for another year in order for the appeal to be resolved. The liquidation of the credit and the public auction for sale of the asset would take between 3 to 6 months.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Even though, there are no permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property, it is important to take into account that according to Colombian foreign exchange regulations, foreign loans to Colombian residents can only be granted by foreign financial institutions duly registered with the Colombian Central Bank. Pursuant to Article 26 of Regulation No. 8 of the Colombian Central Bank, the Colombian debtor would have to make a deposit with the Colombian Central Bank for an amount equal to forty percent (40%) of the disbursed amount. The deposit can be made in USD or in COP and will be held by the Colombian Central Bank in a non-interest bearing account for a six month period. Notwithstanding the above, the borrower may decide to pay a non-refundable discount, instead of making the mentioned 40% deposit. In this case the debtor would have to pay a 5,72% of the 40% deposit. This amount would be equivalent to 2,29% of the disbursed amount. (Additionally, such payment may be deductible for income tax purposes.) Provided the previous requirements are met, foreign loans must be registered with the Colombian Central Bank by means of Form No. 6. Once the loan has been registered, the borrower would be allowed to receive the funds and make the payments abroad thereof (i.e. repayment of loan). This repayment of the loan must be made through the Colombian foreign exchange market, and any transfer of capital and interests would have to be registered. Under current foreign exchange regulations, Colombian residents are entitled to guarantee obligations in a foreign currency provided that the obligation is subject to a foreign exchange transaction (i.e. foreign loans). These guarantees do not have to be registered before the Central Bank. As long as the guaranty is in relation with the foreign exchange operation, the foreign loan, it is possible to guarantee a foreign loan with a mortgage.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Colombian Central Bank sets, from time to time, the maximum rate of interest that can be charged on any loan, including loans secured by real property. Pursuant to Colombian law the legal limit on the amount of default interest is 1.5 times the bank interest rate certified by the Financial Superintendence. When interest is charged above the permitted limits, the creditors lose all the interest charged in excess.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There is no law that restricts the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Francisco Uribe Noguera
furibe@bu.com.co

Brigard & Urrutia Abogados
Calle 70 A # 4 - 41
Bogota, Colombia

Tel 57.1.346.20.11 Fax 57.1.310.06.09
www.bu.com.co

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Cyprus

Prepared by Lex Mundi member firm Dr. K. Chrysostomides & Co LLC

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A registered Contract and Declaration of Mortgage deposited with the local District Land Registry office.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is a registration fee amounting to 1% on the amount secured by a mortgage payable to the Land Registry office. Prior payment of Stamp Duty on the mortgage contract is required.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

An application for the forced sale of mortgaged property can be submitted after giving one month's notice accompanied by a statement of account to the mortgagor, before the District land Office where the property is situated. Any mortgagee may first apply to the Court and obtain an order of sale of the mortgaged properties instead of serving the notice upon the mortgagor and then apply for the sale of the property.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are minimal government fees payable on a forced sale beyond incidentals e.g. legal costs

- 5. What is the customary time period for foreclosing a lien on real property?**

The actual sale could take 1 – 2 years, depending on the district where the property is situated and on any actions that may be taken by the debtor to defer such sale.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Non-EU banks that do not operate in Cyprus may issue mortgaged loans but require the appointment of a local representative for service of process in order to be able to register the mortgage. Moreover, Central Bank approval is required when deposits are to be made in Cyprus by such banks. When the purchaser in a forced sale is an alien, (as defined in the law governing the acquisition of immovable property by aliens), the registration of the property would be subject to the limitations set out in the said law including the need to obtain official permission to register the property. If permission cannot be obtained then the proceeds of the sale are refunded.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

The Central Bank of Cyprus issues a list of interest rates, fixed or fluctuating, applicable to transactions by commercial banks operating in Cyprus.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None provided that the mortgagor is not under any prohibition.

Contact Information

Tassos Stylianou

t.stylianou@chrysostomides.com.cy

Dr. K. Chrysostomides & Co LLC

1, Lampousas Street

P.O. Box 22119

1095 Nicosia, Cyprus

Tel 357.22.777000 Fax 357.22.779939

www.chrysostomides.com.cy

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Denmark

Prepared by Lex Mundi member firm Kromann Reumert

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

To create a lien on real estate to secure indebtedness it is necessary to use a mortgage.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

In Denmark, a mortgage is recorded in the land register, where all Danish properties are registered. The rate of stamp duty on registration of a mortgage is 1.5 % of the principal + DKK 1,400 (USD 1 = approx. DKK 5.30). This tax is paid in full by the debtor. If a mortgage is already registered on the property, the fee for registration may be covered by the registration fee already paid. The amount that may be covered by the fee already paid depends on the type of mortgage registered on the property.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

When the mortgage has been signed by the debtor and the creditor, it is filed for registration. The land registry examines whether the terms of the mortgage satisfy the statutory requirements for registration. If the requirements are satisfied, the mortgage is registered in the land register. The application for registration is processed within approx. two weeks. As from 1 January 2009, mortgages will be registered digitally and signed with a digital signature. The execution and registration of mortgages may thus be made directly and without any processing time at the land registry.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

The costs payable to the public authorities are described in section 2. Besides interest, initial and administrative expenses are usually payable to the lender. The amount of these expenses is determined individually by the lender.

- 5. What is the customary time period for foreclosing a lien on real property?**

When the mortgage has been signed by the debtor and the creditor, registration usually takes two weeks. If the loan has to be paid before the mortgage is registered, the debtor usually has to pay guarantee commission. As from 1 January 2009, mortgages will be registered digitally and signed with a digital signature. The execution and registration of mortgages may thus be made directly and without any processing time at the land registry.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Foreign EU/EEA credit institutions may operate in Denmark on a cross-border basis or through a branch on the basis of the EU financial passport subject to the formalities required by legislation. In respect of cross-border activities, the home country's banking authorities have to notify the Danish

Financial Supervisory Authority of the intended cross-border activities and state that such activities are comprised by the bank's home country license. The cross-border activities may be commenced upon the Danish Financial Supervisory Authority's receipt of this information. As to activities through a Danish branch, the home country's banking authorities have to provide confirmation regarding the banking license in the home country, the capital and solvency figures and miscellaneous other information. The branch may start operating two months after receipt of this information. Foreign non-EU/EEA banks may operate in Denmark through a branch subject to approval from the Danish Financial Supervisory Authority. The branch must have a minimum capital of EUR 8 million and must be managed by two or more branch managers. In general, the branch has to comply with the same regulation in the Danish Financial Business Act as Danish banks.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Generally, there is no legal limit on the amount of interest that may be charged on loans secured by real property. Special restrictions, however, apply to consumer loans; the expenses payable by the consumer under the loan agreement must not be unreasonable.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

In Denmark, there are no laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Jacob Møller
jmo@kromannreumert.com

Kim Tuominen

Kromann Reumert
Sundkrogsgade 5
2100 Copenhagen, Denmark

Tel 45.70.12.12.11 Fax 45.70.12.13.11
www.kromannreumert.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Dominican Republic

Prepared by Lex Mundi member firm Pellerano & Herrera

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage agreement or a mortgage act is the instrument that is used to create a lien on real estate to secure indebtedness in the Dominican Republic.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

In order to record a mortgage on a real estate property, the mortgagee must pay in taxes the 2% of the secured amount.

3. **Describe manner in which a lien secured by real property is foreclosed.**

In case there is a breach of the obligations secured by the mortgage, the mortgagee must start the foreclosure procedure before the Lower Civil Court. The foreclosure entails the sale of the real estate property in a public auction. The timing, publication and publicity requirements in the course of the foreclosure are set forth under the Code of Civil Procedure and the Monetary and Financing Law. At the end of the procedure, the mortgagee will receive either a payment in cash or the ownership of the property asset.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

The cost of foreclosure may be significant if the process takes longer than expected by reasons of actions promoted by the debtor, to delay the public auction and to challenge the actions undertaken by the creditor to obtain the payment of the debt.

5. **What is the customary time period for foreclosing a lien on real property?**

The customary time period for foreclosing a lien on real property, if it is uncontested, is about 1 year. If the foreclosure is contested, there is no specific time frame, and the action will follow a time commensurate with litigation matters in general.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There are no governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are no legal limits imposed on the amount of interest that may be charged on a loan secured by real property. The interest is defined by the market and may be contractually agreed

upon by the parties pursuant to the freedom of contract principle, as set forth under the Civil Code.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no restrictions to make a borrower or guarantor personally liable for indebtedness secured by real property. However, such guarantee shall be specifically stated in the context of the credit agreement or otherwise, in a separate document.

Contact Information

Norman C. De Castro

n.decastro@phlaw.com

Isabel Andrickson

i.andrickson@phlaw.com

Pellerano & Herrera

Av. John F. Kennedy #10
Santo Domingo, Dominican Republic

Tel 1.809.541.5200 Fax 1.809.567.0773
www.phlaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Ecuador

Prepared by Lex Mundi member firm Pérez Bustamante & Ponce

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage or lien public deed granted in front of a notary public is needed; the public deed has to be filed with the Real Estate Registration Office in each County in order for the lien to be valid.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Local mortgage recording systems are administered by County Real Estate Registration Office which keep records of property and its limitations. This system might change in the near future, with the issuance of a new Constitution in Ecuador.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Under Ecuadorian Civil Law, the beneficiary of the lien secured by real property has to ask a judge or arbitration panel to foreclose and enforce the mortgage. If debtor does not comply with the main obligation, secured by the lien on real estate, the judge will issue a court order to auction the real estate in order to recuperate the money owed to the beneficiary.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

In Ecuador costs are associated with value of the real estate, and include legal fees, judicial fees and expenses.

5. **What is the customary time period for foreclosing a lien on real property?**

The customary time period is 12-18 months, due to the judicial process involved in foreclosure.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No, as long as the foreign banks or lenders appoint an attorney-in fact, and that there is no financial intermediation involved, such banks and lenders can guarantee their credits by means of a mortgage or other real estate liens. If the bank or the lender wished to operate in Ecuador, a Government authorization is needed.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are no specific interest rate caps applied to real estate guaranteed operations. In terms of interest rate caps, every month, the Central Bank of Ecuador establishes the maximum interest rate for each credit segment. The established segments are: (A) commercial credit which is divided into (i) corporate commercial credit for enterprises whose annual sales exceed US\$10

million, and (ii) commercial credit for small- and medium-size enterprises whose annual sales are equal to or higher than US\$100,000 but lower than US\$10 million, and for independent professionals earning annual income over US\$40,000; (B) consumer lending which is divided into the following segments: (i) consumer lending which includes operations with individuals in amounts exceeding US\$600, and (ii) minor consumer lending which includes credit operations with individuals in amounts below US\$600; (C) microcredit involving loans not exceeding US\$20,000 to corporations or individuals whose sales are below US\$100,000 per year; it includes three segments: (i) Subsistence microloans in amounts not exceeding US\$600, (ii) simple accumulation microloans in amounts from US\$600 to 8,500, and (iii) expanded accumulation microloans in amounts from US\$8,500 to 20,000; and (D) housing credit extended to individuals for purchase, construction, repairs, reconditioning and improvement of their own houses, always secured by mortgages. The effective reference lending interest rate for each of the above mentioned segments is equivalent to the weighted average by amount of the effective interest rates agreed upon for lending operations with financial system institutions, and is calculated by the Central Bank of Ecuador on a monthly basis.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no specific laws. The guarantor can be personally liable for indebtedness secured by real estate, as long as guarantor agrees in writing to act as joint guarantor.

Contact Information

Diego Pérez-Ordóñez
dperez@pbplaw.com

Pérez Bustamante & Ponce
Avenida República de El Salvador 1082
P.O. Box 17-1-3188
Quito, Ecuador

Tel 593.2.226.0666 Fax 593.2.400.7883
www.pbplaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Estonia

Prepared by Lex Mundi member firm LAWIN

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

In Estonia, the main instrument to create a lien on real estate is establishing a mortgage over the real estate.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Estonia. However, to register the mortgage with the Land Register of Estonia (whereas such registration is compulsory and constitutive, i.e. the mortgage is established by the respective entry in the Land Register) a state fee must be paid. The amount of the state fee is provided in the State Fee Act of Estonia, and fully depends on the amount of the mortgage.

3. **Describe manner in which a lien secured by real property is foreclosed.**

The creditor is entitled to have his claim satisfied through sale of the mortgaged property by a compulsory auction, or through administering the property on compulsory basis. Sale of real property through a compulsory auction or compulsory administration of the property is conducted by a bailiff in course of enforcement proceedings. An agreement on acquisition of the mortgaged property by the mortgagee if concluded before the claim is due is deemed null and void. Claims secured by real property are satisfied from funds received in course of such enforcement proceedings. If real property is encumbered with several mortgages, the mortgagees are satisfied according to the rankings of their mortgages. Each following mortgagee will be satisfied only after the mortgagee holding the mortgage of a higher ranking has become satisfied in full. Mortgages obtain their rankings by statutory registration with the Land Register of Estonia.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

The main cost related to foreclosing of a mortgage is the bailiff fee that is incurred to the debtor. The bailiff fee consists of the fee for commencement of execution proceedings that usually is EEK 250 (excluding VAT 18%), and of the main fee the amount of which depends on the amount of the claim. Furthermore, in case of compulsory sale of real property the bailiff is entitled to additional fee of 3% on the sales price. All the fees are incurred to the debtor but the bailiff may demand the claimant to make a partial advance payment of his fee. The exact amount of the advance payment depends on the amount of the claim; however, for claims exceeding EEK 50,000 the amount of the advance payment is EEK 3,000, and for claims exceeding EEK 9,000,000 – EEK 5,000. If the claimant is requested to make an advance payment of the bailiff fee, the amount paid in advance will be returned to the claimant after the debtor has paid the bailiff fee.

5. What is the customary time period for foreclosing a lien on real property?

The time period for foreclosing a mortgage differs so extensively that a generalization can be hardly made. The minimum time period could be a month but usually foreclosing of a lien on real property takes several months, in rare cases even years.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

There are no governmental permissions, approvals or licenses that are required for foreign banks or other foreign lenders specifically to make real estate loans secured by real property. However, such banks or other lenders are subject to general requirements established for any credit institutions.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Laws provide for no limits on the amount of interest charged on a loan secured by real property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Estonian laws provide for no restrictions on making a borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Triinu Hiob
triinu.hiob@lawin.ee

LAWIN
Niguliste 4
10130 Tallinn, Estonia

Tel 372.630.6460 Fax 372.630.6463
www.lawin.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Finland

Prepared by Lex Mundi member firm Roschier, Attorneys Ltd.

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Under Finnish law, a security interest over a real property is created by way of registering a mortgage and pledging the same as security for a debt. A mortgage may be registered on (i) a registered unit of freehold property, (ii) a fixed share of a unit, (iii) a parcel of land, (iv) transferable leaseholds and (v) certain usufructs. The creation of the security interest takes place in two stages. First, the owner of the real property requests the District Court of the district where the property is located to register mortgage(s) on such property. As evidence of this mortgage the District Court issues real estate mortgage notes to the owner in the number and amount requested by the applicant. These real estate mortgage notes alone, however, do not evidence an actual debt. A debt is generally evidenced by a loan agreement and the security interest is created by the owner pledging the real estate mortgage notes as security for such debt. The security interest is perfected by the delivery of the mortgage notes into the exclusive physical possession of the pledgee (or a third party sufficiently remote from the pledger). Additionally, it is required that such possession is retained by the pledgee throughout the security period. Real properties in Finland are often owned indirectly through an ownership of shares in a limited liability company, the purpose of which is to own (or lease) and manage a property and the building erected thereon. The shares of such real estate company entitle the owners to possess specific premises in the building. Without restricting the right of the company to create mortgage and pledge the real property it owns, a security interest may also be created by the owner pledging the shares of the real estate company.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

The making of a loan, creation of a mortgage and perfection of the security interest do not entail any stamp duty, capital duty or other similar tax consequences. There is, however, a minor administrative fee payable upon the registration of the mortgage.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A creditor cannot generally take the possession of the property or sell it privately when enforcing the security. The enforcement of a real estate mortgage always requires a judgment (or arbitral award), and the enforcement is carried out by a district bailiff. The need for an expedient enforcement of a security is recognized by the Code of Judicial Procedure which allows for a summary procedure for undisputed claims. The procedure also allows the District Court to immediately declare a mortgaged property foreclosed. After receiving a judgment, the creditor has to apply for the enforcement of the judgment, which typically means the execution of the borrower's real property carried out by the district bailiff, who also has discretion on which assets to foreclose. During the enforcement proceedings, the priority of the mortgages and other possible third party rights attaching to the real property will be investigated and taken into account. The property will be sold to the highest bidder unless the bailiff deems that the highest bid is significantly lower than the market value of the property. If the claim of the creditor (whether secured or unsecured) who initiated the public auction would not be paid in full by accepting the

highest bid, the creditor has the right to decide whether that bid will be accepted or not. A private sale of a mortgaged property is also possible under Finnish law, provided however that the owner of the real property and all the mortgage holders give their consent to such sale.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

There are minor official costs relating to the enforcement of the mortgage. In a public auction the property is, unless otherwise notified, sold unencumbered. The discharge of a real estate mortgage must be recorded in a public register maintained by the relevant district court. The registration fee for this is EUR 25 per property. The cost of the public auction process varies between EUR 500 and 1200 in total. All costs relating to the enforcement proceedings, including e.g. the costs for the public auction, are first paid out of the proceeds received from the sale of the real property. If the auction fails and the real property is not sold, the creditor applying for the auction will be in charge of the related costs.

5. What is the customary time period for foreclosing a lien on real property?

The duration of the enforcement proceedings varies significantly depending on whether the debtor contests the claim and accordingly, whether full scale court proceedings are required. In its simplest form, the enforcement proceedings do not necessarily take more than 1-2 months. Enforcement involving full scale court proceedings for the purpose of establishing the existence of a secured claim and the validity and enforceability of the mortgage in turn, may take up to 1-2 years.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Generally, lending and obtaining a security interest over a real property do not require a permission, approval by any local administration or governmental body or a license (other than business license applicable to banks generally).

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Generally, under Finnish law the parties are free to agree on the terms and conditions of a loan agreement including the level of the interest rate. However, a contractual provision may pursuant to the Finnish Contracts Act in some situations be adjusted or set aside if the term is deemed unreasonable or if it would lead to an unreasonable outcome. There are no clearly defined limits on which the level of interest rate is considered unreasonable, and therefore this would have to be assessed on a case by case basis taking into account, inter alia, the collateral securing the loan. Additionally, adverse tax consequences may be imposed pursuant to Finnish tax law if the interest rate is not set at arm's length level. Further, the Finnish Penal Code imposes a penalty on anyone exploiting the distressed position of another to obtain a disproportionate compensation.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There is no specific legislation to this effect, and the borrower is in practice always personally liable for its own debt. The circumstances in which a guarantor becomes liable for a third party obligation may also be fairly freely agreed upon unless the guarantor is a private person. The Finnish Companies Act restricts the granting of security (including guarantees) by limited liability companies. First, the financial assistance provisions prohibit the granting of a loan or security for the purpose of acquiring shares in the company itself or in its parent. Further, the granting of a security must be within the purpose of the company, and the company must benefit from granting such security (overall group benefit is not sufficient). If the security is granted in violation of these

provisions and the beneficiary of such security was (or should have been) aware of such illegality, the security must be returned.

Contact Information

Mika Alanko
mika.alanko@roschier.com

Roschier, Attorneys Ltd.
Keskuskatu 7 A
00100 Helsinki, Finland

Tel 358.20.506.6000 Fax 358.20.506.6100
www.roschier.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Greece

Prepared by Lex Mundi member firm Zepos & Yannopoulos

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

The instruments used to create a lien on real estate are mortgages and prenotations of mortgage. Mortgages are granted by virtue of a title which subsequently must be registered with the competent Land Registry or Cadastre. Such title can be acquired by virtue of: (i) a provision of law, e.g. in favor of the Greek State which can obtain a mortgage over real estate property of its tax debtors; (ii) final court decisions that adjudicate money claims; and (iii) private agreements executed which must be vested the form of a Notarial Deed. It must be noted that mortgages are registered over a specific property for a certain amount of money; both features must be indicated in detail in at the Land Registry/Cadastre, since mortgages are considered as validly existing from the moment they are lawfully registered with the Land Registry/Cadastre. A prenotation of mortgage is a sort of provisional mortgage which can be turned into a full stricto sensu mortgage when the claim of the holder of the prenotation right is recognized finally by virtue of a court decision. Prenotations are granted only by virtue of a court decision and constitute the most usual means to secure a bank loan. The prenotations of mortgage provide the beneficiary only with the preferential right to acquire a full mortgage thereafter. To this end, their special nature as prenotations, as opposed to full mortgages, must be specifically stated in the registration act. The main benefit of the prenotation is that it may be turned into a full mortgage only if and when the debtor of the secured claim defaults on his obligations. In this case the holder of the prenotation right will seek the judicial recognition of his claim (something that he would be obliged to do even if he had registered a full mortgage) and once this is finally recognized, he will register a full mortgage the order of priority (ranking) of which will date back to the time of registration of the prenotation of mortgage.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

The mortgage/prenotation of mortgage registration fees with the Land Registry and the Cadastre amount to approximately 0.8% and 0.9% respectively on the amount of the mortgage/prenotation of mortgage. In case a mortgage is registered by virtue of a Notarial Deed, the following additional expenses apply: (a) legal fees, which vary from a few hundred to many thousand Euros considerably depending on the amount of legal work required; (b) notarial fees amounting to approximately Euro 200 . Also, an amount of 1.2% and 1.3% of the amount of the mortgage is payable to the Notaries Association and to the Jurists Fund respectively. The legal and judicial fees for the issuance of a Court decision, by virtue of which a prenotation of mortgage securing a loan is placed upon an asset, amount to approximately Euro 1,000 depending on the amount of time and effort expended. Subject to certain exemptions, mortgage is in principle subject to stamp tax at the rate of 3,6%. As a general rule, in case the principle loan agreement secured by mortgage is exempt (e.g. in case of Bank loans) or has already been subject to stamp tax at the rate of 3,6%, no further stamp tax liability exists. In the event the mortgage is agreed in the loan agreement and no exemption from stamp tax is applicable, then stamp tax is imposed at the rate of 3,6% calculated on the amount of the loan. In case a mortgage is placed by means of a separate agreement and provided that the loan agreement is either exempt or has already been subject to stamp tax at the rate of 3,6%, then no further stamp tax liability exists. In case however

the loan agreement is subject to stamp tax at the rate of 2,4%, which has been paid to the State, the separate agreement shall be subject to stamp tax at the rate of 1,2%, which is calculated on the amount of the loan. On the other hand a prenotation of mortgage is not subject to stamp tax. Stamp tax is only due at the time the prenotation is turned into a mortgage.

3. Describe manner in which a lien secured by real property is foreclosed.

At the time the claim becomes mature and outstanding namely once the creditor has obtained a final court judgment adjudicating the claim which is secured by the mortgage, the creditor may proceed to the compulsory enforcement of such judgment by proceeding to a seizure of the real estate burdened with the mortgage and subsequent auctioning. The proceeds will serve for the satisfaction of the creditor. The prenotations of mortgage provide the beneficiary only with the preferential right to acquire a full mortgage thereafter. Thus, in case the beneficiary's claim is finalised by virtue of a court decision, the prenotation must be turned into a full mortgage, whose date of effect is considered to be the day of the initial registration, thus having retroactive effect. Then the procedure described above applies.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

It should be noted that the most significant issue when opting to enforce a lien, is to assess in advance whether there are chances to recover the claim since under Greek law it is permissible to register multiple mortgages/prenotations of mortgage on a single asset. Note, that the general rule is that the beneficiary who has the earliest (by way of registration mortgage/prenotation of mortgage) is satisfied first by the proceeds of the auction. The remaining beneficiaries shall be satisfied by way of order of registration if there are any remaining proceeds. However it also be noted that there are certain categories of claims (claims of the Greek State, claims of the Social Security Funds, claims of workers etc.) that are ranked first in terms of satisfaction by the proceeds of the sale. Conclusively, the enforcement procedure may incur costs which may range from a few hundreds of Euro to many thousands and it could lead to lengthy litigation if the debtor files oppositions against the enforcement procedure.

5. What is the customary time period for foreclosing a lien on real property?

There is no customary time for foreclosing a lien on real property. Foreclosing of a lien may take place only after the secured debt becomes outstanding and is adjudicated by virtue of a final court judgment.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Any natural or legal person either Greek or foreign may be the beneficiary of a lien. However, there are certain restrictions on foreign legal entities against the acquisition of real rights (including mortgages/prenotations of mortgage) in case the burdened asset is situated on r areas which are characterized by law, as "border areas" of Greece. In such areas, as regards legal entities established within the EU such prohibition may be waived by virtue of a decision of a Special Regional Committee, following the filing of a relevant application. Regarding legal entities established outside the EU such prohibition may be waived by virtue of a decision of the Minister of National Defense, following the filing of a relevant application.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

The interest rates imposed on loans do not depend on the nature of the security provided. The level of interest rates is freely determined by the credit institutions and agreed upon with the

debtor. However, it must be noted that in case such interest rates are deemed by a court of law to be exceedingly high and thus abusive, they may be declared as null and void.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There is no such restriction. Security over real property is in addition to the personal liability of the debtor. The creditor has the right, not the obligation, to enforce the lien, in the sense that if there are other means available for easier satisfaction of his/her claim e.g. confiscation of bank accounts, the creditor may opt not to enforce the real estate lien.

Contact Information

Charikleia Vlastou
c.vlastou@zeya.com

George Venieris
g.venieris@zeya.com

Zepos & Yannopoulos
75 Katehaki & Kifissias Ave.
Athens 115 25, Greece

Tel 30.210.6967000 Fax 30.210.6994640
www.zeya.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Hungary

Prepared by Lex Mundi member firm Nagy és Trócsányi

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage on real estate is the most common form to secure an indebtedness.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

HUF 12,000 shall be paid to register a mortgage on real estate in the Land Registry. Act XCIII of 1990 on Duties does not contain any duties regarding to mortgages.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

According to Act IV of 1959 on the Civil Code and Act LIII of 1994 on Judicial Enforcement a mortgage on real estate is foreclosed by a sale by auction on the basis of court order unless otherwise provided by law.

Agreements that are concluded before the claim is due and grant to mortgagee the right to acquire ownership of the mortgaged property in the event of the failure to fulfill the obligation shall be invalid and non-effective.

The parties can agree in writing to sell the mortgaged property together before the claim to which it pertains falls due by establishing the lowest sale price or a formula for calculating the sale price, and a deadline from the date on which the claim falls due. If the mortgaged property cannot be sold before the deadline and/or under the conditions set forth in the agreement, the agreement for joint sale shall become non effective. Such agreement requires the co-ordination with the owner of the property.

If the mortgaged property has an official market price or if the mortgagee is engaged in providing loans against security commercially (in terms of claims secured by lien, including all credit institutions), the parties can, before the claim is due, agree to permit the mortgagee to sell the pledged property himself without judicial execution.

The parties can agree, under the terms and conditions mentioned above to permit the mortgagee to appoint a person who is commercially or *ex officio* engaged in providing loans against security or organizing auctions to sell the real estate.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are procedure costs exist such as legal expenses, the costs of the sale by auction and the auctioneer, bailiffs' costs etc.

5. What is the customary time period for foreclosing a lien on real property?

The customary time period depends on many circumstances and factors which cannot be determined. As a general rule the foreclosing procedure goes on for about one year to one and a half years.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

The effect of Act CXII of 1996 on Credit Institutions and Financial Enterprises covers foreign banks and other foreign lenders that means such financial institutions could only make real estate loans secured by real property if they acquire the appropriate license from the abovementioned authority. If the foreign banks and other foreign lenders having their principal seat in EEA countries no further license is required (see Directive 2006/48/EC).

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

There are no special legal limits exist on the amount of interest which may be charged on a loan secured by real property. However, any unreasonably excessive interest rates established by the parties may be reduced by the court.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Dr. Ildikó Varga
varga.ildiko@nt.hu

Nagy és Trócsányi
Ugocsa utca 4/B
Budapest, 1126 Hungary

Tel 36.1.487.8700 Fax 36.1.487.8701
www.nt.hu

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Iceland

Prepared by Lex Mundi member firm LOGOS Legal Services

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the normal form.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

According to Article 24 of Act no. 36/1978 on stamp duty loans secured by real estate are subject to a stamp duty of 1,5% of the loan amount.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A lien secured by real property is foreclosed by a forced sale of the real estate which is carried out by the Magistrate.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are legal/filing costs relating to a forced sale of real estate. Article 5 of Act on extraordinary fiscal earnings of the state treasury, no. 88/1991, states that when a request for a forced sale of real estate is made to the Magistrate, 1% of the amount of the debt shall be paid to the state treasury. The payment shall never be less than 140\$ or more than 480\$ (approximate USD amounts). All costs relating to a forced sale of real estate are paid by the proceeds derived from the forced sale.

- 5. What is the customary time period for foreclosing a lien on real property?**

Up to three months' notice period followed by sale procedures that could take between six to twelve months until closing of the sale.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

The financial activities of a foreign financial undertaking in Iceland are either subject to an operating license or authorization from the Financial Supervisory Authority. However, there are no restrictions especially on real estate loans. The Financial Undertakings Act (FUA), no. 161/2002, applies to the activities of foreign financial undertakings in Iceland. A foreign financial undertaking from other member states of the European Economic Area (EEA), which is established and holds an operating license in such member state of the European Economic Area (EEA), may, according to article 31, establish a branch in Iceland. The branch may pursue any of the activities covered by the FUA. According to article 32 a foreign financial undertaking, which is established and has an operating license in another member state of the EEA, may provide services in Iceland in accordance with the FUA without establishing a branch. Insofar as concerns foreign financial undertakings from countries outside the EEA, the Financial Supervisory Authority may, under Article 33 of the FUA, authorize such a financial undertaking to open a branch in Iceland or to provide services in this country without establishing a branch. The requirement for the granting of such authorization is that the undertaking

be authorized to pursue activity in its home state parallel to that which it proposes to pursue in Iceland and that such activity be subject to comparable supervision in the home state.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

There are no legal limits on the amount of interest which may be charged on a loan secured by real property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Erlendur Gíslason
erlendur@logos.is

LOGOS Legal Services
Efstaleiti 5
IS-103 Reykjavik, Iceland

Tel 354.540.0300 Fax 354.540.0301
www.logos.is

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Kuwait

Prepared by Lex Mundi member firm Abdullah Kh. Al-Ayoub & Associates

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

An official instrument is used to conclude mortgage of the real estate. The parties are required to execute the official instrument before a Notary Public at the Ministry of Justice. Further, all mortgages pertaining to real estates must be registered with the Real Estate Registration and Authentication Department at the Ministry of Justice.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Kuwait.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A lien secured by real property shall not be foreclosed without the intervention of the court. The procedure is such that an application has to be made for attachment of the real property before the execution department and a case for determining the value of the property has to be filed before the Kuwaiti courts. The execution department under the supervision of the court and as per the procedures prescribed under law shall conduct the sale of the property by auction. It should be noted that only Kuwaiti's can own real estates in Kuwait.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are no significant legal/ filing costs relating to foreclosing of a lien.

- 5. What is the customary time period for foreclosing a lien on real property?**

The customary time period for foreclosing a lien on real property is 6 months to 1 year.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There is no requirement of a local governmental permission, approval or licenses required for foreign banks or foreign lenders to make real estate loans secured by real property, provided the agreements pertaining thereto are executed and accepted outside Kuwait. Dispute resolution clause and the governing law set in the agreement should be foreign.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

The legal rate of interest prescribed by law is seven percent from the date of maturity of payment. The contracting parties may agree on another rate of interest, provided it is not in excess of the declared rates of the Central Bank of Kuwait.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Anupama Nair
a.nair@al-ayoub.org

Abdullah Kh. Al-Ayoub & Associates
Souk Al-Kabir Building, Block 'B' 9th Floor
Fahed Al-Salem Street
Safat 13018, Kuwait

Tel 965.22464321 Fax 965.22434711
www.al-ayoub.org

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Latvia

Prepared by Lex Mundi member firm LAWIN

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the only instrument to create a lien on real estate in Latvia.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no other mortgage tax in Latvia, except for a stamp duty for entering the mortgage into the Land Registry, constituting 0.1% of the amount of the loan, maximum 1,000 lats (approx. 1,423 EUR).

3. **Describe manner in which a lien secured by real property is foreclosed.**

Judicial foreclosure, when the lien secured by real estate is foreclosed by sale under the supervision of a court, is the only recognized statutory proceeding under Latvian law for foreclosure of mortgaged estate upon the breach of a mortgage. The law sanctions two ways of foreclosure: voluntary and non-voluntary. Voluntary judicial disclosure is quicker and easier way to sell the estate, but it requires consent of the mortgagor. Both procedures are regulated by provisions of the Latvian Civil Procedure Law.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

Only mortgages duly recorded with the Land Registry may be foreclosed. The court fees and costs for arranging the sale of the mortgaged property as a rule are not significant.

5. **What is the customary time period for foreclosing a lien on real property?**

If the voluntary foreclosure is initiated, as a rule it takes three to four months until settlement of the sale. In case of non-voluntary foreclosure it may take from six to twelve months.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. There are no restrictions or prohibitions for foreign lenders to make real estate loans secured by real estate in Latvia. However, foreign lenders need to comply with local provisions of consumer credit transactions and provision of financial services.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are no such statutory limits. With regard to consumer credits, the Latvian Consumer Rights Protection Law, in compliance with European Council Directive 87/102/EEC, sets methods for calculation of the annual interest rate and limits the maximum amount of the loan secured with a mortgage (90% of the market value of the real estate).

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Anna Mišneva
anna.misneva@lawin.lv

LAWIN
Elizabetes 15, LV-1010, Riga, Latvia
Tel 371.6781.4848 Fax 371.6781.4849
www.lawin.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Lithuania

Prepared by Lex Mundi member firm LAWIN

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A mortgage is the most common, effective and cost-friendly instrument for creation of a lien on real estate in order to secure indebtedness.

2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

Executing a mortgage involves two types of fees: (i) a notary fee for notarization of a mortgage bond and (ii) a fee for registration of the mortgage bond with the Hypothec Register. Both fees are minor and capped: a notary fee cannot exceed LTL 500 (approx. EUR 145), while registration fee cannot exceed LTL 400 (approx. EUR 116) per one mortgage bond.

3. Describe manner in which a lien secured by real property is foreclosed.

The secured creditor may satisfy its claim either (i) by way of enforced sale of the mortgaged property through an auction procedure or (ii) by way of administration of the mortgaged property and collection of income there from (rarely applied in practice). In both cases the creditor must follow the prescribed statutory procedure. The foreclosure of the mortgage is administered by and is implemented through the Hypothecary divisions at the local courts.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Generally, the foreclosure of a mortgage involves (i) minor state fees for filing of an application with a hypothecary judge for commencement of the enforcement procedures and (ii) bailiff's charges for carrying out of respective enforcement procedures. The latter depend mainly on the amount of the debt to be recovered, also the amount actually recovered and the scope of actions that need to be performed in the course of foreclosure (e.g. attachment of property, valuation of property, announcement of auctions, obtaining of experts' opinion, etc.).

5. What is the customary time period for foreclosing a lien on real property?

Based on the statutory terms, in the best case scenario the entire foreclosure procedure could take approx. 3 months (if the procedure is not contested, the property is sold in the first auction, etc.). However, in practice this period may extend substantially if the mortgaged property is non-liquid or if the procedure is challenged by the parties concerned.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Generally there are no limits. However, all transactions between related parties should be effected based on the arm's length principle. This means that transaction between related parties should be made under such (market) conditions (including the amount of interests charged on a loan) as if the parties to the transaction were not related. Further, the Lithuanian laws expressly state that the interest charged on the loan granted to a company by its shareholders may not exceed the average interest rate applied by commercial banks at the place of residence or business of a lender.

8. **Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

None.

Contact Information

Simas Gudynas
simas.gudynas@lawin.lt

LAWIN
Jogailos 9/1
LT-01116 Vilnius, Lithuania

Tel 370.5.268.18.88 Fax 370.5.212.55.91
www.lawin.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Malaysia

Prepared by Lex Mundi member firm Skrine

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

West Malaysia Usual Instruments include:- 1. Registered Memorandum of Charge of the real estate in Form 16A pursuant to the National Land Code 1965 (where there is an individual title issued to the real estate). 2. Debenture creating a fixed charge over the real estate. 3. Loan Agreement cum Assignment (where there is no individual title issued yet to the real estate). 4. Registered lien holders caveat in Form 19D pursuant to the National Land Code 1965.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Stamp duty is payable on the loan instruments secured by real estate in accordance with the Stamp Act 1949 and where the instruments are required to be registered, certain registration fees are payable. Generally, for conventional financing in Ringgit Malaysia, stamp duty is calculated at 0.5% of the loan amount secured (for the principal instrument) and RM10 for every subsidiary instrument securing the same principal loan. Where the loan is in foreign currency, the stamp duty shall be RM5.00 for every RM1,000 or part thereof but the total duty payable shall not exceed RM500.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

West Malaysia Where the security involves a land charge under the National Land Code 1965, foreclosure is typically carried out through a judicial sale in accordance with the provisions of the National Land Code. Distinction is to be made between Land Registry titles and Land Office titles as different procedures are used depending on the type of land titles involved. In certain circumstances, it is permissible to foreclose the real property through private treaty sale (without a court order) by a receiver and manager, as agent/attorney of the charger, in accordance with the powers and provisions under a debenture where a fixed charge is created on the real property. Where the security is a lien holder's caveat, sale of the real property is by way of execution proceedings after obtaining a court judgment.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

West Malaysia Legal fees would be incurred for the foreclosure proceedings. Other costs include valuation fees for purposes of determining the reserve price and other filing fees relating to the judicial sale. In the event the sale is carried out by a receiver and manager through a private treaty sale, the fees of the receiver and manager are likely to be higher than the cost for a typical judicial foreclosure.

- 5. What is the customary time period for foreclosing a lien on real property?**

West Malaysia A judicial sale arising from enforcement of Form 16A Charge can take between 6 to 12 months from the commencement of the process until obtaining the court order and the date of the first auction, longer if contested by the charger. The time period may be prolonged by many factors, including the following: late filing of applications and affidavits leading to adjournments, court vacations, reshuffling of the judiciary, absentees due to medical and other reasons, priority cases (or in the case of the Land Office cases, the timetable of each particular Land Office) etc. In the instance

of a lien holder's caveat, judgment may take between 3 to 9 months on average.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Yes. Offshore borrowing by Malaysian resident (whether company, individual or partnership) from foreign banks/lenders are governed by the Exchange Control Act 1953 including the Foreign Exchange Administration Rules issued by the Central Bank of Malaysia. The factors to consider in determining whether approval is required from the Central Bank for the loan include the identity of the foreign lender, whether the loan is in foreign or Ringgit currency, purpose and amount of the loan. The foreign exchange administrations rules vary from time to time in line with government's objective to progressively liberalize its foreign exchange policies to facilitate a conducive and competitive business environment.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

None.

- 8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

None.

Contact Information

Kin Sum Kwan
kks@skrine.com

Skrine
Unit.No. 50-8-1, 8th Floor
Wisma UOA Damansara
50, Jalan Dungun
Damansara Heights
50490 Kuala Lumpur, Malaysia

Tel 60.3.2081.3999 Fax 60.3.2094.3211
www.skrine.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

New Zealand

Prepared by Lex Mundi member firm Simpson Grierson

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A registered memorandum of mortgage is the usual form.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in New Zealand.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

There is a statutory process that must be followed which overrides anything to the contrary in the mortgage form itself.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are statutory requirements to be met and legal/filing costs relating to forced sale of real estate are approximately US\$2,500 for a straightforward transaction.

- 5. What is the customary time period for foreclosing a lien on real property?**

Twenty working day notice period followed by sale procedures that could take between 2 and 3 months until settlement of the sale.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. There are no restrictions on foreign lenders securing their advances over real estate in New Zealand. However, on any mortgagee sale lenders would need to comply with the requirements concerning foreign ownership of land should any purchaser or the land being sold fall within the requisite criteria. Refer to Survey I answer regarding the foreign ownership criteria in New Zealand.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are some statutory controls (and private and government agencies that monitor and report on interest charges) that ensure that interest rates and costs are not excessive or illegal.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Greg Towers

greg.towers@simpsongrierson.com

Simpson Grierson

Level 27 Lumley Centre
88 Shortland Street
Private Bag 92518
Auckland, New Zealand 1141

Tel 64.9.358.2222 Fax 64.9.307.0331
www.simpsongrierson.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Norway

Prepared by Lex Mundi member firm Advokatfirmaet Thommessen AS

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

According to the Norwegian Mortgage Act, the following types of mortgages may be established on real estate: 1) mortgage on the property itself, 2) mortgage on a ground lease (provided that the ground lease has been registered in the Norwegian Land Register), 3) mortgage on a tenancy right (provided that the tenancy right has been registered in the Norwegian Land Register), and 4) mortgage on any other registered right on a real property – to the extent such a right can be transferred to another party. The registration of a mortgage deed in the Norwegian Land Register is the only way to obtain legal perfection towards third parties (such as a bona fide purchaser of the property, other secured creditors or the bankruptcy estate of the owner of the property).

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

The fee for registering a mortgage deed in the Norwegian Land Register, is currently NOK 1,935 (approximately USD 340).

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A mortgage is not a legal charge/assignment in the sense that the security holder (the mortgagee) can transfer the charged property directly to itself or a third party. Enforcement/foreclosure is a formalized procedure carried out through the Norwegian courts. Sale of the property is made through a real estate agent or a public auction. Upon an event of default (but not before), the parties may agree how to enforce the mortgaged property.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

In addition to cost related to legal assistance, the public fee for a forced sale of real estate is approximately NOK 10,000 (USD 1,800).

- 5. What is the customary time period for foreclosing a lien on real property?**

The time period for a forced sale process depends largely on the salability and complexity of the property. Normally, the process would take six to nine months.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

In general, lenders may charge interest at the rate agreed upon by the borrower as set forth in the loan agreement. Thus, there are no statutory provisions which specifically limit the parties' ability to

agree the amount of interest. In extraordinary situations, however, an agreed interest rate may be deemed invalid pursuant to general contract law principles. Unless otherwise agreed upon by the parties and registered in the Norwegian Land Register, a mortgage deed will only cover interests accrued the last two years before the initiation of a forced sale of the property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Christopher Borch
cbo@thommessen.no

Advokatfirmaet Thommessen AS
Haakon VII's gate 10
P.O. Box 1484 Vika
N-0161 Oslo, Norway

Tel 47.23.11.11.11 Fax 47.23.11.10.10
www.thommessen.no/en/

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Pakistan

Prepared by Lex Mundi member firm RIAALAW

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A mortgage deed or a registered agreement creating a charge can be used in Pakistan to create a lien on real estate in order to secure indebtedness.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

A mortgage deed must be affixed with appropriate stamp duty and it must be registered. Different rates of stamp duty and registration fee are charged for each of the four Provinces and the Capital Territory of Islamabad. If the creator of the mortgage or charge is a company, then the mortgage or charge must be filed with the registrar of companies within twenty-one days of its creation, and the fee for such filing is Pakistani Rupees Five Thousand.

3. Describe manner in which a lien secured by real property is foreclosed.

In order to foreclose a property, a mortgagee would need to institute a suit for foreclosure before the relevant Civil Court. Financial institutions, which include banking companies, can file a suit for foreclosure or sale before a Banking Court, which may pass an interim or final decree for foreclosure or sale. Alternatively, in case of default in payment by a customer, the financial institution may send a notice on the mortgagor demanding payment of the mortgage money outstanding, and failing payment of the amount within due date, it shall send a second notice of demand for payment. In case the customer continues to default in payment, the financial institution shall serve a final notice on the mortgagor demanding the payment of the mortgage money outstanding. Where a mortgagor fails to pay the amount as demanded and after the due date given in the final notice has expired, the financial institution may, without the intervention of any Court, sell the mortgaged property or any part thereof by public auction and appropriate the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

The right to foreclosure is not available in all cases of mortgages. Under Pakistan law, the right to foreclosure is available only in case of a mortgage by conditional sale, or in an anomalous mortgage, by the terms of which the mortgagee is entitled to foreclosure, or a usufructuary mortgage as such.

5. What is the customary time period for foreclosing a lien on real property?

The time period is dependent on the direction given by the Court, in a suit for foreclosure as discussed above which would follow a time progression commensurate with litigation matters in general. In the case of a suit for foreclosure instituted by a financial institution before a Banking Court, such suit is required to be disposed of within ninety days from the day on which leave to defend is granted to the defendant of the suit. In practice however, this time period tends to vary.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

While borrowing from abroad is prohibited, the State Bank of Pakistan ("SBP") has granted general permission to private sector entrepreneurs to obtain loans from foreign banks/financial institutions, provided that the loan agreement and the repayment schedule are duly registered with the SBP.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

In the case of loans obtained from foreign banks or financial institutions, the interest charged on such loans may not exceed the current LIBOR + 1.5%.

8. **Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

None.

Contact Information

Ahsan Zahir Rizvi
arizvi@riaalaw.com

RIAALAW
RIAALAW Chambers
D-67 Block 4, Clifton
Karachi 75600, Pakistan

Tel 92.21.3583.6308 Fax 92.21.3587.0014
www.riaalaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Peru

Prepared by Lex Mundi member firm Estudio Olaechea

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A Public Deed of Mortgage is the typical instrument used to create a lien on real estate. It is recorded in the Public Registry.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Peru.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

There is a judicial foreclosure that must be followed before the Civil or Commercial Lower Court.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Besides the judicial costs for a foreclosure suit, there is no other significant cost or impediments.

- 5. What is the customary time period for foreclosing a lien on real property?**

Generally, the foreclosure suit takes approximately between one to two years. This is due to the fact that the proceedings begin in the Lower Court, then the concerned party may appeal before the Superior Court, and finally before the Supreme Court.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There are no authorizations needed by foreign banks or other foreign lenders to make real state loans secured by real property. However, if the mortgage is going to be registered in Peru, then the foreign bank and/or the foreign lender should have a power of attorney authorizing them to secure the real property and thus, duly register it before the Peruvian Public Registry.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

If the loan agreement is carried out in Peru by a foreign lender, then the interest limits are established by the Peruvian Central Bank. Any excess above the maximum rate will be reimbursed to the debtor. If the loan agreement is carried out by a bank then there are no limits established.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Manuel Villa-Garcia
manuelvilla-garcia@esola.com.pe

Estudio Olaechea
Bernardo Monteagudo 201
San Isidro
Lima 27, Peru

Tel 511.219.0400 Fax 511.219.0420
www.esola.com.pe

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Poland

Prepared by Lex Mundi member firm Wardynski & Partners

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

All that is available is a mortgage that is registered in the land and mortgage register that is maintained by a relevant court. Note that there is no institution of a lien on real estate in Poland. The creditor who has a mortgage over the real estate cannot take possession of the encumbered property, but can enforce a debt from the sale of proceeds of the real estate.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

A mortgage is taxed by a civil law transaction tax of 0.1% of the value of the existing debt, or by PLN 19 for a ceiling mortgage that secures future debt. A mortgagor must pay the tax within 14 days of the date when a statement to establish mortgage is made, unless the mortgage is in a notarial deed, when a notary collects and pays it. A mortgagor paying the tax must also file a tax return, for the tax.

3. Describe manner in which a lien secured by real property is foreclosed.

The general rule is that foreclosure is by order of a court (Polish law also provides other form of debt affirmation, e.g., voluntary submission to debt recovery enforcement in a notarial deed, or a bank enforcement order issued by a Polish bank in accordance with Polish banking law). A creditor must apply to court for an enforcement clause to be added to a final court order, notarial deed, or bank enforcement order. The creditor must then provide the enforcement title to a court-order enforcement officer, indicate the real property belonging to the debtor, or mortgaged to the creditor, and demand that foreclosure commence. The court-order enforcement officer gives the debtor notice to pay the debt within 14 days and at the same time registers the notice in the land and mortgage register maintained for the indicated real estate. From the date of filing the notice, the property is deemed to have been seized by the officer. Transfer of title of a mortgaged property after the seizure does not hinder foreclosure proceedings, which can continue. After expiry of the 14 days, the officer prepares, at the request of the creditor, a description of the real estate, and appoints a valuer. That allows the property to be sold by public auction. A mortgagee is paid from the proceeds of sale of the real estate before other creditors, except for costs of enforcement, alimony, employee salaries – to a fixed amount, or compensation for diseases, incapacity to work, disability or death. Payment to mortgagees is under the priority of registration of mortgages, unless the mortgagees agree otherwise.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

The court fee on court proceedings to affirm the debt by a court order is 5% of the value of the debt, but not more than PLN 100,000, and is usually included in the amount recovered by sale, together with other costs incurred by the court-order enforcement officer. The court officer collects the fees due to the officer from the debtor, but the creditor must pay for valuation of the real estate.

5. What is the customary time period for foreclosing a lien on real property?

It depends on the complexity of a matter, however, court proceedings to affirm the debt by a court order and enforcement proceedings usually take at least a few months.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Legislation prevents an annual charge that is more than four-times the Lombard rate published by National Bank of Poland. The current Lombard rate is 7.5%.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws restricting the borrower's, or guarantor's, personal liability. If, however, a borrower sells mortgaged property, such real estate can still be subject to enforcement, but the purchaser is not personally liable for the debt.

Contact Information

Stefan Jacyno

stefan.jacyno@wardynski.com.pl

Wardynski & Partners

Aleje Ujazdowskie 10
00-478 Warsaw, Poland

Tel 48.22.437.82.00 Fax 48.22.437.82.01
www.wardynski.com.pl

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Portugal

Prepared by Lex Mundi member firm **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

In accordance with our Civil Code, when the object of the security is an immovable asset (a property), security is granted in the form of a mortgage. The voluntary mortgage upon real estate requires a notarial deed and must be registered in the Land Registry Office. The effects of the mortgage depend on its registration. Such registration is constitutive, i.e., without it the security is not valid. The mortgage does not prevent the debtor and owner of the property from selling or charging such asset, as the usual effect of the mortgage registration is its validity against subsequent purchasers of the asset from the owner. Nevertheless, it is possible to agree that the mortgage credit is due the moment the property is sold or charged. The priority of registered mortgages ranks according to the date of registration and, if registered on the same day, they rank equally. The mortgagee does not have the right to take possession of the property in the event of default in payment of the secured obligation, but only the right to cause the judicial sale of the property and be paid with the proceeds of such sale. Another security foreseen in the Portuguese Civil Code is the assignment of rentals ("consignação de rendimentos") which correspond to the assignment of all credits arising from the property. This security cannot exceed 15 years. The assignment of rentals shall be executed by notarial deed and must be registered in the Land Registry Office. Portugal does not favor fiduciary ownership. Trusts do not exist, except in the context of the legislation of Free Trade Zone of Madeira.

2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

In Portugal there are three different kinds of expenses related to making a loan secured by real estate:

- (i) Notary fees: fees to the notary for the execution of the mortgage deed amount to € 137;
- (ii) Registry fee: the registration of the mortgage at the Land Registry has a fixed fee of € 250;
- (iii) Stamp duty: - for the deed: € 25;
 - for the loan agreement: stamp duty is due at a rate of 0,04%, 0,05% or 0,06% over the loaned amount, depending on the loan being granted for one year one and to five years or more than five years, respectively;
 - securities – stamp duty is charged on the issuance of any security (unless ancillary to a contract already subject to stamp duty – i.e. so long as they are granted at the same time as the loan and secure the amount of the loan), 0,04% per month or 0,5% or 0,6% on the amount involved, depending on whether the term for prepayment is less than 1 year, less than 5 years and 5 or more years respectively.

3. Describe manner in which a lien secured by real property is foreclosed.

In relation to mortgages, the normal procedure is the enforcement of the mortgage by means of attachment, i.e. the judicial apprehension of the asset given as guarantee of the obligation. Such procedure deprives the debtor of the right of use of asset. The judicial apprehension procedure is

made by electronic communication to the competent Registry Office, this procedure being equivalent to a formal presentation to register, being the property delivered to a custodian, normally an enforcement agent. The attachment confers the creditor the right to be paid with the product of the sale of such assets, with preference over other creditors, provided that there is no prior security in rem over the attached assets.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Like mentioned before, the attachment of the assets object of the mortgage confers the creditor the right to be paid with the product of the respective sale with preference over other creditors. However, there are two exceptions to this rule: the mortgagee will not be paid with preference to: (i) another creditor secured by prior registered mortgage over the same real property; and (ii) another creditor with specific statutory right of preference on the same real property.

The costs depend on the type of enforcement acts to be performed which are usually performed by the enforcement solicitor.

5. What is the customary time period for foreclosing a lien on real property?

In the absence of statutory rules establishing terms, the time period for foreclosing a lien on real property depends on several factors, like the complexity of the procedure or the existence of other creditors of the same debtor. But we may say that such procedure does not take less than 1 year to 2 years.

The mortgage may lapse:

- i) if the secured credit is extinguished;
- ii) by prescription, on behalf of a third purchaser of the mortgaged real estate, elapsed twenty years over the acquisition registry and five years over the repayment date of the mortgage;
- iii) by perishing of the object of mortgage;
- iv) if the creditor waives the security.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

There are no kind of national or local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

According to article 693^o of the Civil Code, a mortgage is limited in the amount it may secure. In fact, the mortgage may secure the principal amount of the credit, general expenses (for a fixed amount) and three years of interest. It is considered usury the loan agreement in which annual interest that exceeds the legal interests, accrued of 3% or 5%, depending on whether real guarantee is agreed or not. It is also considered as usury the penalty clause that establishes as due indemnity for the loan return failure, in relation to the period of delay, more than the correspondent to 7% or 9% above the legal interests, depending on whether a real guarantee is agreed or not. There are no legal limits to the amount of interest that may be charged on loans made by banks or other financial institutions, secured by real property or by any other mean. Interests charged on loans made by other entities, when secured by real property, have the current limit of 9% rate.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no legal rules that restrict the ability to make the borrower or guarantor personally liable for indebtedness secured by real property.

Contact Information

Filipa Arantes Pedroso

fapedroso@mlgts.pt

Rita Ferreira Vicente

rfvicente@mlgts.pt

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Rua Castilho, 165

1070-050 Lisboa, Portugal

Tel 351.21.381.7400 Fax 351.21.381.7499

www.mlgts.pt

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Russia

Prepared by Lex Mundi member firm Egorov Puginsky Afanasiev & Partners

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Mortgage is the most common instrument to secure indebtedness.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

The state duty payable for the registration of mortgage is uniform for the whole Russia. One registering a real estate mortgage shall pay the state duty which is equivalent to USD 126 for legal entities and USD 31 for individuals. Perfecting a lien is not dutiable.

3. **Describe manner in which a lien secured by real property is foreclosed.**

As a general rule, a lien is usually foreclosed on the basis of a court decision, and the real estate shall be sold through a public auction.

The debtor and the holder of pledge can conclude an agreement on out-of-court foreclosure subject to pledgeholder's consent certified by a public notary. As a result of out-of court foreclosure the real estate may be transferred to the holder of pledge at the market price determined by an independent appraiser.

There are some restrictions of using out-of-court foreclosure. For example, the out-of-court foreclosure cannot be made in respect of the residential property owned by an individual, agricultural land plots and state and municipal property.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

An amount of the state duty payable for filing a claim on foreclosure to the court equals to USD 130. The fee paid to the organizer of the tender is no more than 3 % of the purchase price of paid for the real estate.

5. **What is the customary time period for foreclosing a lien on real property?**

The customary time period for foreclosing is about 6 months: no longer than three months for court procedures (though it may last longer), one or two months for an auction arrangements and one for registration of the right in the Real Estate Register.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

There are no any regulations requiring a permission for foreign banks or other foreign lenders to make real estate loans secured by real property.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

No limits are imposed on the amount of interest which may be charged on a loan secured by real property.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no any specific restrictions for making a borrower personally liable for indebtedness secured by real property. If an appropriate contract (e. g. a contract of guarantee) is concluded by the borrower to secure the indebtedness which has already been secured by the real estate mortgage, then the borrower will still be personally liable without any excuse connected to the mortgage.

Contact Information

Sergey Strembelev

sergey_strembelev@epam.ru

Anton Alekseev

anton_alekseev@epam.ru

Egorov, Puginsky, Afanasiev and Partners

22/24 Nevsky prospect, suite 132

St. Petersburg, Russia, 191186

Tel 7.812.3229681 Fax 7.812.3229682

www.epam.ru

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

South Africa

Prepared by Lex Mundi member firm Bowman Gilfillan

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage bond has to be registered against the real estate in the deeds office to create a lien to secure an indebtedness in preference to third parties. That real estate may not be transferred to anyone else without the consent of the bondholder who normally only consents if repaid in full or is given other security. On liquidation or insolvency of the real estate owner, the holder of the mortgage bond ranks prior to most other creditors as regards the proceeds of the sale of the mortgaged real estate.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There are no taxes payable on making a loan, registering a mortgage bond or perfecting a lien in South Africa when the bond is registered. There is a small registration charge levied by the deeds office depending on the amount of the bond.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

An application has to be made to a court to judicially attach real property and to declare it to be executable. The sheriff of the court will formally attach the real property which may then be sold by judicial auction.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

The costs of the court application can be recovered from the debtor or from the proceeds of the sale of the real property in execution.

- 5. What is the customary time period for foreclosing a lien on real property?**

Usually formal foreclosure proceedings do not begin before the repayments are at least three months in arrears but warning notices are normally sent to the borrower as soon as they are in arrears. A court order is required to judicially attach real property and declare it executable. If the foreclosure procedure is uncontested, the judicial auction could be held within three months of commencing the procedure.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Foreign banks wanting to open branches in South Africa have to obtain approval from the Registrar of Banks. Once off transactions must be approved by Exchange Control Authorities if the money loaned comes into the country.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

The National Credit Act No.34 of 2005 imposes limits on what individuals may be charged but loans to companies are exempt from the interest limits imposed in terms of the act.

8. **Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

Provisions of the National Credit Act restrict the ability to enforce liability of a natural person as borrower or guarantor for indebtedness secured by their own real property. These provisions have to be complied with when making the loan and when enforcing repayment.

Contact Information

Bobby Bertrand

b.bertrand@bowman.co.za

Bowman Gilfillan

P.O. Box 248
Cape Town 8000, South Africa

Tel 27.21.480.7800 Fax 27.21.424.1688
www.bowman.co.za

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Spain

Prepared by Lex Mundi member firm Uría Menéndez

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

The instrument to create a lien on real estate to secure an indebtedness is an in rem right of mortgage, which requires the granting of a notarial deed of mortgage and its registration with the relevant Land Registry. Mortgages are undoubtedly the preferred and most commonly used security interest. A mortgage is an in rem right, enforceable vis-à-vis third parties, which grants the mortgagee significant substantial and procedural privileges.

In essence, the mortgagee is entitled to enforce the collateral to the exclusion of most other creditors following relatively simple and expeditious foreclosure proceedings. For the purposes of foreclosure, it is important that the notarial deed of mortgage sets out (a) the price allocated by the parties to the real estate, which would be the reference price for a sale by auction, and (b) the debtor's domicile for requests and notices. A mortgage can secure all types of payment obligations, including principal, interest, default interest and fees in respect of loans and credit facilities.

Payment obligations may be secured both in euro and in foreign currencies; although, in the latter case, the deed of mortgage must establish the maximum euro amount secured by the mortgage. In practice, it is recommended that the maximum euro amount take into account possible exchange rate fluctuations. By the same token, mortgages securing payment obligations with a floating interest rate must also include a maximum amount to be secured (a requirement that, similar to foreign currency mortgages, gives rise to lengthy negotiations with the borrower).

Mortgages may be granted over any type of real estate properties (commercial premises, residential property, industrial sites, etc.). Concessions (such as concessions for the occupancy of port facilities) may also be mortgaged, but in certain cases they required the prior approval of the grantor of the concession (i.e. the Government, the Municipality or similar public entity). Additionally, the acquirer of a concession as a consequence of mortgage foreclosure may not rely on the fact that the grantor of the concession will always authorize the transfer of the concession.

It is commonly understood that leased properties cannot be mortgaged by the lessee. Conversely, the landlord may mortgage its freehold title. In such cases, the party acquiring title to the real property as a consequence of mortgage foreclosure will, however, be bound by the lease if it qualifies as a protected lease under Spanish law (these are mainly leases for less than 5 years for housing units, and leases registered with the Land Registry).

Lastly, the mortgage cannot be separated from the underlying transaction. Consequently, the mortgage may not be held by a third party (e.g. a security agent) that is not the creditor under the loan, credit facility or payment claim. Any amendment or novation of the underlying transaction implies a novation of the mortgage (with the risk of losing the mortgage ranking); and the voidance of the underlying transaction entails the voidance of the mortgage. Finally, if the secured claim is discharged, the mortgage would need to be cancelled from the Land Registry.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

Creating a mortgage in Spain can probably be considered expensive when compared to other jurisdictions. In addition to notarial and registration fees, a mortgage is subject to stamp duty: approximately 1% of the total mortgage liability, which includes principal, ordinary interest, default interest, fees and expenses, and is typically 120% of the principal amount of the loan secured. Thus, the total cost of the mortgage could easily range between 1% and 2% of the principal of the loan or credit facility.

The assignment of mortgage-backed facilities is also subject to stamp duty, unless the assignment is made in a private deed (in which case, the assignee may not be recorded as mortgagee at the Land Registry).

In an attempt to reduce the material burden resulting from stamp duty in classic mortgage-backed financings, various alternative approaches have been taken recently. Examples of such approaches are: the borrower's undertaking to mortgage upon the lender's request combined with an irrevocable power of attorney granted to the lender to grant the mortgage on behalf of the borrower; and conditional mortgages, i.e. a mortgage which will be registered at the inception of the deal but will only become effective as a security interest when certain conditions (e.g. breach of financial covenants) are met.

3. Describe manner in which a lien secured by real property is foreclosed.

Mortgages may be foreclosed following expeditious court proceedings that the debtor may only challenge on very limited grounds. The action must be filed with the court of first instance of the place in which the real estate is located. The foreclosing party must be assisted by a lawyer and represented by a court agent. The lawsuit must include, amongst other documents, (a) a certificate of the amounts owed (including principal and interest accrued) issued by the enforcing party as agreed in the notarial deed of mortgage, and (b) the notice of the debt served to the debtor.

The stages of the foreclosure proceedings are as follows: (i) the lawsuit is accepted by the court; (ii) the judge issues a judicial decree or writ; (iii) the judge requests payment from the debtor; (iv) the judge issues an official request to the Land Registry seeking information about the status of the mortgage and about any other liens and encumbrances encumbering the real estate mortgaged; (v) the judge serves notices to the persons appearing in the certificate issued by the Land Registry; and (vi) the mortgaged property is sold at public auction (or any other method of compulsory sale).

Most commonly, the mortgage foreclosure entails the sale of the real property at public auction; although in some cases during the judicial proceedings an expert may be appointed to carry out the sale under specific conditions. The mortgagee can even take interim possession and manage the real estate during the foreclosure proceedings.

Before the public auction is held, (i) the Court must issue certain communications and notices (edictos) regarding the public auction. Such communications and notices must be issued at least twenty days before the date of the public auction; and (ii) bidders must deposit 30% of the value of the asset with the Court.

The law permits the following methods of auction:

a) if one or more bidders offer at least 70% of the value of the asset (as is determined in the deed of mortgage), the "Established Value", the highest bidder will be awarded the property at the price offered by it, the "Auction Price". The successful bidder must pay the difference between the Auction Price and the moneys deposited at the beginning of the auction within 20 days following the public auction;

- b) if all the bidders offering more than 70% of the Established Value only offer to pay with installments (properly guaranteed), the foreclosing party is entitled to acquire the asset for 70% of its value within 20 days following the public auction. If the foreclosing party does not use this right, the bidder who offers the highest bid will acquire the property under the terms and conditions it initially offered in the public auction;
- c) if no bidder offers more than 70% of the Established Value, the debtor, within ten days following the public auction, may bring another bidder to the auction who is willing to pay more than 70% of the Established Price;
- d) Upon expiration of the term indicated in c) above without any bidder being proposed by the debtor, the foreclosing party may ask for the property to be sold to it for 70% of the Established Price or for the total amount owed to it by the debtor. This only applies if the amount owed is higher than the best offer;
- e) If the foreclosing party does not exercise its right indicated in d) above, the Court will accept the best bid if it is higher than 50% of the Established Price. On the contrary, the auction will only be approved by the Court if the amount offered by the best bidder is enough to pay the debt owed to the foreclosing party (including accrued interest and costs);
- f) If, in any of the scenarios mentioned above, there are no bidders, the foreclosing party may acquire the property for an amount equal to 50% of its Established Value or for the total amount owed to him. The foreclosing party has a term of 20 days to exercise such right. Upon the expiration of this term without the foreclosing party having exercised the said right, the debtor may ask the Court to dismiss the proceedings.

Under Spanish law, however, mortgages may only be foreclosed in very limited cases, namely, if the borrower breaches the payment obligations secured by the mortgage or other major obligations. In the event of other breaches (e.g. financial covenants, representations and warranties, etc.), the lender may accelerate the repayment of the loan, but must seek a court decision enforcing his right to foreclose. These proceedings may take longer than the summary foreclosure proceedings that the lender can use in case of non-payment.

In addition to payment default, there are other triggering events that authorize the lender to foreclose the mortgage, such as the existence of undisclosed mortgages or encumbrances ranking ahead of its mortgage, the reduction of the value of the property below a certain percentage, the breach of the non-disposal obligation, etc.

Enforcement of the mortgage entails the cancellation of any liens, charges or encumbrances ranking below the foreclosed mortgage. Conversely, encumbrances ranking above the foreclosure mortgage will not be cancelled (and will hence continue to charge the real estate after the sale).

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Debtor's grounds of opposition are limited to (a) extinction of the mortgage or guaranteed obligation, and (b) any mistake in determining the amounts owed. Judicial expenses (i.e. lawyer's fees, court agent's fees and judicial tax) amount to approximately EUR 20,000 for a claimed amount of EUR 250,000.

There are certain significant risk areas in mortgage foreclosures to bear in mind. They relate to particular liabilities and the protection of workers and lessees under Spanish law (workers related to the business conducted in the property and lessees may be transferred with the property). On the other hand, in general terms, the mortgagee's rights and remedies are upheld in insolvency scenarios.

5. What is the customary time period for foreclosing a lien on real property?

Although very much dependent on the workload of the relevant court, in the case of a mortgage foreclosure based on non-payment, foreclosure proceedings usually take between 7 and 18 months from the lawsuit being accepted by the Court until the real estate being sold by public auction (or an alternative method of compulsory sale).

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

As a rule, to act as a lender in a real estate loan secured by real property there is no need to be licensed, qualified or otherwise permitted to carry out business in Spain. Most European financial institutions will not find major obstacles to participating in the Spanish real estate financing markets. In fact, in recent years, German banks have had a very strong presence in financing real estate investment and development transactions.

However, there are certain regulatory considerations that should be taken into account. Spanish banking regulations provide that the taking of funds from the public for the granting of loans, on a regular basis, as part of the principal activities of the lending entity, is a restricted activity requiring a banking license. Both concepts, i.e. what is the principal activity of an entity and when an activity is deemed to be carried on a regular basis, are analysed in detail on a case-by-case basis. The position of the regulatory authorities nowadays seems to be that the only activity that is exclusively reserved to financial entities (i.e. those that are supervised by the Spanish authorities) is that of obtaining funds from the general public with the obligation to return them (e.g. deposits), and that any other activity which is usually performed by a bank (such as granting loans and having them secured by mortgages over real property) can be performed by any other non-licensed entity, or even natural persons.

Companies that are not ordinary credit institutions (banks or savings banks) and that intend to conduct financing activities as their “principal activity” must be licensed by the Ministry of Economy as establecimientos financieros de crédito (or EFCs) (which corresponds to the concept of “financial institution” under EC Directive 2006/48). Alternatively, should they qualify as financial institutions in other EU countries, they may obtain the relevant authorization to carry out those services in Spain on a cross-border basis under the provisions of EC Directive 2006/48.

The volume of loans to be granted (or acquired) would be decisive in determining whether it is more advisable to incorporate a financial institution in Spain or use a financial institution incorporated in another EU country that may be qualified as a financial institution in Spain under the provisions of EC Directive 2006/48. Using a EU financial entity may in any event require the incorporation of a Spanish branch (sucursal) in order to enjoy certain privileges granted to financial entities within Spain.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

The Spanish Mortgage Law does not allow the amount of interest secured by a mortgage over real property to exceed an amount equal to 5 years of interest. However, the interest charged on the loan has no limits (other than those imposed by laws against usury), but the mortgage will only secure a maximum of five years of accrued interest. Court decisions have not always given clear guidance on what constitutes usury but it would be an interest that clearly exceeds rates normally seen in the prevailing market. Also, usury is not normally a concept applied when dealing with loans to legal entities.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

As a rule, in principle, a borrower or guarantor is personally liable for indebtedness secured by real property with all of its assets (according to the Spanish Civil Code). However, the Spanish Mortgage Law allows the parties to agree in the deed of mortgage that liability for the obligation secured by the mortgage is limited to the specific real property being mortgaged (and, thus, does not include any other assets owned by the debtor).

Contact Information

Charles C. Coward

ccc@uria.com

Juan A. Pérez Rivarés

jpr@uria.com

Uría Menéndez

Príncipe de Vergara 187

28002 Madrid, Spain

Tel 34.91.586.04.00 Fax 34.91.586.04.03

www.uria.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Thailand

Prepared by Lex Mundi member firm Tilleke & Gibbins

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Mortgage is used to create a lien on real estate to secure indebtedness in Thailand.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Mortgage must be made in writing and registered with the local Land Office.

- a) Mortgage registration fee: 1% of the mortgage amount, but not to exceed Baht 200,000.
- b) Stamp duty: mortgage to secure a loan is subject to stamp duty of Baht 1 per Baht 2,000, but not to exceed Baht 10,000.
- c) Registration of mortgage is not subject to withholding tax or specific business tax.

3. **Describe manner in which a lien secured by real property is foreclosed.**

To enforce a mortgage, the mortgagee must notify the debtor in writing to perform his obligation within a reasonable amount of time to be fixed in the notice. If the debtor fails to comply with such notice, the mortgagee may take Court action to request a judgment ordering the mortgaged property to be seized and sold by public auction.

In addition to the above, the mortgagee is entitled to claim foreclosure of the mortgage under the following conditions:

- a) The debtor has failed to pay interest for five years;
- b) The mortgagor has not satisfied the Court that the value of the property is greater than the amount due; and
- c) There are no other registered mortgages or preferential rights on the same property.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

- a) Court fee for the foreclosure of the mortgage of 1% percent of the claimed amount, but not to exceed Baht 100,000, as well as other fees related to the Court proceedings.
- b) Fee for sale by auction of 3% percent of the sale proceeds, as well as costs of advertising and expenses incurred from the auction.

5. **What is the customary time period for foreclosing a lien on real property?**

After the mortgagee takes Court action to request a judgment to foreclose the lien, it usually takes more than one year for foreclosure.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

There is no license required for foreign banks or other foreign lenders to make real estate loans secured by real property unless such foreign banks or foreign lenders engage in a business of accepting deposit or receiving money from the public, in Thailand.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Local financial institutions are generally free to set their maximum interest rate. The interest rate chargeable by international financial institutions to which Thailand is a member, as well as banks and financial institutions registered and located in foreign countries, shall not exceed the maximum rate set by law, which is presently 20% p.a. Interest on loans made by any other lenders, such private individuals, trading companies, insurance companies, etc., follows general law, which sets a ceiling of 15% p.a.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Unless otherwise agreed by the parties in the mortgage agreement, if the estimated value of the property (in case of foreclosure) or the net proceeds (in case of auction) is less than the amount due, the borrower is not liable for the difference. If guarantee (*surety ship*) has been given for an obligation which is to be performed at a definite time, and the creditor grants to the debtor an extension of time, the guarantor is discharged. Additionally, if the guarantor tenders performance of the obligation to the creditor from the time, when performance is due and the creditor refuses to accept performance, the guarantor is also discharged.

Contact Information

Cynthia Pornavalai
bangkok@tillekeandgibbins.com

Chaiwat Keratisuthisathorn

Tilleke & Gibbins International Ltd.
Supalai Grand Tower, 26th Floor,
1011 Rama 3 Road
Chongnonsi, Yannawa
Bangkok 10120,
Thailand

Tel 66.2653.5555 Fax 66.2653.5678
[www. tillekeandgibbins.com](http://www.tillekeandgibbins.com)

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Turkey

Prepared by Lex Mundi member firm Pekin & Pekin

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

Under Turkish law and according to Article 881 of the Turkish Civil Code (Law No. 4721), a mortgage can be created as security for any kind of debt, present, future or contingent, by registering a mortgage over a real property with the records of the relevant Title Deed Registrar where the real property subject to mortgage is registered. The perfection of a mortgage requires a mortgage agreement to be entered into between the mortgagor and mortgagee at the Title Deed Register and thereafter, registration of the mortgage with the same.

2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

Upon the execution of the mortgage agreement by and between the mortgagor and the mortgagee before the Title Deed Registrar, 0,7½% of the mortgage amount shall be paid as stamp tax and 0,36% of the mortgage amount shall be paid as Title Deed Charge. According to last paragraph of Article 851 of the Turkish Civil Code, while calculating the Turkish Lira equivalent of the mortgage amount in foreign currency, foreign currency purchase rates of the Turkish Central Bank effective on the date of such calculation shall be applied.

However registration of a mortgage in favour of Banks and Financial institutions (Regulated) is exempted from stamp tax and Title Deed Charge.

The procedures for the registration of a mortgage in favor of a foreign company are as follows:

(a) Application to Local Title Deed Registrar together with the following documents:

- (i) Notarised and apostilled copy of the Certificate of Activity of the foreign company;
- (ii) Notarised and apostilled copy of the Articles of Association of the foreign company;
- (iii) A notarised and apostilled power of attorney enabling the proxies to proceed with the legal procedures for and on behalf of the foreign company.

(b) Execution of the Mortgage Agreement at the Local Title Deed Registrar;

(c) Registration of the Mortgage with the records of the relevant Title Deed Registrar.

3. Describe manner in which a lien secured by real property is foreclosed.

Under Turkish law, the Mortgagee is required to initiate the following judicial foreclosure proceedings in order to cash-in the Mortgage:

- (a) The Mortgagee will apply to the relevant Execution Office for calling the Mortgage and to cash-in the same;

- (b) The Execution Office will serve a payment order to the Mortgagor and require the Mortgagor to pay the amount of the debt, together with default interest and legal charges thereon, within 15 days from the date of receipt of the payment order or to object to the contents of the payment order within 7 days from the date of receipt of the payment order;
- (c) In the event no objection is made by the Mortgagor within 7 days and the debt, together with the default interest and legal charges thereon is not paid within 30 days, the Execution Office will appoint experts to evaluate the market value of the Property. In the event the contents of the payment order are objected to by the Mortgagor, the Mortgagee is required to file a lawsuit against the Mortgagor and claim an annulment of the objection from the courts. In the event the Mortgagee's claim is awarded by the courts, the Execution Office will be able to appoint experts to evaluate the market value of the Property. The judgement of the courts is appealable by the Mortgagor in the event the award is in favour of the Mortgagee, however, the proceedings at the Court of Appeal shall not suspend those of the Execution Office but it will suspend the sale of the Property at a public auction. In other words, the Property can be sold at a public auction after the judgement of the court is approved by the Court of Appeal;
- (d) The Execution Office, after receiving the experts report evaluating the market value of the Property, will serve it to the Mortgagor who will then have the right to object to the evaluation report within 7 days before the relevant court, and the court will determine the market value of the Property through experts to be appointed by the judge. The judgement of the court for determining the market value of the Property is also appealable and an appeal will suspend the sale of the Property at public auction;
- (e) After completion of all the above mentioned foreclosure proceedings, the Execution Office will decide upon the dates of public auction for the sale of the Property subject to mortgage, which will be two separate auction dates. In the first auction, at least 60% of the market value as determined by the experts is required to be offered and if such an offer is not provided, at least 40% of the market value is required to be offered in the second auction. In the event sufficient offers are obtained by the Execution Office, the Property will be sold to the highest bidder and such bidder will be required to pay the amount of its bid in cash to the Execution Office and the Mortgagee will receive its receivables from such proceeds. The costs of the foreclosure proceedings and the legal costs made during that term shall be paid from the sale proceeds and the outstanding amount shall be paid to the Mortgagee. The legal costs includes lawyer's fees payable in accordance with the most recent tariff in force as published in the Official Gazette of the Republic of Türkiye;
- (f) The Mortgagee has the right to bid and purchase the property subject to mortgage. In such case the Mortgagee has the right to off-set its receivables from the bidding price. If the receivables of the Mortgagee is equal to or more than 20% of the market value of the property, then the Mortgagee shall not pay the deposit money/letter of guarantee of 20% of the market value of the Property that the other third party bidders are required to pay before entering into the bid. In case the bidder purchases the Property at the end of the foreclosure proceedings it will be free to sell the same to the third parties;

If the receivables obtained from the foreclosure proceedings do not cover the whole amount of the Mortgagee's receivables, an open pledge certificate is given to the Mortgagee. Thus,

the Mortgagee may commence execution proceedings or bankruptcy proceedings on the other assets of the Mortgagor depending on such certificate.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Costs of involved in foreclosing a real property may be offset from the receivables obtained from the foreclosure proceedings.

5. What is the customary time period for foreclosing a lien on real property?

The above mentioned foreclosure proceedings will take approximately 6-7 months, in the case of no objections from the Mortgagor and 2 years or so, in the case of objections or appeals at each step.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Please note that that Foreign Banks or Lenders are not permitted to provide consumer loans in Türkiye. In this regards housing loans may not be provided to Turkish customers. However Turkish citizens may freely obtain commercial loans from foreign banks or other foreign lenders and such lenders and are free to secure such loan by creating a mortgage over a real property owned by the borrower or even third party.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

There is no limit imposed by respective Turkish legislation on the amount of interest which may be charged on a loan secured by real property. However please note that in principal, the amount of the mortgage is required to be registered in Turkish Lira (Article 851/I of the Turkish Civil Code), however, according to Article 851/II of the Turkish Civil Code, in the event the mortgage is to be registered as a security for a foreign currency cash loan to be obtained by a borrower resident in the Republic of Türkiye from a credit institution conducting business within the Republic of Türkiye or abroad, the amount of the mortgage can be registered in foreign currency, which should be the same currency as the loan.

According to Article 851/I of the Turkish Civil Code, a mortgage securing an existing or future debt, the amount of which is indefinite, can be registered as a maximum amount mortgage, and in such case, the amount of the mortgage should be agreed upon by the mortgagor and mortgagee and written in the mortgage agreement.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

N/A

Contact Information

Sinan Borovali
sborovali@pekin-pekín.com

Pekín & Pekín.
10 Lamartime Caddesi
Taksim 34437
Istanbul, Turkey

Tel 90.212.313.3500 Fax 90.212.313.3535
www.pekin-pekín.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

Uruguay

Prepared by Lex Mundi member firm Guyer & Regules

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

All liens on real estate such as mortgages or trusts must be executed before a notary public in the form of public deed.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

A mortgage agreement by virtue of which a lien is created on real estate must be filed before the Real Estate Registry of the department where the real estate is located. The mortgage agreement is not taxed and only a very minor registration fee must be paid. Notwithstanding the above and due to the fact that the mortgage must be executed before a notary public, the fees of the same will be applicable at a rate of 3% of the secured debt, plus VAT.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Foreclosure proceedings must be followed before the pertinent courts in order to obtain the sale of the real property in a public auction. The creditor will recover his credit from the proceeds of such auction and remaining amounts after expenses and fees are covered will correspond to the debtor. Under Uruguayan law a mortgagee may not take possession of the mortgaged property to cover for the secured amount.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are no significant costs regarding such procedure other than the foreclosure tax (1% of the debt to be recovered) and the forced sale tax (2% of the sales price).

- 5. What is the customary time period for foreclosing a lien on real property?**

The standard term of a mortgage foreclosure proceeding is of approximately two and a half years (in the case that the debtor does not opposes defenses).

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No provisions exist under Uruguayan law establishing any sort of authorization or registration for foreign banks or lenders to make real estate loans secured by real property.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Uruguayan legislation has imposed legal limits on the admissible interest rates which depend on the amount of the secured loan. Should the loan be of less than 2.000.000 Unidades Indexadas (currently equivalent to approximately USD 176.000) interest rate may not exceed 60% of the average rates of the previous three-month period published by the Central Bank of Uruguay. If the amount of the loan

exceeds 2.000.000 Unidades Indexadas, then the admissible rate may not be of more than 90% of the said rates.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Uruguayan legislation does not establish any restriction in the matter consulted.

Contact Information

John Stuart Leaman
jsleaman@guyer.com.uy

Guyer & Regules.
Plaza Independencia 811
11100 Montevideo, Uruguay

Tel 598.2902.1515 Fax 598.2902.5454
www.guyer.com.uy

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Alabama

Prepared by Lex Mundi member firm Maynard, Cooper & Gale, P.C.

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the instrument used in Alabama

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

In Alabama, pursuant to § 40-22-2 of the Code of Alabama, a mortgage filing privilege tax payable at the rate of \$.15 per \$100, or fraction thereof, of the indebtedness secured by the mortgage, is payable upon the recordation of the mortgage. Other instruments, such as an Assignment of Rents and Leases and UCC-1 Financing Statement, can be filed as additional security with no further mortgage tax, provided there is a legend contained within the document that indicates it is filed as additional security for the mortgage that has been recorded simultaneously. An allocation procedure is available for multi-state transactions.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

The most common method of foreclosure is through the use of a non-judicial power of sale. In order to use this method the mortgage must contain an express grant of such a power of sale in the mortgage. Alabama law provides for notice of the foreclosure by publication in some newspaper published in the county or counties in which the land to be sold is located. Such notice must be given once a week for three successive weeks of the time, place and terms of such sale, together with a description of the property to be sold. Under Alabama law the sale must be held between the hours of 11:00 a.m. and 4:00 p.m. on the day designated for the exercise of the power of sale, and at the front or main door of the courthouse of the county in which the land to be sold is located. The mortgage should contain a clause that incorporates these requirements as well as a clause that allows the lender to bid at any such sale and to purchase the property if it is the highest bidder.

If a power of sale provision is not included in the mortgage, then the lender would have to foreclose the mortgage through a judicial foreclosure.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Following the foreclosure of the equity of redemption, a statutory right of redemption provided to the borrower, mortgagor and others, arise for a period of one-year, which cannot be waived by the mortgagor prior to foreclosure.

- 5. What is the customary time period for foreclosing a lien on real property?**

Typically, in Alabama, assuming the mortgage contains the customary clauses, a mortgage can be foreclosed within about a month.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Alabama's laws for qualifying to do business in Alabama, and the consequences if one does not, are rather draconian. Under the laws of Alabama a contract entered into or to be performed in Alabama by a foreign corporation that has not obtained a certificate of authority to transact business in Alabama is void and cannot be enforced in the courts of Alabama. Such a contract cannot be made enforceable retroactively by subsequently obtaining a certificate of authority. Therefore a non-qualified foreign lender doing business in Alabama would be unable to resort to the courts of Alabama to enforce any of its loan documents (e.g., collect the debt, foreclose a mortgage, enforce the terms of a UCC security agreement or sue on guaranties). In effect, the courts of Alabama would be closed to it. However, Amendment No. 154 to the Alabama Constitution permits a foreign corporation to "take and hold mortgages on real estate" and to "collect the debts secured thereby" without qualifying to do business in Alabama. This constitutional amendment does not mention taking security interests in personal property located in Alabama. Additionally, Section 10-2B-15.01(b) of the Alabama Code exempts "corporations organized under the laws of the United States" from the provisions of the Alabama Business Corporation Act requiring a foreign corporation to obtain a certificate of authority from the Secretary of State of Alabama before transacting business in Alabama.

Before advising a client on whether to qualify to doing business in Alabama, we recommend contacting us for an in depth analysis on the issue.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

For amounts over \$2,000, § 8-8-5 permits an unlimited interest rate, subject to laws and principles of unconscionability. The unlimited interest rate provisions of § 8-8-5 are available to borrowers that constitute a natural person, corporation, trust, general or limited partnership or association, since § 8-8-5(a) specifically applies to "any person or persons, corporations, trust, general partnership or partnerships, limited partnership or partnerships, or association."

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Rob Sexton
rsexton@maynardcooper.com

Maynard Cooper & Gale PC.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, Alabama 35203

Tel 1.205.254.1000 Fax 1.205.254.1999
www.maynardcooper.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Arizona

Prepared by Lex Mundi member firm Snell & Wilmer LLP

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

The deed of trust is the preferred instrument for obtaining a security interest in real property. Although a mortgage is also available in Arizona, it is rarely used.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Arizona has no mortgage tax. The recording fees for recording deeds or mortgages are nominal.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Foreclosure of a deed of trust is most commonly accomplished by the exercise of the trustee's power of sale, although it may also be accomplished by judicial foreclosure as a mortgage.

Foreclosure by trustee power of sale, also called a trustee sale, is conducted by either a title company or a law firm acting as the trustee under the deed of trust. The process is initiated by recording, publishing, posting, and mailing a written notice of the time and place of the sale at least ninety (90) days before the sale. The trustee will sell the property at a public auction to the highest qualified bidder. The beneficiary is the only bidder who may credit bid. The purchasing bidder must pay the bid price before 5:00 p.m. the following day. Once the full bid price is paid, the trustee provides the purchaser with a trust deed, conveying all title and interest to the purchaser. In the event of a deficiency, the lender has ninety (90) days to recover a deficiency judgment. The trustor also has the right to reinstate the deed of trust by paying the amount of the installment due, regardless of acceleration, prior to the date of sale.

As an alternative to foreclosure by trustee sale, a lender may commence a judicial foreclosure action. In judicial foreclosure, the court must first grant judgment and issue a special execution for the seizure and sale of the property by the sheriff. The sheriff's sale is then held at a public auction and the property is sold to the highest bidder. As in the trustee sale, the lender may credit bid. Unlike trustee sales, in judicial foreclosure, the property may be parceled to satisfy the judgment. In a procedure similar to reinstatement in a trustee sale, the debtor may redeem the property prior to the sale. However, other judgment creditors may also redeem before the sale, and the redeeming party must pay the entire judgment amount, not simply the default amount. The purchaser does not receive a deed conveying all title and interest, only a sheriff's certificate that the deed will be granted after a statutory redemption period. During the statutory redemption period, the debtor or other judgment creditors have another opportunity to redeem the property by paying the full judgment amount. Statutory redemption periods can range from thirty (30) days to six (6) months, depending on the type of property. If the redemption period expires without redemption by another party, the purchaser receives the sheriff's deed conveying all title and interest. As in the trustee sale procedure, judicial foreclosure allows a party to seek deficiency. Unlike trustee sale deficiencies, however, there is no ninety -day limitation. The lender must return to court for another writ of execution to levy on other debtor property.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

Trustee's generally require a trustee sale guarantee. A guarantee is ordered from a title insurance company and costs one-tenth of one percent of the outstanding principle balance of the loan. Bidders to a trustee sale must also qualify by bringing a \$10,000 cash down payment on the purchase price.

In addition, the speculative builder tax, if applicable to the transfer of property in a normal sale context, will be triggered by a foreclosure or similar exercise of a lender's security interest, with the lender being liable for the tax as a successor.

5. What is the customary time period for foreclosing a lien on real property?

A trustee sale can be as short as ninety-one days. The judicial foreclosure process, however, can take as long as one year or more in light of statutory redemption periods.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Depending on the nature of the entity and its contacts with Arizona, real estate lenders may be required to be licensed as mortgage bankers or mortgage brokers regulated under the Arizona Department of Real Estate.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

None. The interest rate is determined by the terms of the contract. If no rate is specified in the contract, then the default rate is ten per cent per annum.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

Lenders may not seek deficiencies on real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling.

Note also that a spouse of an individual guarantor must co-sign to make the guarantee valid.

Contact Information

Jonathan E. Frank, Esq.
jfrank@swlaw.com

Snell & Wilmer L.L.P.
One Arizona Center
400 E. Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202

Tel 1.602.382.6000 Fax 1.602.382.6070
www.swlaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Colorado

Prepared by Lex Mundi member firm Davis Graham & Stubbs LLP

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A deed of trust to public trustee is the instrument most commonly used to create a lien on real estate to secure indebtedness. Colorado has a unique “public trustee” system under which the person having the non-judicial power of sale under the deed of trust is a public officer. The powers of the public trustee are governed by statute, and the statute supersedes any contrary provisions of the deed of trust. The public trustee is the only means of obtaining expedited foreclosure. A deed of trust to anyone other than the public trustee must be foreclosed judicially as a mortgage. Mortgages may also be used, but they can only be foreclosed through judicial process. Lenders who do not fall into certain categories of financial institutions should be aware that they must deliver to the public trustee the original note or other evidence of indebtedness in order to be able to foreclose or release a deed of trust to public trustee.

2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

No such tax applies, other than the recording fee that applies generally to all recorded instruments.

3. Describe manner in which a lien secured by real property is foreclosed.

Foreclosure of a deed of trust to public trustee is begun by filing a notice of election and demand for sale and other required documentation with the public trustee of the county where the property is located. An advance notice requirement applies to residential foreclosures that are based solely on monetary defaults. There is a statutory right of cure for monetary defaults and certain technical defaults. As a due process requirement, a court order must be obtained to authorize the sale, and the Colorado Rules of Civil Procedure provide an expedited review procedure. The foreclosing holder of the debt must bid the amount of the debt, less costs, at the sale. Statutory deadlines and procedures must be strictly followed. If there is a deficiency after the foreclosure sale, the lender may pursue a claim for the deficiency. There is no single-action rule in Colorado. Foreclosure of a mortgage or a deed of trust to private trustee must be accomplished through judicial process. There is no expedited procedure for foreclosure under such instruments.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

The public trustee foreclosure process must be strictly followed, but public trustee foreclosure is generally faster and less expensive than judicial foreclosure. Note that except for certain regulated financial institutions, a lender foreclosing (or releasing) a deed of trust to public trustee must present the original note or other evidence of the debt or post a bond of 150% of the face value of the deed of trust. This may make public trustee deeds of trust undesirable for non-exempt entities when the deed of trust will secure a debt evidenced by multiple instruments or when there is a material risk that the debt instrument will be lost (such as when numerous partial releases will be needed) and the borrower will not cooperate in the execution of a replacement instrument.

5. What is the customary time period for foreclosing a lien on real property?

Foreclosure of a deed of trust to public trustee typically takes about 150 days for non-agricultural property. Foreclosure of agricultural property takes approximately nine months. Foreclosure of any other instrument requires full judicial process and the amount of time required will vary significantly depending on where the property is located and the pace of the district court docket in the county where the property is located.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

There are no permissions, approvals or licenses required specifically to make a loan secured by real property. Mortgage brokers (that is, mortgage salespersons who are not employed by the lender) must obtain a license from the Colorado Department of Regulatory Agencies, Division of Real Estate.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

The general usury limit in Colorado is 45% simple interest. A lender that violates this limit commits a felony, subject to certain narrow affirmative defenses. Certain types of consumer loans are capped at 12% interest per year, but that cap will not normally apply to regulated lending institutions.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Catherine A. Hance.
catherine.hance@dgsllaw.com

Davis Graham & Stubbs LLP
1550 Seventeenth Street Suite 500
Denver, CO 80020

Tel 1.303.892.9400 Fax 1.303.893.1379
www.dgsllaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Delaware

Prepared by Lex Mundi member firm Richards, Layton & Finger, P.A.

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the instrument that secures a lien on real property in Delaware.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Delaware.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Judicial foreclosure, though a scire facias action in the Delaware Superior Court where the mortgaged property is located, is the only recognized statutory proceeding under Delaware law for foreclosure of real property upon the breach of a mortgage. It is also possible, under certain circumstances, to pursue an equitable foreclosure in the Delaware Chancery Court.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

A scire facias foreclosure proceeding may only be brought in a court of law if the mortgage was executed under seal.

- 5. What is the customary time period for foreclosing a lien on real property?**

If the scire facias action is uncontested, the process generally will take up to seven months. If the scire facias action is brought in the context of a bankruptcy, there is no customary specific timeframe. Likewise, if the scire facias action is contested, there is no specific timeframe and the action will follow a time progression commensurate with litigation matters in general.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. As a general rule, a lender that is a foreign entity does not have to qualify to do business in Delaware if the lender is only lending against collateral located in the State and if the loan is not a consumer credit transaction. 5 Del. C. § 1402 expressly provides that it is not to be construed to prohibit foreign banks from making loans secured by mortgages on real property.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

The legal rate of interest for loans not made by banks or licensed lenders is 5% over the Federal Reserve discount rate. There is no limitation on the rate of interest charged on loans not made by banks or licensed lenders where the amount of the money loaned exceeds \$100,000 and payment is not secured by a mortgage on the principal residence of any borrower. Licensed lenders and banks may charge interest at the rate agreed to by the borrower as set forth in the loan agreement or in the

note or other evidence of the loan. Under Delaware law, no corporation, limited partnership, statutory trust, business trust or limited liability company, and no association or joint stock company having any powers and privileges of corporations not possessed by individuals or partnerships, may interpose the defense of usury in any action.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Robert J. Krapf, Esquire.
krapf@rlf.com

Richards, Layton & Finger, P.A.
PO Box 551
Wilmington, Delaware 19899

Tel 1.860.240.6000 Fax 1.860.240.6150
www.rlf.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Florida

Prepared by Lex Mundi member firm Akerman Senterfitt

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the type of instrument almost always used to create a consensual lien on real estate in Florida. By statute, a deed of trust or other conditional deed of conveyance given to secure indebtedness must be enforced through the courts in accordance with the procedures governing the foreclosure of a mortgage.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Documentary Stamp Tax...\$0.35 per \$100 or fraction thereof of debt Intangibles tax ...\$0.002 per \$1.00 of debt secured. There are various apportionment formulas that may apply to reduce one or both of the above mortgage taxes if the loan is also secured by real estate collateral located outside of the state of Florida. The tax base for computing the intangibles tax will never exceed the lower of the value of the real estate collateral or the loan amount.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

All real estate liens (both residential and commercial) must be foreclosed judicially through a civil action filed in the county where the Florida real estate is located and culminate in a public auction of the real estate conducted by the court clerk on the courthouse steps. A creditor may not conduct a private sale of its Florida real estate collateral even if the debtor expressly granted a power of sale in favor of the creditor in the security instrument.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Particularly in the large urban areas with a high volume of mortgage foreclosures, a creditor may endure a delay of several months, even in an uncontested foreclosure proceeding. The delay is caused by backlogs in obtaining, for example, a specially set hearing date before a judge on a creditor's motion for summary final judgment of foreclosure, a date on which the clerk of the court schedules the foreclosure sale and delays in obtaining service by the sheriff of a writ of possession to the real estate after the foreclosure sale. A creditor has no right to enter into possession of the real estate or to manage the operation of the real estate without the post-default consent of the debtor or a court order, even though the mortgage or other security instrument may purport to grant such rights to the creditor.

- 5. What is the customary time period for foreclosing a lien on real property?**

Approximately five (5) to six (6) months in an uncontested mortgage foreclosure proceeding.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

With respect to a single commercial mortgage loan transaction, no (presuming no other established business presence in the State of Florida). However, there are licensing requirements that will apply to any lender making consumer mortgage loans in the State of Florida (i.e., loans that are primarily for personal, family or household purposes).

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

There are several exceptions; however, in absence of an applicable exception, interest may not exceed 18% per annum, simple interest on loans of up to \$500,000 and may not exceed 25% per annum, simple interest on loans of more than \$500,000.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None. However, if the real property is an individual borrower's or guarantor's permanent residence (i.e, his or her "homestead"), then the borrower's or guarantor's spouse is required to join in and execute the mortgage. Failure of the spouse to join in and execute a mortgage encumbering homestead property will render the mortgage lien voidable at the election of the spouse. Florida law also provides that deficiency judgments are basically limited to the difference between the value of the property and the debt on the date of the foreclosure. The amount of the successful bid at the public foreclosure sale is usually not sufficient to establish the market value of the property. There is no "one action" rule in Florida, and the creditor may proceed against a borrower for collection of the debt without having to foreclose its real estate collateral in the same (or in a prior) lawsuit.

Contact Information

Janis K. Cheezem
janis.cheezem@akerman.com

Akerman Senterfitt
1 SE 3rd Avenue 27th Floor
Miami, Florida 33131

Tel 1.305.374.5600 Fax 1.305.374.5095
[www. rlf.com](http://www.rlf.com)

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Hawaii

Prepared by Lex Mundi member firm Case Lombardi & Pettit

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the instrument that secures a lien on real property in Hawaii.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage tax in Hawaii.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Judicial foreclosure is the predominant remedy for most lenders foreclosing on mortgages. Mortgage foreclosures are governed by Hawaii Revised Statutes ("HRS") Chapter 667. In addition, non-judicial foreclosure (power of sale) is available under HRS §667-5, and a relatively new alternative power of sale process is available under HRS §667-21 et seq. Hawaii law allows for a deficiency judgment in addition to the foreclosure decree in judicial foreclosures only; deficiency judgments are not available in non-judicial foreclosures.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Judicial foreclosure may be time consuming and expensive if it is contested and goes to trial. The publication requirements of a non-judicial foreclosure action may be costly.

- 5. What is the customary time period for foreclosing a lien on real property?**

If the judicial foreclosure action is uncontested, the process generally will take between six to nine months. If the foreclosure action is brought in the context of a bankruptcy, there is no customary specific timeframe, although most lenders will seek to have the automatic stay lifted and proceed to judicial foreclosure in state court. Likewise, if the judicial action is contested, there is no specific timeframe but could be quite lengthy. A non-judicial foreclosure process will generally take from three to five months to complete.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. Hawaii has a foreign (non-Hawaii) lender law (HRS Chapter 207, Part II) that exempts banks making loans secured by liens on real property, receiving security for such loans, or acquiring by assignment or otherwise partial or entire interest in loans or in security for loans, from laws regulating banking, trust or insurance business (HRS Chapter 412), and certain other business registration and tax laws (HRS Chapters 235, 237 and 241). In addition, there is a "foreign lender" exemption from the mortgage broker licensing law (HRS Chapter 454), administered by the State Department of Commerce and Consumer Affairs. So long as the foreign lender maintains its status as a foreign lender and engages only in the activities permitted under HRS §207-13, it does not have to register as doing business in the state.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Other than home business loans (and consumer credit transactions and credit card agreements), lenders and banks may charge interest at the rate agreed to by the borrower as set forth in the loan agreement or in the note or other evidence of the loan. Hawaii's usury law exempts indebtedness secured by a first mortgage and indebtedness secured by a purchase-money junior mortgage from any usury restriction. (HRS §§478-8(b)(1) and (b)(2)). However, "home business loans" are subject to usury rate restrictions under Chapter 478. "Home business loans" are business purpose loans up to \$250,000 secured by a mortgage of "the principal dwelling of a natural person." (HRS §478-1). With respect to a home business loan, a financial institution regulated under HRS Chapter 412 (other than a trust company or credit union) may contract for a rate of simple interest not exceeding 2% per month or 24% per year.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Nancy J. Youngren
njy@caselombardi.com

Case Lombardi & Pettit A Law Corporation
737 Bishop St., Ste. 2600
Honolulu, HI 96813

Tel 1.808.547.5400 Fax 1.808.523.1888
www.caselombardi.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Indiana

Prepared by Lex Mundi member firm Faegre Baker Daniels LLP

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the instrument that is utilized in Indiana to obtain a lien on real property located in Indiana.

- 2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Indiana has no mortgage tax.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Indiana law specifies that judicial foreclosure through an action in the circuit or superior court where the property is located is the only method of foreclosure available in Indiana.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Power of sale clauses are not permitted in Indiana. A mortgagee may not seek to foreclose a mortgage while the mortgagee is prosecuting any other action for the same debt or matter which is secured by the mortgage or while seeking to obtain execution of any judgment in such other action, and may not bring any other action for the same matter while the mortgagee is foreclosing the mortgage or prosecuting a judgment of foreclosure. A mortgagee may obtain a judgment on the debt and then proceed to foreclose the mortgage if the mortgagee does not seek execution on the judgment.

- 5. What is the customary time period for foreclosing a lien on real property?**

The entire process, from filing of the complaint through sheriff's sale, typically takes about six months if the matter is uncontested and no bankruptcy is involved.

- 6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No. The making of a loan in Indiana or acquiring a mortgage on real estate located in Indiana, without more, does not constitute transacting business in Indiana.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

While there is no Indiana statute establishing a maximum legal rate of interest applicable to non-consumer loans, two statutes arguably establish a maximum legal rate or interest. One statute establishes the maximum rate of 72% per annum, but is applicable to non consumer loans only "if unlawful force or threat of force is used to collect or attempt to collect" the loan. The other statute provides that a loan made by a creditor with a reputation for using violence or criminal means to

collect or to punish non-payment at a rate in excess of 45% prima facie unenforceable.

- 8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

None.

Contact Information

Thomas A. Vogtner
tom.vogtner@bakerd.com

Baker & Daniels LLP
300 N. Meridian St. Suite 2700
Indianapolis, Indiana 46204

Tel 1.317.237.0300 Fax 1.317.237.1000
www.bakerdaniels.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Louisiana

Prepared by Lex Mundi member firm Jones Walker LLP

1. **Is perpetual fee simple ownership of real property permitted? If not, what are the principal forms of ownership, or other principal form of ownership, of real property?**

Perpetual ownership of immovable (real) property is permitted in Louisiana.

2. **What instruments are used to convey fee simple ownership, or other principal form of ownership, of real estate?**

The instruments used to convey immovable property include the cash sale, the sale with mortgage or credit sale, the quitclaim deed, the act of contribution, the dation en paiement (giving in payment) and the act of donation. The conveyance of immovable property must be made in writing by authentic act or act under private signature. An authentic act must be signed in the presence of a notary public and two witnesses. A donation of immovable property may only be made by authentic act.

3. **How in this jurisdiction is the ownership of real property recorded or searched? Who generally performs the search?**

Instruments affecting immovable property must be recorded in the official conveyance and/or mortgage records of the Parish in which the property is located in order to be effective against third parties. Ownership is determined through a search and examination of the conveyance and mortgage indices of the Parish in which the property is located. The search is ordinarily performed by a professional abstractor who prepares an abstract of title consisting of copies of the instruments affecting the subject property which appear in the conveyance and mortgage indices. The examination of the abstract of title is performed by an attorney.

4. **What assurances of ownership are available to purchasers of real property (e.g., title insurance or title opinions)? What is the cost of obtaining such assurances?**

Title insurance is available for purchasers of immovable property. Premium rates for title insurance are filed with the Louisiana Department of Insurance by each title insurance company and approved by the Louisiana Commissioner of Insurance. The filed rates are not negotiable.

5. **What are the most common forms of investment vehicles? What are the most common entities employed to own investment real estate in a tax efficient manner?**

The most common entities employed to own investment real estate include limited liability companies, limited partnerships and business corporations.

6. **Has this jurisdiction adopted, or is it considering, legislation permitting the creation of real estate investment trusts or similar entities?**

Louisiana has not adopted legislation permitting the creation of real estate investment trusts.

7. **What state or local transfer, stamp or similar taxes are levied generally on sellers or buyers upon the direct transfer of real estate?**

No state taxes are levied on the direct transfer of immovable property in Louisiana. Except for Orleans Parish which includes the City of New Orleans no local taxes are levied upon the direct transfer of immovable property. In Orleans Parish, a documentary transfer tax is levied based upon the number of pages in the instrument. The minimum charge is \$325 and the maximum charge is \$2,500.

8. What state or local transfer, stamp or similar taxes are levied generally on sellers or buyers upon the transfer of interests in entities which own real estate?

No state or local taxes are levied upon the transfer of interests in entities which own immovable property.

9. How significant is local regulation and taxation of real estate? How significant is the variation of real estate law among political subdivisions of this jurisdiction?

Local regulation of real estate consists primarily of zoning and land use laws and laws regulating the subdivision of land. In addition, ad valorem property taxes are assessed and collected by local governmental organizations. There is wide variation among local jurisdictions in all of these areas.

10. Must ultimate beneficial owners of entities which own real estate be disclosed as a matter of public record?

Louisiana law does not require that the beneficial owners of entities which own immovable property be disclosed as a matter of public record.

Keith Colvin
kcolvin@joneswalker.com

Jones Walker LLP
Place St. Charles
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100

Tel: 1.504.582.8000
Fax: 1.504.589.8583
www.joneswalker.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Massachusetts

Prepared by Lex Mundi member firm Foley Hoag LLP

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

In Massachusetts, a mortgage secures a lien on real estate.

2. **Describe national, state or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage recording tax in Massachusetts.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Foreclosures in Massachusetts are conducted pursuant to the Statutory Power of Sale in the mortgage and are non-judicial. The foreclosing mortgagee must publish notice in a local newspaper for three successive weeks, the first such notice to appear not less than twenty-one days before the date of the sale. The mortgagee must also send written notice to the holder of the equity of redemption and junior lienors of record as of thirty days before the date of the sale by certified mail not less than fourteen days before the date of the sale. If the mortgagee wants to preserve a deficiency action, the mortgagee must send a notice to the holder of the equity of redemption as of thirty days before the date of the sale by certified mail not less than twenty-one days before the date of the sale. The holder of the equity of redemption has no right to redeem the property once the property has been sold by the auctioneer.

If the holder of the equity of redemption is a natural person or the trustee of a nominee trust, the mortgagee must also comply with the provisions of the Servicemembers Civil Relief Act of 2003 before proceeding under the Statutory Power of Sale in order to convey good title. This requires filing a Complaint in the Land Court Division of the Trial Court, the publication of a notice in the local newspaper and service on the holder of the equity of redemption by certified mail or in hand by a deputy sheriff.

Finally, it is customary practice in Massachusetts to foreclose simultaneously by making a physical entry on the property and recording an affidavit of entry in the Registry of Deeds. After three years, if the entry was not opposed, the entry ripens into a foreclosure and cures any errors that may have occurred when the mortgage was foreclosed pursuant to the Statutory Power of Sale.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are no significant costs in connection with, or impediments to, foreclosing a lien on real property.

5. **What is the customary time period for foreclosing a lien on real property?**

If a natural person or the trustee of a nominee trust is the holder of the equity of redemption, it may take eight weeks or more before the mortgagee can obtain a judgment from the Land Court stating that there is no person in the military service who is entitled to the protection of the Servicemembers Civil Relief Act of 2003. That judgment is a precondition to proceeding under the Statutory Power of

Sale in order to convey good title. If neither is the case, a sale under the Statutory Power of Sale can reasonably be conducted in six to eight weeks.

Massachusetts has recently passed a statute which provides that a mortgagor of residential real property which the mortgagor occupies has a ninety day right to cure an outstanding default. A mortgagee cannot proceed to accelerate the unpaid balance of the obligation or otherwise enforce the mortgage until the ninety day period has passed.

6. Are there national, state or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

Non-bank lenders that make more than five residential (owner-occupied) mortgage loans in any twelve month period must obtain a mortgage lender license. Banks (including foreign banks) are exempt from these licensing requirements, but bank subsidiaries are not.

A foreign bank or other entity making loans secured by Massachusetts property may need to register with the Secretary of State as a foreign corporation. Whether an out-of-state bank is required to qualify as a foreign corporation simply to make loans secured by Massachusetts real estate depends on whether the extent of the lending activity is significant enough to constitute "doing business" in the Commonwealth. The highest court in Massachusetts (the Supreme Judicial Court) has consistently followed the constitutional rule that, as long as a foreign corporation is engaged solely in interstate commerce, and limits its activities within the Commonwealth to matters incidental to its conduct of interstate commerce, it is not "doing business" in Massachusetts for purposes of foreign corporation qualification requirements.

Whether or not registration with the Secretary of State is required, a foreign bank is "engaged in business in the Commonwealth" for purposes of the Massachusetts financial institution excise tax if it is "regularly receiving interest income from loans secured by tangible personal or real property located in the commonwealth..." "Regularly" receiving interest income is presumed if the foreign bank (i) does business with 100 or more Massachusetts residents per year, (ii) has \$10 million or more assets attributable to sources in Massachusetts or (iii) has more than \$500,000 in receipts attributable to sources within Massachusetts.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Massachusetts General Laws c.271, §49, prohibits anyone making a loan of money from charging interest and expenses which, in the aggregate, exceeds twenty (20%) percent per annum unless the person making such loan notifies the Attorney General of his intent to engage in such a transaction involving a proscribed rate of interest, and provided further that any such lender maintains records of the transaction which are available to the Attorney General for purposes of inspection at his request. Any such filing with the Attorney General is valid for a two-year period. The amount to be paid on any loan for interest and expenses includes all sums paid or to be paid by or on behalf of the borrower for interest, brokerage, recording fees, commissions, services and other enumerated costs and expenses. Anyone who makes such a loan shall be guilty of criminal usury and shall be punished by incarceration in the state prison for not more than ten years and subject to a fine. The provisions of this statute do not apply to any loan the rate of interest for which is regulated under any other provision of any general or special law, or regulations promulgated thereunder, or to any lender subject to control, regulation or examination by any state or federal regulatory agency. If it is possible that the rate of interest, fees and other charges under the loan documents may exceed twenty (20%) percent per annum, and if the lender does not qualify for an exemption under the immediately preceding sentence, the lender must file an appropriate notice with the Attorney General.

Massachusetts law also imposes (i) a cap on the interest rate charged by lenders, including banks, on open-end credit plans (18%), including home equity loans (except under certain circumstances in a high interest rate environment), (ii) a cap on the rate charged on mortgage loans secured by owner-

occupied properties having an assessed value of \$40,000 or less (18%, dropping to 12% six months after default) and (iii) a cap on loans of less than \$6,000 for personal, family or household purposes (12% per annum for any lender, other than a bank, that does not have a “small lender” license; for banks and licensees, the cap is established by a small loans regulatory board, and is currently 23%, dropping to 6% per annum after the termination of one year after maturity of the loan.).

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are none.

Contact Information

Jacob N. Polatin
jpolatin@foleyhoag.com

Foley Hoag LLP
255 Seaport Boulevard
Boston, Massachusetts 02210

Tel 1.617.832.1000 Fax 1.617.832.7000
www.foleyhoag.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Missouri

Prepared by Lex Mundi member firm Armstrong Teasdale LLP

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A deed of trust is the most common method of securing a lien on real estate in Missouri. Mortgages may be used, but are very rare. The deed of trust is a three party instrument with the borrower as the grantor, the lender as the beneficiary or the grantee, and a trustee.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There are no "mortgage taxes" or "stamp taxes" arising out of the making of a real estate loan secured by a deed of trust on Missouri property. Standard recording fees apply to the recordation of the deed of trust.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Deeds of trust are typically foreclosed in Missouri by the trustee (or a successor trustee) by non-judicial trustee's sale after the giving of all required statutory notices (including notices sent by the trustee to classes of persons by mail and published notice).

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

None other than the cost of publishing the notice of sale.

- 5. What is the customary time period for foreclosing a lien on real property?**

Approximately 60 days in the case of a non-judicial trustee's sale under the deed of trust.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

No, presuming no other established business presence in the State of Missouri.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Usury laws only apply to consumer loans in Missouri and there are no limits on commercial loans. Absent federal preemption, Section 408.030 RSMo governs limits on first lien mortgage loans in Missouri and limits the amount of interest to the "market rate" or 10%. If the "market rate" exceeds 10%, the parties may agree to that rate. The Missouri Division of Finance announces the current "market rate" on its website. For second mortgages, the parties may agree to any rate.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None.

Contact Information

Timothy J. Tryniecki
ttryniecki@armstrongteasdale.com

Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102

Tel 1.314.621.5070 Fax 1.314.621.5065
www.armstrongteasdale.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Nevada

Prepared by Lex Mundi member firm Lionel Sawyer & Collins

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Deed of trust.

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Nevada has no mortgage tax. Nominal fees are charged for recordation and filing of documents.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

A notice of breach and election to sell is recorded and mailed to parties designated by statute. The debtor has 35 days to cure before acceleration. If the debtor does not cure and the loan remains unpaid three months after recordation of the notice of breach, the trustee can notice the sale. The minimum notice period before a sale is 21 days.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Trustee's generally require a trustee's sale guaranty. The premium for the guaranty and the trustee's fees can be substantial in larger transactions. In addition, a real property transfer tax must be paid upon the conveyance to the foreclosure purchaser.

- 5. What is the customary time period for foreclosing a lien on real property?**

If not delayed because of settlement negotiations or otherwise, a foreclosure usually takes slightly less than four months.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Depending on the nature of the entity and its contacts with Nevada, real estate lenders may be required to be licensed as mortgage bankers or mortgage brokers.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Nevada has no usury law.

- 8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

Nevada has a one-action rule which generally requires that in the case of a real estate loan the creditor must proceed against its collateral before it can proceed against the debtor personally. Nevada law also provides that deficiency judgments are basically limited to the difference between

the value of the property and the debt on the date of the foreclosure, with the amount bid at the trustee's sale setting a bottom value for the property. Guarantors are entitled to the benefits of both the one-action and deficiency laws, though in most commercial loans the guarantors can waive the one action rule, but not the deficiency statute.

Contact Information

Jeffrey P Zucker

jzucker@lionelsawyer.com

Lionel Sawyer & Collins

300 South Fourth St. #1700

Las Vegas, NV 89101

Tel 1.702.383.8888 Fax 1.702.383.8845

www.lionelsawyer.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, New Jersey

Prepared by Lex Mundi member firm Day Pitney LLP

- 1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Mortgage

- 2. Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Customary recording fees. There is no mortgage tax.

- 3. Describe manner in which a lien secured by real property is foreclosed.**

Judicial foreclosure.

- 4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

The process can be time consuming, taking many months.

- 5. What is the customary time period for foreclosing a lien on real property?**

9 months to a year in most cases, if not contested.

- 6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

A foreign bank or lender cannot "do business" in New Jersey without a license [either directly or through an agent] or qualification. The penalty is denial of access to the courts of New Jersey. However, by itself, the mere making of a loan secured by NJ real estate is not necessarily "doing business" if the lender limits access to the state to such things as inspection of the property, does not "close" the transaction in the state and does not have an office in the state. Also, a non-bank lender who receives more than \$25,000. in payments from NJ in any year may be required to file a Notice of Business Activities report with the State. Again, the penalty for failing to do this is denial of access to the courts of New Jersey, although the failure can be cured.

- 7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

No limit on a commercial mortgage loan not secured by a one to four family residence, up to the criminal usury amount of 30%.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

None. There is no anti-deficiency law.

Contact Information

Lawrence F. Reilly
lreilly@daypitney.com

Day Pitney LLP
200 Campus Drive
Florham Park, New Jersey 07932

Tel 1.973.966.6300 Fax 1.973.966.1015
www.daypitney.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Oklahoma

Prepared by Lex Mundi member firm Crowe & Dunlevy

1. What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?

A mortgage is the basic instrument used to secure a lien on real property. An absolute deed, intended as security for the payment of money, is deemed to be a mortgage. 46 Okla. Stat. § 1 (2001). Deeds of trust are subject to mortgage laws. 46 Okla. Stat. § 1.1 (2001). Contracts for deed are deemed to be mortgages and subject to rules of foreclosure. 16 Okla. Stat § 11A (2001).

2. Describe national or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.

No mortgage of real property shall be recorded unless a mortgage tax in the amount described below is paid. Mortgage tax is assessed at the rate of \$.10 for each \$100.00 and each remaining fraction thereof, of indebtedness secured by a mortgage where the maturity date of indebtedness is five years or more; \$.08 for each \$100.00 for each mortgage where such mortgage is for four years or more but less than five years; a tax of \$.06 for each \$100.00 where such mortgage is for three years or more but less than four years; a tax of \$.04 for each \$100.00 where such mortgage is for two years or more but less than three years; and a tax of \$.02 for each \$100.00 where such mortgage is for less than two years. Additionally, the county treasurer shall collect a certification fee of \$5.00 on each mortgage presented for certification. Such tax and certification fee may be paid by the mortgagor, the mortgagee or any other interested party. Mortgage tax may be paid by the mortgagor, the mortgagee or any other interested party. 68 Okla. Stat. §1904 (2001). If the principal indebtedness secured is not determinable from the terms of the mortgage, the mortgage shall be taxable upon the value of the property covered by the mortgage, which shall be determined by the county treasurer to whom the mortgage is presented for taxation, unless at the time of presenting the mortgage for taxation, the owner of the mortgage files with the county treasurer a sworn statement of the maximum amount secured by the mortgage. Such amount shall be the basis for assessing the tax levied. 68 Okla. Stat. § 1906 (2001).

3. Describe manner in which a lien secured by real property is foreclosed.

Mortgage on real estate can be judicially foreclosed in the district court of the county in which the real property is located. 12 Okla. Stat. § 131, 686 (2001). Property must be appraised, unless waived, and if not waived, may not be sold for less than two-thirds appraised value. Sale cannot be held less than thirty days after first publication of notice of sale. Order of sale must conform to judgment. 12 Okla. Stat. § 760-65 (2001). Party for whom judgment rendered is entitled to reasonable attorney's fee. 42 Okla. Stat. § 176 (2001). Sale must be confirmed by the court. 12 Okla. Stat. § 765 (2001). Sheriff executes foreclosure deed. 12 Okla. Stat. § 766 (2001). Mortgages can be nonjudicially foreclosed pursuant to the Oklahoma Power of Sale Mortgage Foreclosure Act, 46 Okla. Stat. § 40 et seq. (2001). Such power must be granted by the mortgagor to the mortgagee in the mortgage. 46 Okla. St. § 43A.1 (2001). In order for the power to be enforceable, the mortgage must state in bold and underlined language, substantially as follows: A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage. 46 Okla. Stat. § 43A.2.a (2001).

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

None.

5. What is the customary time period for foreclosing a lien on real property?

The customary time period for a judicial or non-judicial foreclosure on real property is between four and six months.

6. Are there national or other governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

There are no such state or local governmental permissions required.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

For commercial loans, the ceiling is 45% per annum. 14A Okla. Stat. § 5-107 (2001). For consumer loans, the ceiling is 10% per annum, 14A Okla. Stat. § 3-201 (2001), but the ceiling may be raised to 13% where the loan is primarily secured by interest in land and other conditions are met, 14A Okla. Stat. § 3-105 (2001). Corporations are prohibited from pleading usury in any suit to recover indebtedness. See 18 Okla. Stat. § 1129 (2001). Oklahoma has not opted out of application of the Federal usury law of 12 U.S.C.S. § 1735f-7a(b) applicable to certain residential federally related mortgage loans.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

No mortgage or conveyance shall be valid unless in writing and signed by both husband and wife, where both are living and not divorced or legally separated. 12 Okla. Stat. § 2 (2001).

Contact Information

Michael S. Laird

michael.laird@crowedunlevy.com

Crowe & Dunlevy

20 North Broadway Avenue Suite 1800
Oklahoma City, Oklahoma 73102

Tel 1.405.235.7700 Fax 1.405.239.6651
www.crowedunlevy.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Tennessee

Prepared by Lex Mundi member firm Bass, Berry & Sims PLC

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage or deed of trust may be used to create a lien on real estate to secure an indebtedness. Deeds of trust, however, are much more common and the preferred method for creating a lien on real estate, and mortgages are rarely used.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Tennessee imposes a tax on the privilege of publicly recording any instrument evidencing an indebtedness, including deeds of trust and mortgages, in the amount of 11.5¢ for each \$100, or major fraction thereof, of principal indebtedness in excess of \$2000. Tenn. Code Ann. § 67-4-409(b). If some of the property securing payment of the indebtedness is located in Tennessee and some is located outside of Tennessee, there is another optional method of computing the tax that may reduce the tax amount. In addition to the state recordation tax, the county register of deeds where the instrument is being recorded requires a register's fee for recording. This fee will vary depending on the type and length of the instrument but is generally \$5.00 per page plus a nominal electronic fee.

3. **Describe manner in which a lien secured by real property is foreclosed.**

While both judicial and non-judicial foreclosures are available in Tennessee, non-judicial foreclosure is the preferred mechanism generally used to foreclose where the deed of trust or mortgage contains a power of sale clause. The terms of a non-judicial foreclosure are generally governed by language in the deed of trust or mortgage. Although statutory language and case law suggest that minimum statutory notice requirements can be overridden by provisions in the deed of trust or mortgage, non-judicial foreclosure sales are generally held only after the prescribed statutory notice. The statute requires at least 3 different advertisements for the foreclosure sale in a newspaper published in the county where the real property is located, with the first advertisement being published at least 20 days before the sale.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

Applicable notice requirements must be followed for the foreclosure sale.

5. **What is the customary time period for foreclosing a lien on real property?**

While a non-judicial foreclosure typically takes around 60 days, it is possible for foreclosure to happen much sooner. As previously discussed, the statute generally only requires 20 days' notice before a foreclosure sale. Language in the deed of trust or mortgage may or may not be able to decrease this statutory notice period further.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No. A foreign bank or other foreign lender generally is not required to qualify to do business in Tennessee merely by making real estate loans secured by real property in Tennessee or by exercising any right or remedy provided in the loan documents. Note, however, that the management and rental of real property in Tennessee acquired in connection with the enforcement of a deed of trust or mortgage may be considered transacting business in Tennessee if the management and rental is for an unreasonably long period of time, the owner is not attempting to liquidate its investment or the owner is maintaining an office or agency in Tennessee.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

Tennessee's usury statute generally requires interest to be no greater than 4 percentage points over the average prime loan rate for the most recent week for which such rate has been published by the Federal Reserve System's board of governors, but in no event more than 24% per annum. There are a number of exceptions and variations of this depending on the circumstances; thus, Tennessee counsel should be consulted to determine compliance for any particular transaction.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property. If a foreclosure sale is not properly conducted, however, the person conducting the sale may be liable to the borrower or guarantor for injuries incurred due to the improper sale.

Contact Information

D. Mark Sheets
msheets@bassberry.com

Bass, Berry & Sims PLC
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238

Tel 1.615.742.6200 Fax 1.615.742.6293
www.bassberry.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Virgin Islands

Prepared by Lex Mundi member firm Dudley, Topper and Feuerzeig, LLP

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the instrument used to create a line on real estate to secure an indebtedness.

2. **Describe territorial or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

A recording fee of approximately one tenth of one percent of the amount secured is payable upon recording a mortgage. A release fee equal to 25% of the recording fee is payable upon recording a release of mortgage.

3. **Describe manner in which a lien secured by real property is foreclosed.**

A mortgage must be foreclosed by filing an action for foreclosure in the Superior Court of the Virgin Islands or the District Court of the Virgin Islands (if there is federal jurisdiction).

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

The principal cost for foreclosing a lien on real property consists of legal fees associated with a judicial foreclosure action. In addition, the foreclosure sale must be advertised in a local paper and the conveyance to the purchaser at foreclosure is subject to a stamp tax of between 2-3.5% of the value of the property. There are no significant impediments to foreclosing a lien on real property other than the time involved.

5. ***What is the customary time period for foreclosing a lien on real property?***

There is no customary time period for foreclosure – it depends on the judge assigned to the case and his or her docket, as well as any actions taken by the debtor to avoid or delay the foreclosure process. Total time can vary from around six months to two years or more.

6. **Are there territorial or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

A foreign lender engaged in the business of making mortgage loans in the U.S. Virgin Islands must obtain a license to do so from the Office of the Lt. Governor. A lender making an isolated loan transaction in the U.S. Virgin Islands but not regularly doing business in the U.S. Virgin Islands or holding itself out as offering loans in the U.S. Virgin Islands has not traditionally been deemed subject to the licensing laws.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

There are legal limits on the amount of interest that may be charged on certain first priority mortgage loans where the amount secured is \$100,000 or less. The limit is equal to 1.5% above the Federal Home Loan Mortgage Corporation's posted yield on 30 year standard conventional fixed rate

mortgages committed for delivery within 60 days, rounded to the nearest ¼%. Certain loans where the amount of the loan is \$9,000 or less are subject to an interest rate cap of 18.5%. These interest rate limitations do not apply to loans to entities, loans made for business purposes, loans with variable or convertible rates, or to home equity loans. Except as set forth above, mortgage loans are not subject to interest rate limitations.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are none.

Contact Information

William S. McConnell
wmcconnell@dtflaw.com

Dudley, Topper and Feuerzeig, LLP.
1000 Frederiksberg Gade
St. Thomas, US Virgin Islands 00804

Tel 1.304.774.4422 Fax 1.340.715.4400
www.dtflaw.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides

Issues Relating To Finance

USA, Virginia

Prepared by Lex Mundi member firm McGuireWoods LLP

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A deed of trust is used to create a lien on real estate to secure indebtedness in Virginia.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

State recordation taxes on a deed of trust are imposed at a rate of \$0.25 per \$100 or portion thereof that is secured, based on the maximum amount that may be outstanding at any time, up to \$10,000,000. For amounts secured above \$10,000,000, an adjusted schedule is imposed. If the amount secured cannot be ascertained, the tax is based on the fair market value of the conveyed property. Va. Code §58.1-803.

Deeds of trust are also subject to local recordation taxes. Local recordation taxes vary by city or county, but are generally one-third of the state recordation tax.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Non-judicial foreclosure is available and typically used in Virginia to foreclose a lien secured by real property. A trustee may conduct the foreclosure sale without the involvement of the courts.

4. **Describe any significant costs of or impediments to foreclosing a lien on real property.**

There are strict statutory notice and advertisement requirements that must be followed in a foreclosure proceeding. Va. Code §§55-59.1 and 55-59.2. The foreclosure costs may include a "reasonable commission" to the trustee under Va. Code §55-59.4.

5. **What is the customary time period for foreclosing a lien on real property?**

An uncontested non-judicial foreclosure customarily takes 60 -90 days.

6. **Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

Generally, no additional state or other local governmental permissions, approvals or licenses are required for foreign banks or other foreign lenders to make real estate loans secured by real property. Va. Code §6.1-5. However, this may vary, for example, if the lender maintains a lending office in Virginia.

7. **What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Generally, loans secured by a deed of trust will be enforced as agreed upon in the loan documents. Va. Code §6.1-330.69. The defense of usury is also not available for loans made for "business or

investment purposes". Va. Code §6.1-330.75.

8. **Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

As a matter of practice, a guaranty governed by Virginia law should include provisions whereby the guarantor waives its rights under Va. Code §§49-25 and 49-26. These statutes allow a guarantor to require, by notice in writing to a creditor, that such creditor first sue the principal debtor before seeking a remedy against the guarantor. In the case of an absolute guaranty, the holder of the guaranty does not have to exhaust its remedies against the principal debtor before proceeding against the guarantor.

Contact Information

Nancy R. Little, Esq.
nlittle@mcguirewoods.com

McGuireWoods LLP
901 E. Cary Street
Richmond, Virginia 23219

Tel 1.804.775.1000 Fax 1.804.775.1061
www.mcguirewoods.com

This guide is part of the Lex Mundi Global Practice Guide Series which features substantive overviews of laws, practice areas, and legal and business issues in jurisdictions around the globe. View the complete series of Lex Mundi Global Practice Guides at: www.lexmundi.com/GlobalPracticeGuides