



Security over Collateral

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1. Can assets be charged, liened and/or encumbered in your jurisdiction? Please insert any exemptions, if any.

Yes, in principle all assets (real and non real property, tangible and intangible assets) may be charged, liened and/or encumbered¹.

2. In your jurisdiction, under what circumstances may security arrangements be subjected to choice of law and/or choice of forum clauses (does it matter, whether the security itself is located abroad and/or governed by foreign law [e.g. a pledged claim])? What is the market practice in your jurisdiction? Is there a treaty on this in your jurisdiction, whether bilateral or multi-lateral? Are there any requirements for enforcement in your jurisdiction?

Under Uruguayan conflict of law rules the parties to an agreement are not allowed to choose the applicable law and/or forum². On the contrary, the applicable law shall be determined by the application to the agreement of the Uruguayan conflict of law rules. A choice of law shall be considered valid and upheld by a Uruguayan Court, only if the law determined to be applicable pursuant to Uruguayan conflict of law rules allows such choice of law. Regarding the enforceability of such choice of law, Uruguayan Courts

¹ Article 3, Law 17.228 (2000); articles 2292 – 2321 and 2322 - 2348 Civil Code; articles 741-765 and 766 – 787 Commercial Code.

² Article 2403 Civil Code.

shall uphold a foreign Court ruling that is, among other issues, granted by a competent Court according to Uruguayan conflict of law rules and where the law applied by such Court has been the law determined as applicable according to such Uruguayan conflict of law rules.

What is the market practice in your jurisdiction?

N/A

Is there a treaty on this in your jurisdiction, whether bilateral or multi-lateral?

Uruguay is a party to the 1889 and 1940 Montevideo Treaties on Civil International Law³ (the 1889 and/or 1940 “Montevideo Treaty”).

According to said treaties, assets of any nature are exclusively governed by the law of the country where such assets are located regarding their quality, possession, transfer and all the relations of real nature derived from such assets⁴. Same rule applies to cases not covered by the Treaties due to Section 2398 of our Civil Code.

Moreover, regarding the *agreement* by which the parties constitute a security interest, article 36 of the 1889 Montevideo Treaty and article 40 of the 1940 Montevideo Treaty establish that subordinate contracts are governed by the law of the main obligation. Same rule is applied as a general principle due to a specific reference to 1889 Montevideo Treaty made by the Civil Code.

Are there any requirements for enforcement in your jurisdiction?

Requirements for enforcement will depend on the existence of applicable treaties (commercial, procedural etc) with the country where such judgement was issued. In the presence of an applicable treaty, requisites and formalities will be those provided in such treaty. In the absence of such treaties, the foreign judgment (or arbitral award) is subject to the process of *exequatur* before the Uruguayan Supreme Court. Requisites for the recognition and enforcement of foreign judgements are numbered in article 539 of the Civil Procedure Code as follows:

- (i) The foreign judgement must comply with all formalities and requisites required for the enforceability thereof under the laws of the country where the same was issued;
- (ii) The judgement must also be a final judgement not subject to any appeal or any other action (“*res judicata*”).
- (iii) The foreign judgement must have been ruled by a competent court as per Uruguayan conflict of law rules.
- (iv) Evidence of valid service of process upon the parties to the action and also evidence that the defendant had a due opportunity to present its defence, as per the laws of the country of the foreign judgement.
- (v) The foreign judgement must not be against Uruguayan public policy principles (“*orden público*”).

³ Incorporated by Laws N° 2.207 (1892) and N° 10.272 (1942). Parties to the 1889 treaty are: Argentina, Bolivia, Colombia, Paraguay, Perú, and Uruguay; parties to the 1940 treaty are Argentina, Paraguay and Uruguay.

⁴ Article 26 of the 1889 Montevideo Treaty; Article 32 of the 1940 of the Montevideo Treaty.

In case the Supreme Court decides that the foreign judgment can be enforced, and henceforth the “*exequatur*” order is granted, the Supreme Court of Justice will then send the foreign judgment to the competent court (as per Uruguayan jurisdiction regulations) for its enforcement. Under such lower court and on the grounds of the foreign judgment the plaintiff may file a summary action against the debtor, requesting the enforcement of the foreign judgment.

3. In your jurisdiction, are floating charges or security over the overall assets of an entity accepted, and if so in what terms?

Floating charges on the *overall* assets of an entity are not accepted (generically speaking)- each asset or category of assets would have to be individualized or determined. However, floating charges may be constituted over a determined or determinable category of assets. In order to constitute a floating charge in these terms the security agreement must *expressly* state that assets that enter the estate of the entity may substitute or complement assets initially charged and located in the same place as those initially charged⁵.

4. In relation to the following types of assets, please explain in your jurisdiction the types of security that can be created or granted, if the security requires any type of registration or perfection requirements, an estimate of cost (including applicable taxes and any other duties/ costs) and timing for granting such security, and any special considerations regarding the asset type:

(a) Aircraft;

The type of security that may be created over aircrafts is the mortgage (“Hipoteca”)⁶. A public deed must be signed by debtor and creditor (*security agreement*) before a Notary Public and registry (*filing*) of said agreement must be made in the “*Registro Nacional de Aeronaves*”⁷.

Estimated cost: There is a fixed cost of 21.5% over the value of the aircraft; variable costs vary from US\$ 50 to US\$ 200 (American dollars).

Estimated timing: approximately 30 days.

(b) Bank Accounts;

The type of security that may be created over bank accounts is either a pledge (“Prenda”) or a registrable pledge (“Prenda sin Desplazamiento”). In the case of the pledge, the agreement must be done in writing, signed by the title-holder(s) of the account and the creditor and notified to the bank; dispossession of the funds of the account may be effective or symbolic. In the case of the registrable pledge, the agreement must be done in writing, signed by the title-holder(s) if the account and the creditor (*security agreement*) and signatures must be certified by a Notary Public. Registry (*file*) of said agreement must be made in the “*Registro Nacional de Prendas sin Desplazamiento*”⁸. Notification of the agreement to the bank is advisable in

⁵ Article 3.2 Law 17.228

⁶ Article 2331 Civil Code

⁷ Article 61 Law 17.292 (2001)

⁸ Article 4, Law 17.228

application of civil law principles (although not expressly required in order to constitute this type of security).

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(c) Animals, Crops (in ground and severed) and Timber;

The type of security that may be created over animals, crops and timber is a registrable pledge (“Prenda sin Desplazamiento”). The agreement must be done in writing, signed by debtor and creditor (*security agreement*) and signatures must be certified by a Notary Public. The contract must state location of the assets (*collateral*). Registry (*file*) of said agreement must be made in the “*Registro Nacional de Prendas sin Desplazamiento*”⁹.

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(d) Equipment;

The type of security that may be created over equipment is either a pledge (“Prenda”) or a registrable pledge (“Prenda sin Desplazamiento”), depending on the interests of debtor and creditor. In both cases, the agreement must be done in writing, signed by debtor and creditor (*security agreement*). For the pledge, dispossession of the equipment from the debtor to the creditor (or third party) must take place. For the registrable pledge, the debtor maintains possession of the equipment. Certification of signatures of the agreement by a Notary Public and registry (*file*) of said security agreement must be made for the registrable pledge in the “*Registro Nacional de Prendas sin Desplazamiento*”¹⁰.

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(e) Intellectual Property;

The type of security that may be created over Intellectual Property is a registrable pledge (“Prenda sin Desplazamiento”). An agreement must be done in writing, signed by debtor and creditor (*security agreement*), and signatures must be certified by a Notary Public. Registry (*file*) of said agreement must be made in the “*Dirección Nacional de la Propiedad Industrial*”¹¹.

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(f) Inventory

The type of security that may be created over inventory is a registrable pledge (“Prenda sin Desplazamiento”). The agreement must be made in writing, signed by debtor and creditor (*security agreement*); signatures must be certified by a Notary Public. The contract must determine assets or category of assets included in the inventory that will be charged and state location of said assets (*collateral*). Registry (*file*) of said agreement must be made in the “*Registro Nacional de Prendas sin Desplazamiento*”.

⁹ Article 301, Law 17.296 (2001)

¹⁰ Article 4, 8 Law 17.228

¹¹ Article 4 D), Law 17.228

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(g) Leases;

Theoretically, a pledge may be created over the rights resulting from a lease agreement as a registrable pledge (*Prenda sin desplazamiento*), although it is not common. In practice a secured interest over the rights under a lease agreement is created by means of an assignment of such rights. . See k) below.

(h) Mineral Interests, including Hydrocarbons;

The type of security that may be created over mineral interests (this is, over rights granted from a government concession to exploit minerals since these are of public domain), is a mortgage (“Hipoteca”)¹². A public deed must be signed by debtor and creditor (*security agreement*) before a Notary Public and registry (*file*) of said agreement must be made in the “*Registro General de Minería*”.

Estimated cost: there is a fixed cost of 21.5% over the value of the property; variable costs vary from US\$ 50 to US\$ 200 (American dollars).

Estimated timing: approximately 30 days.

(i) Promissory Notes and Chattel Paper;

The type of security that may be created over promissory notes is a pledge (“Prenda”). The endorser of the promissory note must endorse the note expressly stating that the endorsement is made as “collateral of”, or in “prenda” or other equivalent that denotes that the endorsement is made as securement of payment¹³.

Estimated cost: No costs are included.

Estimated timing: No relevant timing is included.

Regarding chattel paper there is no such equivalent in our jurisdiction.

(j) Real Estate;

The type of security that may be created over real estate is a mortgage (“Hipoteca”). A public deed must be signed by creditor and debtor (*security agreement*), before a Notary Public and registry (*file*) of the document must be made in the “*Registro Nacional de la Propiedad Inmueble*”.

Estimated cost: there is a fixed cost of 21.5% over the value of the property; variable costs are an estimated US\$ 200 (two hundred American dollars).

Estimated timing: approximately 30 days.

(k) Receivables (credit rights under contracts or invoices)

The type of security that may be created over credit rights under contracts in general is either an assignment of contract rights as security (“*Cesión de Créditos en Garantía*”¹⁴), or a registrable pledge (“*Prenda sin Desplazamiento*”). In the first case, an agreement

¹² Article 16, Mineral Code

¹³ Article 46, Law 14.701 (1977)

¹⁴ Article 2298 Civil Code

must be done in writing, signed by assignor and assignee and the document (title) of the credit must be handed to the assignee. The parties must notify the obligor in order for payment to be made to the assignee. In the second case, an agreement must be made in writing, signatures must be certified by a Notary Public, and registry (*file*) of the agreement must be made in the “*Registro Nacional de Prendas sin Desplazamiento*”.

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(l) Rights under Contracts (excluding Receivables);

Please see Receivables.

(m) Shares (in book-entry and certificate form and other securities);

The type of security that may be created over shares held in certificate form is the pledge (“*Prenda*”)¹⁵. An agreement must be made in writing among debtor and creditor and dispossession of the shares from the debtor to the creditor or to a third party (depositor) must occur.

In the case of the shares and/or securities held in-book entry form, the type of security will be the registrable pledge (“*Prenda sin Desplazamiento*”). An agreement must be made in writing among debtor and creditor. Registry of the agreement must be made before the entity which holds book-entry of said shares or securities¹⁶ which will make the proper note in the books

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

(n) Vessels;

The type of security that may be created over vessels is a mortgage (“*Hipoteca*”)¹⁷. A public deed must be signed by debtor and creditor (*security agreement*) before a Notary Public and registry (*file*) of the document must be made in the “*Registro Nacional de Buques*”¹⁸.

Estimated cost: there is a fixed cost of 21.5% over the price of the value of the vessel; variable costs vary from US\$ 50 to US\$ 200 (American dollars).

Estimated timing: approximately 30 days.

(o) Vehicles;

The type of security that may be created over vehicles is either a pledge (“*Prenda*”) or a registrable pledge (“*Prenda sin Desplazamiento*”), depending on the interests of debtor and creditor. In both cases, the agreement must be done in writing, signed by debtor and creditor (*security agreement*). For the pledge, dispossession of the vehicle from the debtor to the creditor (or third party) must take place. For the registrable pledge, the debtor maintains possession of the vehicle. Certification of signatures of the agreement

¹⁵ Article 309, Law 16.060 (1989).

¹⁶ Article 12, Law 16.749 (1996)

¹⁷ Article 2331 Civil Code, Article 773 Commercial Code

¹⁸ Article 22 Law 16.387 (1993)

by a Notary Public and registry (*file*) of said security agreement must be made for the registrable pledge in the “*Registro Nacional de Automotores*”¹⁹.

Estimated costs: No relevant costs are involved.

Estimated timing: approximately 7 days.

(p) Business as an ongoing concern.

The type of security that may be created over business as an ongoing concern is a registrable pledge (“*Prenda sin Desplazamiento*”). A written agreement must be made, signed by debtor and creditor. Certification of signatures by a Notary Public and registry of said agreement must be made in the “*Registro Nacional de Comercio*”. The registrable pledge will include concrete assets with the exception of merchandise, raw materials and goods unless otherwise expressly agreed upon among the parties in the security agreement.

Estimated cost: No relevant costs are involved.

Estimated timing: approximately 7 days.

Please note that for all cases mentioned above we have assumed that debtor is also the owner of the assets; otherwise, assent from the owner will be required to perfect the security interest.

5. Please explain briefly for each type of assets the procedure for enforcement (judicial and extra-judicial). Is it possible to enforce security governed by another jurisdiction? If yes, what is the procedure?

Procedures vary regarding the type of security constituted over the asset (*prenda*, *prenda sin desplazamiento*, *hipoteca*). Judicial enforcement of the *prenda* (art. 2307 Civil Code), and *hipoteca* (2337-2344 Civil Code) are similar and follow a common procedure established in article 377 of the Civil Procedure Code. Judicial enforcement of the *prenda sin desplazamiento* has been regulated separately in articles 14-17 of Law 17.288. Judicial enforcement applies unless the parties expressly agree upon an extra-judicial enforcement, in which case there is no need for attachment of the assets (*embargo*) or dispossession of same; the creditor sells the asset directly.

If the security is located within Uruguay, and governed by another jurisdiction, security may be enforced by local judges (a) given there is a previous court judgment issued by a foreign court awarding payment of our obligation (such judgement will have to be submitted to the *exequatur* process mentioned above), or (b) by application of the foreign law by local judges to obtain judgement awarding payment of an obligation in order to commence enforcement procedures.

6. Can a trustee or security agent be used in your jurisdiction, or must security be granted in favour of all lenders?

Exceptionally the only cases in which a trustee or security agent may be used is for financial trusts²⁰, and corporate debt issuance²¹.

¹⁹ Article 4 A), Law 17.228

²⁰ Articles 7, 42 Law 17.703 (2003).

²¹ Article 39, Law 16.749 (1996)

7. In bankruptcy or insolvency scenarios, what are the suspect periods, is claw-back possible, and what other types of rights (tax debts, employees, etc.) have preference over security granted?

The law states a general suspect period of 1 (one) year prior to the ruling that declares bankruptcy²², and specific suspect periods for certain acts of a maximum period of 3 (three) years prior to the ruling declaring bankruptcy. Under Uruguayan law certain transactions such as donations made during the suspect period are legally presumed fraudulent, and as such are subject to be declared null and void by the judge; on the contrary, transactions made during the suspect period which do not have a legal presumption of fraud will need to prove this quality in order for said transactions to be null and void²³.

In insolvency scenarios the law classifies rights of creditors firstly attending to the date the debt was acquired (before or after bankruptcy²⁴). Secondly the law classifies creditors (a) with privileges and (b) with preferences. Whether the creditor has a privilege or has a preference is a matter of law (public order) and may not be subject to private agreements. The law establishes that creditors with a preference may execute assets of the debtor independently to the bankruptcy proceeds. Creditors with a preferred credit are (a) creditors with secured assets (*prenda*, *prenda sin desplazamiento*, or *hipoteca*) (b) labour creditors²⁵ (c) tax creditors²⁶, in the aforementioned order.

8. In your jurisdiction, can borrowers or guarantors subordinate their claims and if so in what terms?

Yes. Terms may be agreed upon by the parties.

9. What are the consequences of a transfer, assignment or novation of an underlying credit in your jurisdiction (is new security necessary, is the security automatically transferred, etc.)

If a credit is transferred or assigned, security of such credit is automatically transferred with the credit to the assignee²⁷. In the case of novation of the credit, the extinction of the credit (by novation) does not allow security to be transferred; therefore, unless otherwise expressly agreed by debtor and creditor²⁸, a new security is needed.

10. Can you have on top of a security in your jurisdiction, another layer consisting of an assignment of the collateral concerned conditional upon default by the debtor?

²² Article 1643 Commercial Code

²³ Article 1602-1603 Commercial Code

²⁴ These are commonly referred to as *acreedores* (creditors) “*en la masa*”, and “*de la masa*”

²⁵ This is, former employees with a *res judicata* sentence acknowledging the credit, article 11 Law 14.188 (1972)

²⁶ Namely the *Dirección General Impositiva* (internal revenue agency), articles 30, 31 Law 15.646 (1984)

²⁷ Article 1761 Civil Code

²⁸ Article 1535 and 1536 Civil Code

No.

11. Are step-in rights lawful in your jurisdiction or does any action to take control require the creditors to go through a court process?

In principle, step-in rights in favor of creditors without a court process are not provided for in our jurisdiction. Exceptionally, in the case of security over shares, parties may expressly agree that shareholders rights will be exercised by the creditor²⁹.