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Comparative analysis: pledges vs mortgages

In Panama, there is no general security interest for lenders. Instead, Panamanian law recognizes both personal and real guarantees. The two most common real guarantees used by borrowers in Panama to secure lenders' debts are the pledge and the mortgage.

Pledges

A pledge is a guarantee granted over all kinds of moveable assets. The control of said moveable assets must be physically delivered to the creditor or a third party for the pledge to be perfected (with limited exceptions). Examples of movable assets often used in pledges to lenders are stocks of companies, securities, and cash. For a pledge to be constituted it must be treated with the same level of legal formality as the agreement that sets out the obligation it guarantees.

Mortgages

Mortgages are guarantees that are granted over real estate property, ships, and certain moveable assets (such as machinery and equipment). However, unlike pledged assets, control over mortgaged assets is maintained by the owner of the assets. Furthermore, mortgages must be registered in the Public Registry of Panama for their perfection.

Differences Between Pledges and Mortgages

There are several practical considerations in evaluating the convenience of a pledge agreement over a mortgage. Firstly, a pledge can be executed in a private document and does not have to be registered, making it simpler and more cost-effective. Meanwhile, a mortgage must be registered in the Public Registry of Panama and granted on a public deed.

The fact that the mortgage needs to be granted on a public deed and registered in the Public Registry, creates several formalities that need to be complied with:

1. The public deed must include a summary of the obligation guaranteed by the mortgage.
2. The signatories must be in Panama and appear before the notary public to sign the deed.
3. The creation of the mortgage also implies the creation of other ancillary documents, such as powers of attorney, that must be issued in Spanish or translated by a certified Panamanian public translator; further, any documents executed abroad must be duly apostilled before being incorporated in the Panamanian deed.
4. The mortgage's registration will result in registration fees, stamp tax, and notary fees.

Furthermore, since mortgages are registered with the Public Registry of Panama, the transaction and the parties thereto are of public record. Finally, pledges can be executed either judicially or extrajudicially, whereas mortgages must be judicially executed.

Similarities Between Pledges and Mortgages

Despite the differences mentioned above between pledges and mortgages, there are several similarities that do not pose a particular advantage or disadvantage when comparing one security with the other. Firstly, Panamanian law treats both pledges and mortgages as valid legal obligations in case of reorganization or bankruptcy. Therefore, the pledgor or mortgagor will enjoy a first-priority security interest over the assets. Further, those assets will not enter the bankruptcy proceeding unless the pledgor or mortgagor waives their rights. Secondly, neither the pledge nor mortgage agreements, as standalone structures, have material tax considerations.

Furthermore, certain rights in the contracts can be assigned, for both mortgages and pledges, but are subject to what the respective agreement says on the matter. However, generally, both parties must agree on any assignment.

Conclusion

When creating guarantees for a debt, pledges and mortgages are amongst the most common and essential methods for securing debt. Yet, it is advisable to hire an attorney to manage the process of creating the guarantee and help decide which is the best structure for the specific debt being secured.

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