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Securitisation

Mexico
Alejandro Sainz, Daniel Saltzberg Koris,
Octavio L. Hernández Negretti and Santiago Alessio-Robles Seguí
Sainz Abogados

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MEXICO

Law and Practice

Contributed by:
Alejandro Sainz, Daniel Saltzberg Koris, Octavio L. Hernández Negretti and Santiago Alessio-Robles Seguí
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Contributed by: *Alejandro Sainz, Daniel Saltzberg Koris, Octavio L. Hernández Negretti and Santiago Alessio-Robles Seguí,* ***Sainz Abogados***

1. STRUCTURALLY EMBEDDED LAWS OF GENERAL APPLICATION

1.1 Insolvency Laws

The Mexican Bankruptcy Law (*Ley de Concursos Mercantiles*) protects the preservation of the debtor as a going-concern (unless the proceeding is in the liquidation stage), in order to reach a restructuring plan with the required majority of creditors. It also classifies creditors into different categories/ranks and provides different seniority to their claims. The main types of claims recognised by the Mexican Bankruptcy Law, in ranking priority, are as follows:

- labour claims and expenses to administer the estate and credits against the estate;
- secured;
- unsecured taxes;
- unsecured; and
- subordinated (intercompany claims).

The only claims recognised and characterised as "secured" are those in favour of creditors holding a security interest over assets owned by the debtor, provided that such collateral is structured as mortgages (a real property, in rem, guarantee) or pledges (ordinary pledge or debtor in possession/floating/non-possessory pledge).

Consequently, a crucial feature of public securitisations and other types of private structured financing transactions is to attempt to isolate the assets through special vehicles that aim to be bankruptcy remote. In Mexico, this is normally achieved (although it can be challenged by third parties) by transferring the corresponding assets into a separate special purpose vehicle/entity, in the form of a "true sale" trust agreement (*fideicomiso*).

Therefore, assets that have been legally transferred into a trust should be deemed, in principle, to be segregated from the debtor's estate if the debtor is subject to a voluntary or involuntary bankruptcy process (*concurso mercantil*) (as provided in Article 71(VII)(e) of the Mexican Bankruptcy Law). It must be proved that the transfer of the assets into the vehicle was implemented as a true sale, pursuant to which the trust (through the trustee thereunder) shall be considered the title holder of the assets, as opposed to a simple guaranty vehicle that continues to be controlled by the debtor.

Accordingly, if the trust was structured simply as a security instrument, then such transaction could be challenged as not being a true sale mechanism, in which case its assets might be considered as part of the estate of the debtor for the purposes of the applicable terms of the Mexican Bankruptcy Law, and thus the claims covered by such deficient vehicle could be considered as unsecured claims, ranking at the bottom of the priority waterfall under a concurso proceeding, ahead of subordinated claims only.

1.2 Special-Purpose Entities

As explained, trusts (*fideicomisos*) are the most common form of SPE for securitisations in Mexico. With a few exceptions for security trusts, only financial institutions (banks, acting through their trustee division) can act as trustees under the trust agreements. In addition, trusts used for public securitisations, as issuers, would be managed by a technical committee (equivalent to a company's board of directors), at least 25% of which must be independent members.

Although Mexican trusts are commercial contracts governed by Mexican laws (which provide for certain mandatory provisions that cannot be modified or waived), this type of vehicle allows for enough flexibility and is widely used for these purposes. Trusts used for public securitisations and similar private secured transactions typically

consist of three parties: the settlor, the trustee, and the beneficiary (investors).

Securitisations can also be structured through a direct or indirect subsidiary of the debtor/issuer, as an SPE. However, in the event of bankruptcy, creditors would have the right to request for the SPE to be jointly declared insolvent, but without consolidating the estate of the SPE with the estate of the main debtor. Although the assets transferred to the SPE would not be consolidated into the estate of the principal debtor, its creditors would have direct actions against the SPE and could drag it into the bankruptcy procedure. Therefore, it is advisable to structure securitisations through true sale trust mechanisms.

1.3 Transfer of Financial Assets

The general rule is that the transfer of real estate in favour of a trust must be evidenced by a written agreement and formalised before a notary public (and registered before the corresponding Public Registry of Property) in order to be effective against third parties. However, the transfer of financial assets (ie, accounts receivables) is effective upon an agreement between the assignor and the assignee being reached, regardless of such agreement being documented or formalised in the form of a notarial deed, provided that the debtor of such receivable is duly notified. In the case of public securitisations, and since the transaction documents will be subject to review by the authority and described in legal opinions, a written agreement will be necessary.

Obtaining the authorisation from the debtor of the account receivable is not necessary for transferring financial assets, unless it is expressly required in the original documentation of the claim being transferred. However, such assignment of rights will become effective against the debtor once the latter is notified either before two witnesses or before a Mexican notary public, and against third parties as from the date of its filing before the Sole Registry of Movable Assets (*Registro Único de Garantías Mobiliarias* – the RUG).

Also, generally, for an assignment in favour of a Mexican trust to be considered a true sale, whether the assignor of the assets received adequate consideration or full market value in exchange of the transferred assets should be analysed, in order to evidence an assignment rather than a simple grant of a security interest. If the transfer is performed as a "true sale", then the assignment of the receivables should not be considered as collateral to a credit facility and, in principle, such assets should not be subject to bankruptcy look-back/claw-back provisions (ie, the period when transactions can be reviewed and, in some cases, declared null and void, to protect creditors from debtors who have engaged in fraudulent activity that diminishes the value available for such creditors).

1.4 Construction of Bankruptcy-Remote Transactions

In order to construct a bankruptcy-remote transaction, the most common vehicle pursuant to Mexican law is a Mexican trust, by means of which the settlor transfers (assigns) assets into the trust estate, for the benefit of the investors (trust beneficiaries). Such trust would normally include a waterfall to allocate the proceeds received in the trust (ie, payment of the costs of the bankruptcy-remote structure, fees, interest, default interest, principal and the remaining amount transferred back to the settlor). The most common types of Mexican trusts are as follows:

- a guarantee trust, in which the settlor transfers and assigns to the trustee (a Mexican bank acting in such capacity) real or personal property or rights to secure the payment of obligations in benefit of the beneficiaries thereunder;

- a source of payment and administration trust, in which certain assets (ie, account receivables) are transferred (through an assignment agreement) to the trust to serve as a source of payment for credit facilities, according to a waterfall of funds to be provided for in the trust agreement; and
- ia "securitisation" trust, in which the assets (ie, account receivables) are undoubtedly transferred into the trust as a true sale perfected mechanism, and the trust is the main debtor or issuer of the securities to be placed in the open market (commercial paper or *certificados bursátiles* – securitised certificates).

However, Mexican courts have issued different – and sometimes contradictory – rulings when determining if certain transactions should be characterised as security trusts or as true sale transactions. These cases have been dealt with on a case-by-case scenario, and there is currently no binding ruling (precedent) on the matter.

2. TAX LAWS AND ISSUES

2.1 Taxes and Tax Avoidance

Pursuant to Mexican tax laws, no withholding tax would be triggered from the payments made by the debtor of the receivables to the SPE. With some exceptions, withholding taxes would be triggered only when the payment is made to the holder of the structured debt instrument (issued by the SPE) to the final beneficiary.

Withholding tax would be payable on the interest paid or due and payable, and the rates depend on the provisions of any applicable international treaties to avoid double taxation to which Mexico is party. Rates for withholding tax may range from 4.9% to 35% (the latter being in the absence of a tax treaty benefit). Depending on the applicable tax treaty, the withholding tax rate could be 10% or 15%. If the securitisation is structured as a loan, and if all informative formal requirements before the Mexican National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* – CNBV) and the Mexican tax authorities are met, a 4.9% withholding rate could apply to the qualified investors; otherwise, a reduced withholding rate would be applicable. Parties must seek special tax advice when structuring, or investing in, a securitisation vehicle, since tax rules may vary from time to time and depend on the tax residence of the issuers and beneficiaries.

It is also customary for certain securitisation documents (particularly those placed with international investors) to provide a "gross-up" mechanism on any potential withholding tax, in the sense that the amounts payable under the corresponding debt instrument shall be paid without deduction for any taxes; if the corresponding borrower is statutorily required to make any tax withholding from any amount payable, then the borrower would be required to pay additional amounts (gross-up) to enable the lenders to receive, after such withholding, an amount equal to the full amount then payable to the lender in the absence of such applicable withholding.

2.2 Taxes on SPEs

Typically, if the securitisation is structured thought a trust, such trust would be transparent for tax purposes. Parties must seek special tax advice when structuring, or investing in, a securitisation vehicle, since tax rules may vary from time to time and depend on the tax residence of the issuers and beneficiaries.

2.3 Taxes on Transfers Crossing Borders

Please see **2.1 Taxes and Tax Avoidance**. In any case, parties must seek special tax advice when structuring, or investing in, a securitisa-

tion vehicle, since tax rules may vary from time to time and depend on the tax residence of the issuers and beneficiaries.

2.4 Other Taxes

Depending on the nature of the assets, other taxes (for instance, value added tax and/or real estate transfer taxes) and income tax for the tax beneficiary of the collection of the account receivables might apply in connection with securitisation transactions. In any case, parties must seek special tax advice when structuring, or investing in, a securitisation vehicle, since tax rules may vary from time to time and depend on how the vehicle was structured and the tax residence of the issuers and beneficiaries, as well as the availability of tax treaties to the case concerned.

2.5 Obtaining Legal Opinions

Obtaining legal opinions on the validity and enforceability of the documentation and securitisation transaction is a requirement by the CNBV in public securitisations, and is also customarily requested by the creditors and investors. The material conclusions and qualifications might vary based on how the transaction was finally documented, the governing laws and jurisdiction of the ancillary documents, the type of underlying assets, the collateral instruments, the existence of guarantors, the nationality of the relevant parties, etc. All legal opinions would likely be qualified by the applicable bankruptcy laws and potential bankruptcy proceedings of the debtors and guarantors.

3. ACCOUNTING RULES AND ISSUES

3.1 Legal Issues with Securitisation Accounting Rules

The only policy is to follow Mexican *Normas de Información Financiera* (NIFs) and to prepare the accounting information to be quarterly and annually disclosed to the stock exchange market following those principles.

Accounting treatment may guide the tests for "true sale" and consolidation. The assignor must transfer the control of the economic benefits of the receivables to the SPE, and is not obliged to repurchase the assets, except under the limited recourse provisions. The assignor must not have control of the SPE to avoid consolidation effects, if applicable.

This guide does not provide any analysis or advice related to accounting rules. Parties must seek accounting guidance when structuring or participating in securitisation transactions.

3.2 Dealing with Legal Issues

Please see **2.5 Obtaining Legal Opinions**.

4. LAWS AND REGULATIONS SPECIFICALLY RELATING TO SECURITISATION

4.1 Specific Disclosure Laws or Regulations

The most important laws or regulations that govern securitisation transactions are as follows:

- the Mexican Federal Civil Code (*Código Civil Federal*);
- the Mexican Code of Commerce (*Código de Comercio*);
- the General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*);
- the Mexican Securities Exchange Law (*Ley del Mercado de Valores*);
- the Mexican Credit Institutions Law (*Ley de Instituciones de Crédito*);

- the general rules applicable to the issuers of securities and other key players in the Mexican Stock Exchange (*Disposiciones de Carácter General aplicables a las emisoras de valores y a otros participantes en el mercado de valores*) and any other general rules that are issued, from time to time, by the CNBV; and
- Mexican tax laws.

4.2 General Disclosure Laws or Regulations

The Mexican Securities Exchange Law and the general rules applicable to the issuers of securities and other key players in the Mexican Stock Exchange (*Disposiciones de Carácter General aplicables a las emisoras de valores y a otros participantes en el mercado de valores*) oblige the issuer of securities registered before the National Securities Registry (*Registro Nacional de Valores* – RNV) to periodically disclose information on the issuer of an accounting, economic, financial and legal nature to the public.

Pursuant to the Mexican Securities Exchange Law and the internal regulation of the Mexican Stock Exchange (*Bolsa Mexicana de Valores*), the issuers of securities registered before the RNV must disclose the following periodic information to the CNBV (for further disclosure to the investors):

- continuing reports regarding corporate acts, resolutions of corporate bodies and any notices in connection therewith to fulfil legal provisions or provisions of the securities issued;
- quarterly unaudited financial statements;
- annual financial statements;
- annual reports of the activities of the corporate bodies of the SPE;
- any report regarding corporate acts approved by the corporate bodies of the SPE;
- any report with relevant information to be disclosed in connection with material events (*eventos relevantes*);
- the balance of the trust estate; and
- in general, any other required information pursuant to the applicable regulations issued by the CNBV.

4.3 Credit Risk Retention

In Mexico there are no special rules on credit risk retention in the sense that the issuer needs to retain a certain percentage of the credit risk of the assets that were transferred (ie, to the trust) as part of the securitisation transaction. In some cases, hedges might be required to cover exchange rate fluctuations. As regulated entities, financial institutions must observe certain credit-risk parameters and guidance prior to entering into certain credit transactions.

4.4 Periodic Reporting

SPEs implementing securitisations must disclose periodic information to the CNBV (for further disclosure to the investors), including quarterly unaudited financial statements, together with reports containing any comment related to the administration of the SPE, the integration of the SPE estate, its operations and financial condition (such quarterly financial statements must be signed by the common representative or legal representative of the SPE, as well as by the Chief Financial Officer of the assignor) and annual audited financial statements (which must also be signed by the same officers).

4.5 Activities of Rating Agencies

Depending on the type of instruments, the targeted investors (public market) and the structure of the corresponding securitisation transaction, the authority might request to independently ascertain the value and grading of the issuance through credit-risk rating opinions to be issued by qualified rating agencies (RAs). Such opinions would need to be obtained prior to the issuance

of the debt instrument that is the subject matter of the qualification.

RAs are regulated by the CNBV. Only seven agencies are currently authorised to operate in México in such capacity: Fitch México, S&P Global Ratings, Moody's de México, HR Ratings de México, Verum, DBRS and AM Best.

The Mexican securities laws and regulations provide penalties for the RAs in case of wrongdoings related to the opinions issued in connection with issuers and securitisation instruments. The authorisation of the RAs might be revoked in the case of serious infringements.

4.6 Treatment of Securitisation in Financial Entities

There are applicable Mexican rules and guidelines that regulated financial entities must observe regarding the treatment of capital, reserves, anti-money laundering and liquidity.

4.7 Use of Derivatives

The use of derivatives is generally governed by the Mexican Securities Exchange Law (*Ley del Mercado de Valores*) and the secondary regulations issued by competent authorities, including guidelines by the Mexican National Bank (*Banco de México*). Penalties for non-compliance are also generally set forth in the Mexican Securities Exchange Law and enforceability relies on the Mexican Banking Commission (*Comisión Nacional Bancaria y de Valores*) (equivalent to the SEC in the US).

4.8 Investor Protection

Issuers and financial institutions must observe rules regarding know-your-client, anti-money laundering, looking-forward statements, and similar provisions that are applicable to securitisation transactions in order to protect the interests of investors. Penalties would be applied by the CNBV, depending on the nature and effects of the infringement.

4.9 Banks Securitising Financial Assets

Please see **4.1 Specific Disclosure Laws or Regulations**.

4.10 SPEs or Other Entities

SPEs used in public securitisations would most likely be organised as trusts. Other secured transactions or private securitisations could take the form of a Mexican private entity – most likely an SA de CV or an SRL de CV (Mexican equivalents to a US corporation or a US limited liability company). In this last scenario, both types of entities are governed by the same corporate rules, have the same tax treatment (in Mexico) and are subject to the same bankruptcy provisions.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

This question is not applicable in Mexico.

4.12 Material Forms of Credit Enhancement

Common credit enhancements include cash reserves, deposits, guarantees, letters of credit and credit default swaps. Additional liquidity facilities and over-collateralisation are also customarily required as a form of credit enhancement.

4.13 Participation of Government-Sponsored Entities

Some government-sponsored entities have participated in securitisations, mainly with respect to housing loans and mortgages, such as:

- *Instituto del Fondo Nacional de la Vivienda para los Trabajadores* (INFONAVIT);
- *Fondo de la Vivienda del Instituto del Seguro Social al Servicio de los Trabajadores del Estado* (FONHAPO);

- *Fideicomiso Fondo Nacional de Habitaciones Populares* (FOVISSSTE); and
- *Sociedad Hipotecaria Federal* (SHF).

4.14 Entities Investing in Securitisation

Insurance companies and pension funds participate as holders of debt instruments structured as securitisations, with some regulatory differences regarding their investments, individual investors and other types of entities, including asset managers.

5. DOCUMENTATION

5.1 Bankruptcy-Remote Transfers

In order to achieve a bankruptcy-remote structure, it is important to carry out the transfer of financial assets to an SPE in the form of a Mexican trust. Such a transaction should imply an adequate consideration or full market value in exchange (as consideration) to support or indicate an outright assignment rather than a grant of a security interest. To cover the above, it is advisable to obtain a fair-market value for the assets as determined by an external and independent appraiser, and for the assignor of the assets to waive any right to use the proceeds from the assets assigned. Such assignment will be perfected if it is carried out under the formalities described in this article.

Although it is common for the assignor and assignee to agree and covenant that the assets will be the property of the SPE, there is a high risk of Mexican courts presiding over bankruptcy procedures to determine that such assets are, in fact, part of the debtor's estate.

5.2 Principal Warranties

The principal warranties used in securitisation documents under Mexican law include the following:

- that the organisation and powers of attorney are valid and existing;
- that authorisations and approvals were obtained;
- that the execution of the securitisation documents will not breach any laws, articles of incorporation or other material agreements of the assignor;
- that the securitisation documents constitute, upon due execution, legal, valid, binding and enforceable obligations of the assignor;
- that no insolvency proceeding has been initiated against the assignor; and
- that no event of default has occurred on the underlying agreement of the assets.

5.3 Principal Perfection Provisions

As provided for in **1.3 Transfer of Financial Assets**, a transfer of rights will become effective against the debtor upon its due notification to such debtor, and against third parties as from the date of its filing before the RUG. In public securitisation transactions, the exercise of rights and remedies – as provided for in the issuance documents – is typically reserved to the common representative, who will act in the best interest of the investors, following their instructions.

5.4 Principal Covenants

The principal covenants used in securitisation documents under Mexican law include the following:

- the obligation of the assignor to comply with any and all of its obligations under the underlying agreements from which the assets arise;
- the obligation of the assignor to promptly inform the assignee (trustee of the SPE) of any action that could jeopardise the compliance of its obligations over the underlying agreements, and of any event of default that has occurred or is likely to occur under the underlying agreements;

- reporting obligations from the assignor regarding its ordinary course and business;
- the maintaining and keeping of books and records;
- the compliance of the assignor with any and all applicable laws and regulations and any and all permits, licences, authorisations or regulatory obligations, and the maintenance of such in full force and effect;
- ordinary limitations on sales, assignments or entering into transactions that could imply a reduction in the equity value of the assignor;
- limitations on consolidating or merging with or into, or conveying, leasing or transferring all or substantially all of its assets (with certain ordinary exceptions); and
- the obligation of the assignor to carry out all necessary and required acts and actions to collect, recover and/or obtain the goods.

5.5 Principal Servicing Provisions

The servicing provisions are generally set forth in a management agreement with the trust manager and relate to collection, servicing and reporting, among other general items.

5.6 Principal Defaults

The principal events of default used in securitisation documents under Mexican law include the following:

- failure to pay any amounts due under the securitisation documents;
- failure to perform covenants or obligations;
- if any representation, warranty, certification or statement made by the assignor, or any certificate, financial statement or other document delivered, proves to have been incorrect in any material respect;
- the commencement of a voluntary insolvency proceeding or the commencement of an involuntary insolvency proceeding if such situation is not appealed, challenged or dismissed within a certain term; and
- any change of control.

5.7 Principal Indemnities

The principal indemnities used in securitisation documents under Mexican law are (without limitation) to hold each investor and related party harmless from and against any and all losses incurred, and to reimburse all costs, charges and expenses in connection with investigating, disputing or defending any action or claim as such loss is incurred, provided that such loss does not result from an investor's gross negligence, wilful misconduct or fraud, as determined by a court of competent jurisdiction by final and non-appealable judgment.

6. ROLES AND RESPONSIBILITIES OF THE PARTIES

6.1 Issuers

The SPEs would act as issuer and most likely would be limited to activities related to the securitisation. In the case of public securitisations, an SPE would have to comply with maintenance requirements and obtain authorisation from the CNBV to issue securities.

6.2 Sponsors

The company incorporating the SPE and generating receivables being securitised is considered the sponsor.

6.3 Underwriters and Placement Agents

Generally, financial institutions will carry out the structuring and placement of the securities, and will assist the issuer and sponsor to register and carry out the necessary procedures before the stock market authorities (CNBV, RNV, etc).

6.4 Servicers

Generally, an affiliate of the sponsor, or the sponsor, would act as an administrator and would

carry out collection activities and prepare the collection reports. However, in public securitisations it is customary to engage a third party to act as servicer and administrator of the assets.

6.5 Investors

Investors usually have no major responsibilities. Typically, in addition to payment rights, investors would be entitled to direct the trustee to take certain actions, including enforcement and other actions, and could request information and other customary covenants as provided in the transaction documents.

6.6 Trustees

Typically, a financial institution will act as trustee and be in charge of managing the trust and its estate. In addition, a different financial institution would be appointed as common representative in charge of monitoring the interest of the investors. The rights and obligations of the issuance trustee and the common representative are described in the issuance documentation, alongside the terms and conditions relating to its removal and substitution.

7. SYNTHETIC SECURITISATION

7.1 Synthetic Securitisation Regulation and Structure

There are no specific rules and regulations applicable to synthetic securitisations, so any structure would have to follow the general rules for securitisations. While not typical, the principal structures used for synthetic securitisation would include a risk mitigation method, such as credit derivatives, non-compliance insurance or placing additional collateral to secure payment obligations.

8. SPECIFIC ASSET TYPES

8.1 Common Financial Assets

The most common financial assets securitised in Mexico are those that generate cash flows used to pay the costs of maintaining the securitisation structure and returns to investors, including mortgages and account receivables (credit receivables, airline ticket receivables, highway toll receivables and other infrastructure receivables, as well as receivables against government for services to be provided or infrastructure projects).

8.2 Common Structures

The type of financial asset does not determine the securitisation structure. See **2.1 Taxes and Tax Avoidance** for the most common structures.

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Sainz Abogados is a Mexican law firm that focuses on delivering creative and problem-solving results to its clients. The firm has a dynamic and complex domestic and cross-border practice, representing a broad base of clients, ranging from some of the world's largest companies (including Fortune 500 and financial institutions) to entrepreneurs. The members of Sainz Abogados rely on a collaborative approach, aimed to ensure a high degree of responsiveness, providing accurate, efficient, timely and tailor-made solutions. The firm is recognised by clients and peers for having a highly efficient top-tier team of lawyers with sophisticated transactional and litigation capabilities. The main areas of practice are corporate and transactional, dispute resolution, energy, financing & financial instruments, insolvency & restructuring, labour & employment and real estate.

AUTHORS

Alejandro Sainz chairs the Restructuring and Insolvency Practice Area and is a member of the Finance, Compliance & Investigations, and Mergers and Acquisitions practice groups at Sainz Abogados. He has more than 30 years' experience in advising and representing clients on cross-border insolvencies and restructurings (both out-of-court and in-court – concursos mercantiles), finance, refinancing and corporate reorganisations, as well as the purchase and sale of assets in special situations and distress. He represents clients from various industries, including domestic and foreign companies, public and private, as well as several ad-hoc committees of international bondholders and noteholders issued abroad by Mexican issuers.

Daniel Saltzberg Koris is a Partner in the Real Estate and Gaming Practices at Sainz Abogados. He has more than 15 years of experience in operations involving real estate developments, financing and acquisitions. In Mexico he represents international public and private investment funds in all the vertical markets of the industry, as well as Investment Trusts (FIBRAS). Daniel also represents developers and private equity funds in acquisitions, the development of financing, asset management and the sale of real estate.

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Octavio L. Hernández Negretti is a Partner in the Private Equity, Mergers and Acquisitions and Financing practice areas of Sainz Abogados, mainly representing private equity funds and financial institutions (foreign and domestic) in investments, divestments and financings in Mexico and abroad. Octavio's clients participate in several industries, including manufacturing, asset management, restaurants, franchises and professional services. In addition, Octavio advises various groups of entrepreneurs in Mexico. He commonly represents financial institutions and debt funds, as creditors, as well as corporate borrowers, in their credit operations and guarantee structures, including subordinated debt structures (mezzanine), among other complex financing structures.

Santiago Alessio-Robles Seguí is a Partner at Sainz Abogados and represents national and international clients in a broad range of transactional matters, providing legal advice in the areas of corporate, finance and commercial law, including reorganisations, restructurings and workouts, bankruptcy and cross-border procedures, corporate finance, foreign investment and joint ventures. He has more than ten years' experience in complex insolvency, bankruptcy and restructuring proceedings.

Sainz Abogados

Boulevard Manuel Avila Camacho 24, 21st Floor
Lomas de Chapultepec
Mexico City
Zip Code 11000

Tel: +52 (55) 91 785 052
Fax: +52 (55) 55 403 433
Email: info@sainzmx.com
Web: www.sainzmx.com

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Trends and Developments

Contributed by:
Alejandro Sainz, Daniel Saltzberg Koris, Octavio L. Hernández Negretti and Santiago Alessio-Robles Seguí
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Characterisation of a True Sale Transaction vis-à-vis Bankruptcy

An essential element of public securitisation transactions and other types of private structured financings is the isolation of underlying assets through transferring such assets to special purpose vehicles or entities (SPE) created in such a way that can be considered bankruptcy remote.

In Mexico, trusts (*fideicomisos*) are the most common form of SPE for securitisations and other private secured transactions. Although Mexican trusts are commercial contracts governed by Mexican laws (which provide for certain mandatory provisions that cannot be modified or waived), this vehicle allows for enough flexibility and is widely used for these purposes. Trusts used for public securitisations and similar private secured transactions typically consist of three parties: the settlor, the trustee and the beneficiary (investors).

For an assignment in favour of a Mexican trust to be considered a "true sale", whether the assignor of the assets received adequate consideration or full market value in exchange of the transferred assets should be analysed, to evidence an assignment rather than a simple grant of a security interest. If the transfer was performed as a "true sale", then the assignment of the receivables should not be considered as collateral to a credit facility and, in principle, such assets should not be subject to bankruptcy look-back/claw-back provisions (ie, the period when transactions can be reviewed, and in some cases declared null and void, to protect creditors from debtors who have engaged in fraudulent activity that diminishes the value available for such creditors).

If the transaction is characterised as a true sale, the assets transferred to the trust would be segregated from the debtor's estate and could not be clawed back to the debtor's estate. However, if the transaction is *not* characterised as a true sale, then the assets transferred into the trust would be deemed part of the debtor's estate and used to pay creditors according to the claims ranking provided in the Concursos Law.

In addition, when determining whether a transfer of financial assets should be considered as a secured financing or a true sale, the courts take several factors into consideration, including:

- whether the assignment was notified to the debtor of the accounts receivables;
- whether the assignee or the investors themselves continue to have a right of recourse against the assignor;
- whether the assignor continues to service the accounts directly with the debtor of said accounts and mixes receipts with other operating funds (even by means of consolidating bank accounts at an accounting level);
- whether the assignor has rights over excess collections (either directly or as beneficiary in second place at the trust);
- whether the assignor retains an option to repurchase or recover the accounts (ie, through exercising a reversion right of the assets transferred into the trust, customarily provided for in Mexican trusts);

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- whether the assignee can unilaterally alter the pricing terms;
- whether the assignor has the absolute power to alter or compromise the terms of the underlying asset assigned to the trust estate; and/or
- the parties' intentions and the specific language included in the agreement.

By performing this test, the courts assess the transaction from a legal and economic perspective, rather than focusing solely on the "labels/titles" or language used by the parties in certain documents. Furthermore, by evaluating the foregoing, the courts aim to obtain a clear sense of whether or not the public interest protected by the public policy provided in Article 1 of the Mexican Concursos Law (in the event of a Mexican concurso proceeding) is being violated, and would be able to assess the situation on a case-by-case basis.

Notwithstanding the general use of the test above, Mexican courts have issued different – and sometimes contradictory – rulings when determining if certain transactions should be characterised as a security trust or as a true sale transaction. These instances have been dealt with on a case-by-case basis and there is currently no binding ruling (precedent) on the matter.

Examples of recent rulings

Some judges have deemed that any assets transferred by the debtor into a trust shall become part of the debtor's estate. This reasoning is stronger in cases where the assets or rights clearly continue in the possession of the debtor, or where there is a substantial relationship between the asset and the debtor. Examples include the following transactions:

- real property is transferred into a trust, while the debtor remains in possession in a depositary capacity, or accounts and services payments are rendered by the debtor;
- accounts receivables, in cases where the debtor remains in a direct relationship with the debtors of said receivables; and
- movable property, where the debtor remains in full operation, control and administration of the underlying goods.

In the event of bankruptcy and under this interpretation, the beneficiary will not be able to enforce its security provision under the trust, notwithstanding any default or breach. The claim could be recharacterised as an unsecured claim and be subject to the corresponding treatment under the plan of reorganisation for unsecured creditors. In the case of liquidation, the assets of the trust's estate could be used to pay the creditors according to the ranking and priority under the Concursos Law, in which the unsecured creditors rank at the bottom (with seniority over subordinated claims only).

In another case, a different Mexican court (in a concurso procedure) adopted a contradictory posture, stating that assets transferred to a security trust are not part of the debtor's estate since the debtor no longer has any property rights (title) over the assets transferred, pursuant to the provisions set forth in Article 381 of the General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*), which states that "by virtue of the trust, the settlor transfers to a trust institution the property or the ownership of one or more goods or rights, as the case may be, to be used for lawful and determined purposes, entrusting the realisation of said purposes to the fiduciary institution itself."

This allows the beneficiary, acting through the trustee, to enforce its guarantee provisions and obtain, as payment, the assets transferred by the debtor, despite any bankruptcy proceeding.

Also, in this scenario, if the trustee successfully exercises its segregation rights before the concurso court, the creditor's rights under the guarantee trust will not be affected by any plan of reorganisation nor by any liquidation of the estate, as the trust assets could not be used to pay any claim within the bankruptcy proceeding. Any deficiency of the value of the assets in trust, versus the outstanding underlying indebtedness, could be claimed as unsecured credit by the corresponding creditor under the underlying loan agreement if the latter preserved a recourse against the settlor of the assets transferred into the trust.

On the other hand, the Collegiate Court ruled that a guarantee trust whose assets consist of accounts receivables derived from a debtor's ordinary business could not be held valid and shall not be considered as a true sale transaction, upon the filing of the bankruptcy petition. To support this ruling, the Collegiate Court stated that the bankruptcy proceeding is a matter of public interest, so a structure protecting only one creditor should not be effective.

Under this interpretation (not considered as a binding case precedent), any future proceeds subject to the guarantee trust should be considered the property of the debtor's estate and, thus, will become available to satisfy the indebtedness of the debtor according to the rankings set forth in the Mexican Bankruptcy Law, considering that the receivables were purportedly assigned outright to the trust estate only to serve as a source of repayment and not to transfer the title of such assets.

Also, based on this ruling, a debtor under a Mexican bankruptcy proceeding, or any other party with interest – ie, creditors, plaintiff or the Conciliator (which is the individual designated by the Federal Institute of Specialists in Concurso Proceedings (*Instituto Federal de Especialistas de Concursos Mercantiles*) as being responsible for, inter alia, publishing the creditors' deadline to submit proofs of claims, processing proofs of claims, serving as a mediator among the debtor and its creditors, and proposing a plan of reorganisation to the court) – could then attempt to file an ancillary proceeding within the same concurso proceeding, seeking the following:

- the annulment of the Mexican trust;
- the turnover of any proceeds in such Mexican trust to the debtor's estate; and
- even the claw-back of any monies disbursed by the Mexican trust after the filing of the bankruptcy (concurso) proceeding for the benefit of the debtor's estate.

Furthermore, the Court of Appeals (*Tribunales Colegiados de Circuito*) has issued several rulings adopting both interpretations regarding the characterisation or recharacterisation of a guarantee or securitisation trust. The courts have also considered a couple of contradictory additional matters, including that, in a typical true sale, the investor bears the risk of not being able to collect because it has no recourse against the assignor. On the other hand, a transaction in which the investor retains recourse against the assignor is more akin to a secured loan. However, as mentioned, none of the rulings are binding for the lower courts – district courts – and they have only persuasive authority.

Real Estate Investment Trusts

Other SPE used under Mexican laws in order to carry out a semi-securitisation (rights over real estates, rights over income derived from leases of real estates or financing for real estate developments) are the Mexican Real Estate Investment Trusts (*Fideicomisos de Inversión en Bienes Raíces* – FIBRA).

FIBRA is the name ascribed to trusts that are constituted for the following:

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- the acquisition or construction of real estate specifically destined for leasing;
- the acquisition of the right to participate in the income derived from the leasing of real estate that forms part of the estate of the corresponding trust; or
- to provide financing for such purposes.

The aforementioned definition is provided by Article 187 of the Mexican Income Tax Law (*Ley del Impuesto Sobre la Renta*), which states that at least 70% of the trust estate must be invested in real estate or rights thereon, as specified above, and the remaining amount must be invested in securities issued by the Mexican Federal Government duly registered in the National Securities Registry (*Registro Nacional de Valores*) or in stocks of debt investment funds. Investments are evidenced through the issuance of "certificates of participation" over the trust estate, which must be placed in Mexico among the general public investors or be acquired by a group of investors comprising at least ten individuals who are not related and do not individually own more than 20% of the total amount of the outstanding certificates.

A "Business Trust" (*fideicomiso con actividades empresariales*) has independent legal capacity and is registered as a taxpayer with the Mexican authorities, thus the trust itself is the debtor and guarantees the investment of the securitisation with the trust's estate; therefore, the holder of the "certificates of participation" has direct recourse against the trust.

This type of vehicle has been trending over the past few years, and has provided liquidity to the Mexican real estate market. Based on recent market examples, investors planning to launch a FIBRA would need to take the following into consideration:

- fee structures and limits to fixed cost dilution – there are no clear-cut structures among these vehicles to charge fees, although certain vehicles provide cumbersome structures that are complicated for investors to understand and calculate, and such circumstance may have an impact on valuation;
- corporate governance – generally, FIBRAs are externally managed, so good corporate governance on management has proved to have a favourable impact on valuations;
- diversification of asset class versus no diversification of asset class – although at first glance diversification of asset class may seem to be the obvious choice, certain market valuations conclude otherwise, therefore a precise assessment is highly recommended; and
- costs – as with any other public traded vehicle, the costs of launching and maintenance of a FIBRA have to be considered.

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Sainz Abogados is a Mexican law firm that focuses on delivering creative and problem-solving results to its clients. The firm has a dynamic and complex domestic and cross-border practice, representing a broad base of clients, ranging from some of the world's largest companies (including Fortune 500 and financial institutions) to entrepreneurs. The members of Sainz Abogados rely on a collaborative approach, aimed to ensure a high degree of responsiveness, providing accurate, efficient, timely and tailor-made solutions. The firm is recognised by clients and peers for having a highly efficient top-tier team of lawyers with sophisticated transactional and litigation capabilities. The main areas of practice are corporate and transactional, dispute resolution, energy, financing & financial instruments, insolvency & restructuring, labour & employment and real estate.

AUTHORS

Alejandro Sainz chairs the Restructuring and Insolvency Practice Area and is a member of the Finance, Compliance & Investigations, and Mergers and Acquisitions practice groups at Sainz Abogados. He has more than 30 years' experience in advising and representing clients on cross-border insolvencies and restructurings (both out-of-court and in-court – concursos mercantiles), finance, refinancing and corporate reorganisations, as well as the purchase and sale of assets in special situations and distress. He represents clients from various industries, including domestic and foreign companies, public and private, as well as several ad-hoc committees of international bondholders and noteholders issued abroad by Mexican issuers.

Daniel Saltzberg Koris is a Partner in the Real Estate and Gaming Practices at Sainz Abogados. He has more than 15 years of experience in operations involving real estate developments, financing and acquisitions. In Mexico he represents international public and private investment funds in all the vertical markets of the industry, as well as Investment Trusts (FIBRAS). Daniel also represents developers and private equity funds in acquisitions, the development of financing, asset management and the sale of real estate.

Contributed by: *Alejandro Sainz, Daniel Saltzberg Koris, Octavio L. Hernández Negretti and Santiago Alessio-Robles Seguí,* ***Sainz Abogados***

Octavio L. Hernández Negretti is a Partner in the Private Equity, Mergers and Acquisitions and Financing practice areas of Sainz Abogados, mainly representing private equity funds and financial institutions (foreign and domestic) in investments, divestments and financings in Mexico and abroad. Octavio's clients participate in several industries, including manufacturing, asset management, restaurants, franchises and professional services. In addition, Octavio advises various groups of entrepreneurs in Mexico. He commonly represents financial institutions and debt funds, as creditors, as well as corporate borrowers, in their credit operations and guarantee structures, including subordinated debt structures (mezzanine), among other complex financing structures.

Santiago Alessio-Robles Seguí is a Partner at Sainz Abogados and represents national and international clients in a broad range of transactional matters, providing legal advice in the areas of corporate, finance and commercial law, including reorganisations, restructurings and workouts, bankruptcy and cross-border procedures, corporate finance, foreign investment and joint ventures. He has more than ten years' experience in complex insolvency, bankruptcy and restructuring proceedings.

Sainz Abogados

Boulevard Manuel Avila Camacho 24, 21st Floor
Lomas de Chapultepec
Mexico City
Zip Code 11000

Tel: +52 (55) 91 785 052
Fax: +52 (55) 55 403 433
Email: info@sainzmx.com
Web: www.sainzmx.com