

The International Comparative Legal Guide to: Securitisation 2007

A practical insight to cross-border Securitisation Law



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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the debtor to the seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable “contract” be deemed to exist as a result of historic relationships?

It depends on the goods or services to be transferred. As provided in the Federal Civil Code and the Civil Code for the Federal District, the general rule is that the transfer of real estate property or rights *in rem* on real estate property must be evidenced by a written agreement. However, the transfer of property of mobile goods and rights *in rem* in connection with such kind of goods, as well as the transfer of rights to services is effective upon an agreement between seller and buyer being reached, regardless of such agreement being evidenced in a document or not. However, in any case, it is convenient to evidence the sale of goods or services with a written agreement for purposes of having an enforceable obligation of the Debtor to the Seller. Notice to the Debtor is needed when Receivables are assigned so that the Debtor acknowledges that payments are to be made to the assignee instead of to the Seller. In certain agreements it may be required to obtain the Debtor’s agreement to effectuate the assignment of the Receivables.

1.2 Consumer Protections. Do your country’s laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

No. There is no limitation on interest rates on consumer credits, loans or other kind of Receivables. The Mexican Central Bank (*Banco de México*) is the authority that may impose limits on interest rates. As of this date, such authority has not imposed any limitations. Moreover, the Mexican Supreme Court (*Suprema Corte de Justicia de la Nación*) has ruled that it is legal for banks to charge interest on interest.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency are there different requirements and laws that apply to the sale of receivables?

Yes. Government entities acting as Sellers are subject to their own laws and, thus, different requirements apply to agreements assigning Receivables owned by the Mexican government or

Mexican government agencies. The scope and the kind of different requirements to be fulfilled depend on the Government and the Government Agency itself and their nature in accordance with Mexican administrative law.

2 Choice of Law - Receivables Contracts

2.1 No Law Specified. If the seller and the debtor do not specify a choice of law in their receivables contract, what are the main principles in your country that will determine the governing law of the contract?

Basically, the creation, regime and termination of rights *in rem* on real estate property, leasing of real estate property agreements and agreements regarding the limited time use of such kind of goods, as well as mobile goods located in the United Mexican States (“**Mexico**”), will be governed by the laws of Mexico. The agreements executed between parties will be governed by the laws agreed by the parties, or in absence of such agreement by the laws of the place in which the agreement was executed.

2.2 Base Case. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, and the seller and the debtor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your country would not give effect to their choice of law?

No, there is no reason.

2.3 Freedom to Choose Other Law. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country’s law to govern the receivables contract and the receivables?

Besides those cases in which the Receivables represent collection rights to real estate property, in which case the law governing the assignment of such rights and the transactions thereon would be Mexican law, the seller and the debtors may choose other law different from Mexican law.

2.4 Seller Resident. If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes, provided that the parties expressly agreed to be submitted to the laws of Mexico and waived to any other applicable jurisdiction.

2.5 Debtor Resident. If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes, provided that the parties expressly agreed to be submitted to the laws of Mexico and waived to any other applicable jurisdiction.

3 Choice of Law - Receivables Purchase Agreement

3.1 Freedom to Choose Other Law. If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Yes, provided that the Receivables are not rights *in rem* as mentioned in section 2 above. A Mexican court would give effect to their choice of law. However, it is important to consider that pursuant to Mexican Commerce Code (*Código de Comercio*) in the absence of a fixed domicile of the parties in the sale agreement, the Judge of the place where the contract was entered into shall be competent to act when the action is personal, and that of the location of the property when the action pertains to real estate property.

3.2 Other Advantages. Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

In order to consider circumstances whether it would be beneficial to choose the law of Mexico to govern the sale agreement, pursuant to Mexican Commerce Code it is important to bear in mind the following:

Every claim must be presented before a competent judge. Whenever there are several competent judges in the place where the suit has to be brought, the one selected by the plaintiff shall have jurisdiction in the case. The judge to whom the litigants have either expressly or tacitly submitted themselves is competent to try the case.

On the one hand, under Mexican law there is express submission to a specific law when the interested parties clearly and finally waive to the choice of law granted by law, and they designate as competent courts those of the domicile of any of the parties, of the place of compliance with any of the obligations contracted or of the location of the goods. On the other hand, there is implicit submission whenever: (i) the plaintiff, by submitting its claim to the judge and formulating its request before said judge, not only for the purpose of bringing its claim but also for answering to the defence which is opposed; (ii) the defendant, by replying to the claim or by counterclaiming against the plaintiff; (iii) the defendant, by not presenting exceptions of incompetence which he/she could have

asserted within the corresponding term, it being deemed in this case that there is submission to the jurisdiction of the court summoned him/her; (iv) the party who raised an objection desists from it; (v) a third party and whoever, for any reason whatsoever, is involved in the case by incidental proceedings; (vi) a party called to trial so that the judgment should stay damages to a party, being able to offer evidence, to plead and to enter all kinds of defences and appeals, provided that no question of jurisdiction is opposed within the corresponding periods.

Additionally, the following shall be preferred to any other judge: (i) the Judge of the place contractually designated by the debtor where payment should be legally demanded; and (ii) the Judge of the place designated in the agreement for the fulfillment of the obligation.

If the jurisdiction has not been expressly agreed, the Judge of the domicile of the Debtor shall be competent whatever the action taken. If the Debtor has several domiciles, that chosen by the creditor shall be preferred.

As mentioned above, in the absence of a fixed domicile, the Judge of the place where the contract was entered into shall be competent to act when the action is personal, and that of the location of the property when the action pertains to real estate property (action *in rem*).

If there are several real properties forming part of a real estate property action and they are located in different places, the Judge at any of such places to whom the plaintiff first files an action shall be competent to act. The same shall apply when the property is located in the territory of different jurisdictions.

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

Yes it will.

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

The Seller usually enters into an assignment agreement with the Purchaser (the "**Assignment Agreement**"). By the Assignment Agreement, the assignor (the Seller) irrevocably assigns and transfers the property of the Receivables and the Accounts Receivable to the assignee (the Purchaser). The transfer of the Receivables is not considered a loan having the Receivables as Collateral.

Usually, the Purchaser is a trustee (the "**Trustee**"). The Trustee shall receive then the assigned and transferred Receivables and the Accounts Receivables. Such Receivables and Accounts Receivable will be part of the corpus of a trust specifically created, as a special purpose vehicle ("**SPV**"), to manage such Receivables and Accounts Receivables as well as other assets forming the wealth of the SPV. Additionally, one of the main purposes of the Trust is to issue the securities that will later be publicly traded in the Stock Exchange.

Since the transfer of Receivables and Accounts Receivable under the Assignment Agreement to the Trustee is effective and definitive, in principle such assets should no be longer subject to risks of further foreclosure in case of Insolvency Proceedings of the Seller.

- 4.2 **Perfection Generally.** What formalities are required generally for the sale of accounts receivable to be perfected? Are there any additional or other formalities required for the sale of accounts receivable to be perfected against any subsequent good faith purchasers for value of the same accounts receivable from the seller?

The assignment and transfer of Receivables and Accounts Receivable is valid upon agreement between the Seller and the Trustee. However, it is necessary to evidence such assignment and transfer by the Assignment Agreement. In some cases, such assignment and transfer must be evidenced in a Mexican public deed depending on the nature of the right itself to be assigned (i.e. rights in rem to real estate property).

No consent on the side of the Debtor is required by the Seller to assign and transfer the Receivables and Accounts Receivable to the Trustee, unless (i) such assignment and transfer is prohibited either by law or by previous agreement between the Seller and the Debtor, or (ii) by the nature of the right to be assigned, making impossible such assignment. Therefore, provided that there is no limitation as to the assignment and transfer of the Receivables and Accounts Receivable to the Trustee, only a written notice of the assignment and transfer to the SPV addressed to the Debtor is required (the “**Notice**”). The Notice must be given either by an officer of a court or out-of-court by a document witnessed by two witnesses or even formalised before a Mexican notary public.

The Notice is required, so any payment to be made under the Receivables and the Accounts Receivables is directed to the assignee only and not to the assignor (the Seller) as from the date of the Assignment Agreement.

If rights *in rem* on real estate property are to be assigned, then such assignment and transfer must be recorded in the public registry of the property of the place in which the real estate property is located. Entities of the Mexican financial system, including Banks and other financial institutions are entitled to avoid the Notice to the Debtors and to record the assignment and transfer in the public registry of the property, as long as the assignor acts, not only as Seller, but as servicer as well.

- 4.3 **Perfection for Promissory Notes, etc.** What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

In the case of Promissory notes, such negotiable instruments must be endorsed by the Seller in favour of the Trustee, as assignee, as provided in the Mexican General Law on Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*). No other formalities are generally required, but those mentioned in question 4.2 above.

- 4.4 **Debtor Notification.** Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

Yes. Despite the legal validity and effectiveness of the assignment and transfer of the Receivables and Accounts Receivable upon the execution of the Assignment Agreement, the Trustee shall be entitled to require payment from the Debtor only if the Notice is given. Otherwise, the Debtor may discharge its payment obligation by paying to the assignor, as original creditor.

- 4.5 **Debtor Consent.** Must the seller or the purchaser obtain the debtors’ consent to the sale of receivables in order for the sale to be an effective sale against the debtors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment?

The general rule is that no consent is required from the Debtor to assign and transfer the Receivables and the Accounts Receivable or any other right as well. However, restrictions to the free assignment and transfer of rights may be imposed either by law or by the agreement executed between the Seller and the Debtors or even by the nature of the right itself to be assigned to the SPV.

- 4.6 **Liability to Debtor.** If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

Yes. The Seller in such a case would be liable for damages caused to the Debtor as a consequence of the actual assignment of Receivables, provided that such assignment and transfer was expressly forbidden.

- 4.7 **Identification.** Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

It is strongly advisable that the Assignment Agreement contains a description of the Receivables and the Accounts Receivable assigned thereunder. The list of such Receivables is attached to the Assignment Agreement, so further lists may be part of said agreement as so required from time to time. However, if the rights to be assigned and transferred under the Assignment Agreement may be generally identified, there is no need to specifically describe in detail each Receivable assigned and transferred to the SPV. A general description on the characteristics of the rights to be assigned and transferred would be sufficient. The rationale is that the Receivables and the Accounts Receivable to be assigned and transferred are or may be determined pursuant to the Assignment Agreement.

- 4.8 **Economic Effects on Sale.** What economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and (c) control of collections of receivables without jeopardising perfection?

The assignment and transfer of the Receivables to the SPV is perfected upon the execution of the Assignment Agreement. Usually, the SPV and the legal structure created using the trust have the purpose of isolating the wealth used to fulfil payment obligations preventing the Seller to retain credit and interest rate risks, in other words the assignment and transfer of assets to the SPV is a True Sale. Actually, the Seller retains the control of collections and acts as servicer on behalf of the Trustee. A servicing agreement is executed between the Seller and the Trustee for such purpose. However, in case of any wrong performance of the Seller under the servicing agreement, a substitute servicer, obviously different from the Seller, would collect payments for the Trustee for the final benefit of the holders of debt securities.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

Yes. Unless, other (i) agreements (containing specific negative covenants) to which the Seller is party, (ii) court orders, or (iii) specific laws preclude the Seller to do so.

4.10 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a "future flow" securitisation)?

Yes it can.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

The assignment and transfer of a credit right, implies also the transfer of all accessory rights including related securities such as mortgages, bonds, or pledges and even accrued interests, if any. The concurrent transfer of rights and accessory rights as related security is mandatory, unless such accessory rights are personal rights of the Seller in which case, as a consequence of such quality or kind of rights, they cannot be separated, and thus, the related security cannot be assigned to the Purchaser.

Formalities regarding the registration in the corresponding registries of related securities must be fulfilled.

5 Security Interests

5.1 Back-up Security. Is it customary in your country to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

No. It is not customary to take a back-up security over the seller's ownership interest. Notwithstanding the foregoing, it is customary to get additional Receivables from the Seller. Mexican courts will analyse whether the assignment of the assets is legal or not. Therefore transferring additional Receivables protects the security holder's rights.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

As explained above, the formalities depend on the nature of the rights that are being transferred. In certain cases, it is necessary to transfer the right before a Notary Public, who will formalise such transfer in a public deed.

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

Usually for structuring this kind of transactions a Mexican Trust is formed. Seller will assign its receivables to the Trust, and certain additional Receivables in excess, which will constitute a collateral. Provisions obligating the Seller to contribute an additional cash amount as additional collateral would be included in the trust agreement. In addition to such collateral, the Trust may be allowed to apply for a line of credit and grant as collateral the assets forming the wealth of the Trust.

5.4 Recognition. If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

In principle, Mexican Law will recognise security interests granted under the law of any third country. Notwithstanding, the granting of such securities interests would have to comply with all Mexican law requirements in order for such securities interests to be enforceable in Mexico. In the case of rights *in rem*, Mexican law is applicable.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to promissory notes, mortgage loans, consumer loans or marketable debt securities?

Each security document has its own formalities. Pursuant to Mexican law, a promissory note has to contain (i) the mention that it is a promissory note; (ii) the unconditional promise to pay a certain amount of money; (iii) the name of the person to whom the payment has to be made; (iv) the date and place of payment; (v) the date and place in which the promissory note is being executed; and (vi) the signature of the Debtor or Debtors.

If the price of the asset that is being mortgaged exceeds 375 times the daily minimum wage (approximately US\$1,700.00), the mortgage has to be granted before a notary public, and in the event of default the asset would need to be transferred before a notary public.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your country's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

Yes. Under the Mexican Insolvency Law (*Ley de Concurso Mercantil*) ("**MIL**") the insolvency official has the ability to stay collection and enforcement actions until he/she determines that the sale is perfected.

6.2 Insolvency Official's Powers. If there is no automatic stay, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

Under the MIL there is a single insolvency proceeding known as "*Concurso Mercantil*" ("**Concurso Procedure**"). The Concurso Procedure consists of two main stages: the conciliation stage; and the bankruptcy stage, each of them supervised by the Federal Institute of Specialists in Insolvency & Bankruptcy Procedures (*Instituto Federal de Especialistas de Concursos Mercantiles*) ("**IFECOM**"). The Concursos Law forms part of the Federal commercial legislation of Mexico. Pursuant to Article 17 of the Concursos Law, jurisdiction over a commercial bankruptcy case lies in the Federal District Court of the Debtor's corporate domicile, or its principal place of business, as the case may be ("**Court**"). The Concursos Law further provides that all claims against a Debtor must be brought before the Court hearing the case, in order to avoid different courts hearing claims against the estate in a "piecemeal" fashion.

The MIL is based upon certain general principles, as follows: (i) all creditors of the same class shall be treated the same, without regard to nationality, domicile or capacity; (ii) all creditors of the Debtor, whether domestic or foreign, shall have access to the Concurso Procedure, and shall collect in equal proportion (according to the class) from the assets located within the territorial jurisdiction of the Court; and (iii) the Debtor's operations should be preserved where possible for the benefit of the general economy of Mexico. This principle seeks to avoid the phenomenon of "chain bankruptcies", where the commercial bankruptcy of one company and its cessation of operations causes the commercial bankruptcy of its creditors; and (iv) all assets of the Debtor shall be consolidated and liabilities determined. This principle is the basis for actions taken to eliminate dubious credits, such as the commencement of legal proceedings to collect debts due in favour of the Debtor, or actions to invalidate fraudulent conveyances or other transfers contrary to the MIL taken by the Debtor in violation of the principle that all creditors of the same class should be treated the same. Also, in furthering the goals of this principle, third parties are permitted to recover assets in the Debtor's possession that are not owned by the Debtor.

Following the declaration of insolvency, the Court (by its own decision or acting upon the Examiner's (*visitador*) recommendation) may issue restriction orders on Debtor's conduct of business, including the prohibition of making payment under current and previous obligations or disposing of any property.

During the Conciliation stage, the Debtor may continue its ordinary course of business with a Conciliator reviewing the Debtor's operations and accounting. In principle, the Debtor keeps management of its business, unless the Conciliator requests from the Court the removal of the Debtor in order to protect the pool of assets. If the Debtor keeps the management, the Conciliator shall: (i) supervise the accounting and all transactions performed by the Debtor; (ii) decide if any existing agreements binding on the Debtor must be terminated; (iii) approve, with the prior opinion of the interveners appointed by the creditors, new credits in favour of the Debtor, the creation of new security interests, the substitution of any existing security interests or the sale of any assets not involved in the ordinary course of business of the Debtor; and (iv) call the board or any other decision-making committee of the Debtor to discuss and approve any kind of matters relating to the Debtor's business. In the event the Debtor is removed from the management of its business, the Conciliator will become the administrator and will be granted full authority to conduct the business, on the understanding that the authorities of the Debtor and its decision-making

committees shall cease. The Conciliator may also request from the Court to suspend the Debtor's operations if the pool of assets or an increase in the Debtor's liabilities is at risk. The Court may adopt measures to safeguard assets of the Debtor for the benefit of the creditors, and assure that no actions are taken outside the ordinary course of business.

6.3 Suspect Period. Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding?

Pursuant to MIL any of the following transactions may be invalidated if entered during the period starting on the day which is 270 calendar days before the declaration of insolvency by a competent Court: (i) transactions made by a Debtor before the declaration of insolvency with the intention to defraud creditors (knowledge of the counterparty is not required if the act was gratuitous); (ii) gratuitous transactions; (iii) transactions at an undervalue; (iv) transactions not made at an arms' length basis; (v) waivers of debts made by a Debtor; (vi) payments of obligations before their maturity date; and (vii) discounts made by a Debtor.

Additionally, there is a presumption that the following transactions are made in fraud of creditors, unless the debtor proves good faith: (i) to create new security interests or to increase any existing security interests if the original obligation did not contemplate the foregoing; (ii) payments made with assets other than money if such form of payment was not originally agreed; and (iii) transactions made by a debtor with related persons, such as its spouse, relatives, members of the board or decision-making persons within the business, or with companies where at least 51% of their capital stock is owned or voted by any of the foregoing persons.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

Pursuant to the MIL an *intervener* (interventor) may represent the interests of creditors in the *Concurso* procedure and may be assigned the responsibility of overseeing actions of the Conciliator and of the Receiver, as well as the actions of the Debtor in relation with the operation of its business (the "**Intervener**").

Any creditor or group of creditors that represent, at least, ten percent of the value of the credits owed by the Debtor, pursuant to the provisional list of credits, has the right to request the Court to appoint an Intervener in the *Concurso* procedure. The fees of the Intervener shall be paid by the creditor(s) requesting such an appointment. The Intervener does not have to be a creditor. Any creditor or group of creditors may file before the Court requests for the appointment of an Intervener. The Intervener may be substituted or removed by those who requested his/her appointment.

Intervenors have the power to: (a) deal with the service and publication of the Declaration of Insolvency; (b) request that the conciliator or trustee examine books, documents or any other means of storing information belonging to the Debtor subject to the Declaration of Insolvency, with regards to the issues that, in his judgment, may affect the interest of the creditors; (c) request that the conciliator or trustee provide information in writing with regard to questions related to the administration of the Estate that, in his/her judgment, may affect the interest of the creditors, as well as request the reports the trustee and the conciliator shall provide to

the judge bimonthly on the activities they have undertaken in Debtor; (d) request the Court an order requiring Debtor to allow the conciliators and Interveners to conduct the activities required of their posts; (e) challenge before the Court the acts and omissions of the Examiner, Conciliator or Receiver that do not follow the provisions of the MIL, so the Court orders the coercive measures deemed appropriate and, if applicable, may request that the IFECOM replace the Examiner, Conciliator or Receiver in order to avoid endangering the estate; (f) oppose the complaint to reclaim the property when the legal requirements are not satisfied; (g) he/she shall make decisions concerning pending contracts and shall approve, after considering the opinion of the Intervener, new obligations, the creation or substitution of guarantees and the sale of assets if they are not related to the ordinary operation of the Debtor, providing the Court with a report of such decisions; (h) he/she shall consider the advisability of continuing to operate as the Debtor, and after considering the opinion of the Intervener, if any, may request that the Court order the total, partial, temporary or definitive closing of the Debtor for purposes of avoiding an increase in debt or the deterioration of the estate; (i) request the Court to establish a retroactive date prior to the 270 (two hundred seventy) calendar days before the Declaration of Insolvency is declared, provided that such requests are filed prior to the decision acknowledging, grading and establishing preference of credits; (j) he/she shall be notified on the day after the decision acknowledging, grading and giving preference of the credits issued; and, (k) he/she may appeal the decision acknowledging, grading and giving preference to the credits.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

In order for a creditor to file a claim, it must first submit a petition for the recognition of its credit (proof of claim). Once such claim is admitted, the Court will call upon the Conciliator or the Examiner, as the case may be, and the Debtor to submit a response indicating their views of the claim. One permitted response is to request the Court to require additional evidence of the validity, legality or amount of the claim. The Court will then issue a judgment and divide credits into three categories: (i) those recognised; (ii) those excluded; or (iii) those still pending upon their status is sufficiently clarified.

The MIL classifies creditors into five categories: (i) singularly privileged creditors; (ii) secured creditors (with mortgages and pledges); (iii) creditors with special privilege; (iv) common creditors in commercial transactions; and (v) common creditors in other transactions.

Satisfaction of credits must be made in the following manner: secured creditors (with mortgages and/or pledges) are paid first with proceeds from the sale of mortgaged or pledged items. If the items have a value or a price in excess of the debt, any such excess is directed to cover subsequent debt payments to other creditors. If the price does not cover the debt, mortgage or pledge creditor may participate, pro-rata, as a common creditor, to collect the remaining amount. This procedure is the same for other creditors with preemptive rights. Common commercial creditors collect pro-rata from the balance after the initial sale of assets to satisfy all prior debts. The balance thereof will then be apportioned among noncommercial creditors.

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

No. There is no specific law governing securitisation transactions. In fact, several laws are applicable for securitisation structured financings. The Civil Code (*Código Civil*), the Code of Commerce (*Código de Comercio*), the Stock Exchange Act (*Ley del Mercado de Valores*), the Credit Institutions Act (*Ley de Instituciones de Crédito*), and the Income Tax Law (*Ley del Impuesto sobre la Renta*), are applicable, among others. Additionally, rules issued by the Mexican National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (“**CNBV**”) are mandatory with respect to certain aspects of the securitisation process.

7.2 Securitisation Entities. Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to (a) requirements for establishment of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

There is no provision forcing an entity to establish a SPV for securitisation transactions. However, as mentioned above, it is common that Trusts are used as SPV for such purpose. Besides the creditworthiness of the issuer, the legal structure using a SPV improves the rating of the debt securities intended to be traded, particularly, since the assets, including the Receivables and the Accounts Receivable are isolated and totally separated from the wealth of the Seller, preventing (i) the Seller to use the proceeds from the Receivables and the Accounts Receivable for other purposes different from fulfilling payment obligations to holders of the issued debt securities, and (ii) in principle, any foreclosure on the transferred assets for the benefit of the mentioned holders in case of insolvency of the Seller. Mainly, what is referred to in items (i) and (ii) before are the legal benefits of the SPV. There are no specific requirements as to the status of directors or shareholders since the SPV is not a corporation or a company but a Trust created to perform securitisation transactions.

7.3 Non-Recourse Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

Yes. Usually the financing structure created for securitisations transactions has the purpose of isolating the Seller from the Receivables and the proceeds therefrom. Therefore, this kind of financing is without recourse against the Seller. Mexican courts will give effect to a contractual provision limiting the recourse of the parties to available funds.

7.4 Non-Petition Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) prohibiting the parties from (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Yes it will.

- 7.5 **Independent Director.** Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

It is valid to provide in the company's by laws that the Board of Directors are prevented to resolve on a voluntary insolvency petition without the unanimous vote of the members or a super majority vote, however, it is important to then limit the powers of attorneys-in-fact since under Mexican law there is no requirement to count with the approval of the Board for a company to file a voluntary insolvency procedure.

8 Regulatory Issues

- 8.1 **Required Authorisations, etc.** Assuming that the purchaser does no other business in your country, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

Since the Trust is the SPV commonly formed for securitisation transactions, the Trustee must act as Purchaser. Trustees are usually banks who have authorisation to act as such by the Mexican Ministry of Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*). Corporations may issue debt securities as a consequence of securitisations processes without need to have an authorisation from said Ministry. However, to publicly trade the mentioned securities, in either cases, if issued by a Trustee or a directly by a company or corporation, authorisation in that regard is mandatory and is granted by the CNBV and the Mexican Stock Exchange (*Bolsa Mexicana de Valores, S.A. de C.V.*)

- 8.2 **Data Protection.** Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

All the information on the Debtor of the Receivables, its creditworthiness and history is part of the information contained in the debt securities offering memorandum or prospectus. There is some information kept by the Trustee that is protected by the Trust secrecy provisions under the Credit Institutions Act. However, almost all the information required from the Debtor to offer the debt securities is disclosed in the mentioned memorandum or prospectus. This is a natural request since the level of demand of the issued debt securities depends importantly on the payment capacity of the Debtors.

- 8.3 **Consumer Protection.** If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

The Trustee has to maintain the confidentiality of the name of each Debtor, pursuant to the Credit Institutions Act. There is a banking secret provision forbidding banks to disclose certain specific information.

- 8.4 **Currency Restrictions.** Does your country have laws restricting the exchange of your country's currency for other currencies or the making of payments in your country's currency to persons outside the country?

No. However, please be informed that any obligation in foreign currency to be paid in Mexican territory may be discharged by the Debtor by paying pesos at the applicable exchange rate on the date of payment published by the Mexican Central Bank, pursuant to the Mexican Currency Act (*Ley Monetaria*).

9 Taxation

- 9.1 **Withholding Taxes.** Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

Withholding tax is not triggered by payments of the Debtor under the Receivables to the SPV. Instead, withholding tax is triggered when payment is made to the debt security holder as final beneficiary. Withholding tax will be paid on interest paid or due and payable and the rates depend on provisions of treaties to avoid double taxation which Mexico is party. Rates for withholding tax may be as low as 4.9% in certain cases.

- 9.2 **Seller Tax Accounting.** Does your country require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

No. Only to follow Mexican GAAP and to prepare the accounting information to be quarterly and annually disclosed to the stock exchange market following those principles.

- 9.3 **Stamp Duty, etc.** Does your country impose stamp duty or other documentary taxes on sales of receivables?

No it doesn't.

- 9.4 **Value Added Taxes.** Does your country impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Yes, value added tax ("**VAT**") on sales of goods and services supply. Value added tax rates are from 10% up to 15%.

- 9.5 **Purchaser Liability.** If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims against the purchaser or on the receivables or collections for the unpaid tax?

No. The Seller will charge 15% of the amount of the sale transaction as VAT, and it is responsible to pay such retained amount to the Mexican tax authorities following certain tax rules. Hence, the Purchaser only has the obligation to pay such amount to the Seller for subsequent delivery to the tax authorities, as applicable.

- 9.6 **Doing Business.** Assuming that the purchaser conducts no other business in your country, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the debtors, make it liable to tax in your country?

The Purchaser would pay the VAT in the acquisition of the Receivables. Withholding tax on interests will be paid by the final beneficiary depending on his/her/its nationality and the fact that Mexico has a treaty to avoid double taxation with the country of origin of the holder of the debt securities.



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