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The International Comparative Legal Guide to:

Securitisation 2012

A practical cross-border insight into securitisation work

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Mexico



Diego Martinez



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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor 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 the behaviour of the parties?

It depends on the goods or services to be transferred. As provided in the Federal Civil Code (“**Civil Code**”) of the United Mexican States (“**Mexico**”), 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 and formalised, in some cases, before a Notary Public. However, the transfer of property of mobile goods and rights *in rem* in connection with such kinds of goods, as well as the transfer of rights to services, is effective upon an agreement between the 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 obligor to the seller. Notice to the obligor is needed when receivables are assigned so that the obligor 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 obligor’s agreement to effectuate the assignment of the receivables.

1.2 Consumer Protections. Do Mexico’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; (c) permit consumers to cancel receivables for a specified period of time; or (d) 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 kinds 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 or collection of those receivables?

Yes. Government entities acting as sellers are subject to special 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 obligor do not specify a choice of law in their receivables contract, what are the main principles in Mexico 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 kinds of goods, as well as mobile goods located in Mexico, will be governed by the laws of Mexico. Other commercial or mercantile agreements executed between parties will be governed by the laws contractually agreed by the parties, or in absence of such agreement by the laws of the place in which the contract was executed.

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

No, there is no reason.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Mexico but the obligor is not, or if the obligor is resident in Mexico but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Mexico give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such that between the seller and the obligor under the receivables contract?

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 obligors may choose another law different from Mexican law.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Mexico?

Yes, it is.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Mexico's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Mexico's laws or foreign laws)?

Yes, provided that the receivables are not rights *in rem* as mentioned in questions 2.1 and 2.3 above. A Mexican court would give effect to their choice of law. However, it is important to consider that pursuant to the 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. In principle, we do not foresee any exceptions to this rule.

3.2 Example 1: If (a) the seller and the obligor are located in Mexico, (b) the receivable is governed by the law of Mexico, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Mexico to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Mexico, will a court in Mexico recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Yes, provided that the sale of the receivables to the obligor is not limited or prohibited by law or by agreement between the seller and the obligor. Additionally, in respect to the creditors of the obligor and the seller in an scenario of a insolvency of either the obligor or the seller, transfers of the receivables from the obligor to the seller and from seller to purchaser should be valid and not questioned by a Mexican court if such transfers are not performed within the 270 calendar-day "claw back" period provided for in the Mexican Insolvency Act (*Ley de Concursos Mercantiles*).

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside Mexico, will a court in Mexico recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the requirements of the obligor's country or the purchaser's country (or both) be taken into account?

Both requirements of the obligor's and the purchaser's countries will be taken into account. A Mexican court should recognise any foreign court resolution that transfers are valid pursuant to foreign laws and that transfers have been validly performed without affecting creditors in accordance with foreign insolvency laws, if all the requirements of article 1347-A of the Mexican Commerce Code (*Código de Comercio*) are duly fulfilled to have a foreign court resolution acknowledged, recognised and validated.

3.4 Example 3: If (a) the seller is located in Mexico but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in Mexico recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with Mexico's own sale requirements?

Yes, parties may freely choose the law governing the receivables transfer or sale agreement. Assuming that the sale of receivables by the seller to the obligor is not limited or prohibited by law or by agreement between the seller and obligor and provided that the transfer is not performed within the mentioned 270-day "claw back" period provided for under the Mexican Insolvency Act (*Ley de Concursos Mercantiles*) in the case of a possible insolvency (*concurso*) of the seller, the sale should be valid and recognised by a Mexican court.

3.5 Example 4: If (a) the obligor is located in Mexico but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in Mexico recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with Mexico's own sale requirements?

Yes, the Mexican courts should recognise such transfer for the same reasons and subject to the same limitations set forth in question 3.4 above.

3.6 Example 5: If (a) the seller is located in Mexico (irrespective of the obligor's location), (b) the receivable is governed by the law of Mexico, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in Mexico recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in Mexico and any third party creditor or insolvency administrator of any such obligor)?

Yes, the Mexican courts should recognise such transfer for the same reasons and subject to the limitations expressed in question 3.4 above.

4 Asset Sales

4.1 Sale Methods Generally. In Mexico what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology - is it called a sale, transfer, assignment or something else?

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 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 on 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 longer be subject to risks of further foreclosure in case of the insolvency proceeding of the seller. It is customary to use any of such terminologies but it is more usual to use the terminology "Assignment Agreement" (*Contrato de Cesión de Derechos*).

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables 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 obligor 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 obligor, or (ii) by the nature of the right to be assigned, making such assignment impossible. 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 obligor 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 giving Notice to the obligors and to record the assignment and transfer in the public registry of the property, as long as the assignor acts, not only as the seller, but as the 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 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? 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? Whether or not notice is required to perfect a sale, are there any benefits to giving notice - such as cutting off obligor set-off rights and other obligor defences?

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 to the obligor only if the Notice is given. Otherwise, the obligor may discharge its payment obligation by paying to the assignor, as original creditor. The Notice itself has no impact on the obligor's set off rights and other obligor defences. Said rights and defences have their origin in law and in the obligor's and seller's agreement. For that reason, even the Notice itself has no impact in connection with those rights and defences, it would be convenient to have the transfer notified to the obligor to prevent any intention of the obligor to claim such rights and defences since they have been transferred to the purchaser. It would be important to determine whether or not such receivables transferred to the purchaser are subject to limitations derived from certain other obligors' rights or not.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

Notice is normally given in written and it would be convenient to formalise it before a Mexican notary public or any other public attester, such as a Mexican *corredor publico*. Usually the notice of transfer is simultaneously informed to the obligor or within the next days following the transfer from seller to purchaser. Notice may be used for current and future receivables. Limitations or prohibitions to the transfer of the receivables may arise only if the transfer is limited by law or by agreement between obligor and seller.

4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Mexico? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Mexico recognises prohibitions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

The general rule is that no consent is required from the obligor 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 contract or even by the nature of the right itself to be assigned to the SPV.

Yes. The seller in such a case would be liable for damages caused to the obligor 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., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells all of its receivables to the purchaser, is this sufficient identification of receivables?

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 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, 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/or (c) control of collections of receivables without jeopardising perfection?

The assignment and transfer of the receivables to the SPV is perfected between the parties 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 (i.e., sales of receivables as and when they arise)?

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 to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., “future flow” securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to or after the seller’s insolvency?

Yes, it can. The sale of future receivables shall be structured in the same manner as current receivables are sold to be valid and enforceable.

4.11 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? 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 Issues

5.1 Back-up Security. Is it customary in Mexico 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 Mexico, 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 in the form of a public deed.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in Mexico to grant and perfect a security interest in purchased receivables governed by the laws of Mexico and the related security?

Usually for structuring this kind of transaction, a Mexican Trust is formed as an SPV. The seller will assign its receivables to the Trust, and certain additional receivables in excess, which will constitute 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 receivables governed by the laws of Mexico, and that security interest is valid and perfected under the laws of the purchaser’s country, will it be treated as valid and perfected in Mexico or must additional steps be taken in Mexico?

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

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, 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 fact 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 obligor or obligors.

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 Mexican notary public and, in the event of default, the asset would need to be transferred before a notary public.

5.6 Trusts. Does Mexico recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller’s own assets until turned over to the purchaser?

Mexico does recognise Trusts. Trusts are used as a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed held separate and apart from the seller’s own assets until turned over to the purchaser.

5.7 Bank Accounts. Does Mexico recognise escrow accounts? Can security be taken over a bank account located in Mexico? If so, what is the typical method? Would courts in Mexico recognise a foreign-law grant of security (for example, an English law debenture) taken over a bank account located in Mexico?

Normally, in Mexico, rights to the bank account funds may be pledged in favour of a creditor or an instruction is irrevocably given by an obligor to a Trustee or a bank to release funds from a bank account in favour of a creditor in case of default. Such instruction and the terms and conditions whereby the funds may be transferred to the creditor are usually documented through a mandate agreement.

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 Mexico’s insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a “stay of action”)? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Yes. Under the Mexican Insolvency Law (*Ley de Concurso Mercantiles*) (“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 stay of action 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 obligor’s corporate domicile, or its principal place of business, as the case may be (“**Court**”). The *Concursos* Law further provides that all claims against an obligor 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 obligor, 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; (iii) the obligor’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 obligor 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 obligor, or actions to invalidate fraudulent conveyances or other transfers contrary to the MIL taken by the obligor 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 obligor’s possession that are not owned by the obligor.

Following the declaration of insolvency, the Court (by its own decision or acting upon the Examiner’s (*visitador*) recommendation) may issue restriction orders on obligor’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 obligor may continue its ordinary course of business with a Conciliator reviewing the obligor’s operations and accounting. In principle, the obligor keeps management of its business, unless the Conciliator requests from the Court the removal of the obligor in order to protect the pool of assets. If the obligor keeps the management, the Conciliator shall: (i) supervise the accounting and all transactions performed by the obligor; (ii) decide if any existing agreements binding on the obligor must be terminated; (iii) approve, with the prior opinion of the interveners appointed by the creditors, new credits in favour of the obligor, 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 obligor; and (iv) call the board or any other decision-making committee of the obligor to discuss and approve any kind of matters relating to the obligor’s business. In the event the obligor 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 obligor and its decision-making committees shall cease. The Conciliator may also request from the Court to suspend the obligor’s operations if the pool of assets or an increase in the obligor’s liabilities is at risk. The Court may adopt measures to safeguard assets of the obligor for the benefit of the creditors, and assure that no actions are taken outside the ordinary course of business.

6.3 Suspect Period (Clawback). 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? What are the lengths of the “suspect” or “preference” periods in Mexico for (a) transactions between unrelated parties and (b) transactions between related parties?

Pursuant to the 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 an obligor 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 arm’s length basis; (v) waivers of debts made by an obligor; (vi) payments of obligations before their maturity date; and (vii) discounts made by an obligor.

Additionally, there is a presumption that the following transactions are made in fraud of creditors, unless the obligor 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 an obligor 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.

Any creditor or group of creditors that represent, at least, 10% of the value of the credits owed by the obligor, pursuant to the provisional list of credits, has the right to request the Court to appoint an Intervener in the *Concurso* Procedure. The Intervener can request the Court to establish a retroactive date prior to the 270 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.

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, the insolvency procedures of the parent company and the subsidiary can be heard before the same Court but in separate or parallel procedures. In principle, an insolvency official cannot consolidate the assets and liabilities of the purchaser with those of the seller in the insolvency proceeding.

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?

As explained above, during the Conciliation stage, the obligor may continue its ordinary course of business with a Conciliator reviewing the obligor’s operations and accounting. In principle, the obligor keeps management of its business, unless the conciliator requests from the Court the removal of the obligor in order to protect the pool of assets. If the obligor keeps the management, the Conciliator shall: (i) supervise the accounting and all transactions performed by the obligor; (ii) decide if any existing agreements binding on the obligor must be terminated; (iii) approve, with the

prior opinion of the interveners appointed by the creditors, new credits in favour of the obligor, 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 obligor; and (iv) call the board or any other decision-making committee of the obligor to discuss and approve any kind of matters relating to the obligor's business. In the event the obligor 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 obligor and its decision-making committees shall cease.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Mexico establishing a legal framework 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 Mexico 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 and management 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 an SPV for securitisation transactions. However, as mentioned above, it is common that Trusts are used as SPVs for such purpose. Besides the creditworthiness of the issuer, the legal structure using an 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 Mexico 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 Mexico 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. However, under the MIL, any contractual provision that creates a burden on the obligations of the debtor as a consequence of the filing of an insolvency procedure (i.e. an increase in interest rate) will be disregarded by the Court.

7.5 Independent Director. Will a court in Mexico 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 bylaws that the Board of Directors are prevented to resolve 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 vested to attorneys-in-fact since, under Mexican law, there is no requirement to receive 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 Mexico, 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 licence or its being subject to regulation as a financial institution in Mexico? Does the answer to the preceding question change if the purchaser does business with other sellers in Mexico?

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 securitisation processes without the need to have an authorisation from said Ministry. However, to publicly trade the mentioned securities, in either cases, if issued by a Trustee or 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.B. de C.V.*).

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

Usually, the only requirement is that seller and the purchaser enter into a servicing agreement for the collection of the sold receivables.

8.3 Data Protection. Does Mexico have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

All the information on the obligor 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 obligor 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 obligors.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of Mexico? Briefly, what is required?

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

8.5 Currency Restrictions. Does Mexico have laws restricting the exchange of Mexico's currency for other currencies or the making of payments in Mexico Mexico'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 obligor 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 obligors to the seller or the purchaser be subject to withholding taxes in Mexico? 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 obligor 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 Mexico require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

No. The only policy is 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 Mexico impose stamp duty or other documentary taxes on sales of receivables?

No, it doesn't.

9.4 Value Added Taxes. Does Mexico 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 the sales of goods and services applies. In principle, the rate is 16% provided that the VAT can be lower in certain zones of the country.

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 for the unpaid tax against the purchaser or against the sold receivables or collections?

No. The seller will charge 16% of the amount of the sales 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 Mexico, 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 obligors, make it liable to tax in Mexico?

In this case, the purchaser pays VAT in the acquisition of the receivables. Withholding tax on interests will be paid by 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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