

GETTING THE
DEAL THROUGH 

Structured Finance & Securitisation 2015

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Preface

Structured Finance & Securitisation 2015

First edition

Getting the Deal Through is delighted to publish the first edition of *Structured Finance & Securitisation*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 13 jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Patrick D Dolan of Dechert LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
March 2015

Mexico

Andrés Nieto

Von Wobeser y Sierra, SC

General

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

In Mexico, these types of operations are governed by:

- the Securities Market Law;
- the general rules issued by the National Banking and Securities Commission;
- the General Law of Negotiable Instruments and Credit Operations; and
- the Income Tax Law.

2 Does your jurisdiction define which types of transactions constitute securitisations?

Mexican law does not define the concept of securitisation, however such concept is found in the Securities Market Law and in the General Law of Negotiable Instruments and Credit Operations, through the issuance of bonds and participation certificates, respectively.

3 How large is the market for securitisations in your jurisdiction?

During the first six months of 2014, the total volume of securitisations of mortgages and other assets in Mexico was 16,000 million pesos. Also, during 2013, securities backed by mortgages were issued for 29,728 million pesos in Mexico (of those, Fovissste placed 16,967 million pesos, Infonavit 8,569 million pesos and Bancomer 4,192 million pesos).

Regulation

4 Which body has responsibility for the regulation of securitisation?

The National Banking and Securities Commission (an agency of the Ministry of Finance and Public Credit) is the body responsible for the supervision and regulation of the entities forming the Mexican financial system. They ensure its stability and proper functioning, and maintain and promote the healthy and balanced development of such system as a whole, in protection of the interests of the public. It therefore has powers to issue general provisions applicable to securities issuers.

5 Must originators or issuers be licensed?

To make a public offer in Mexico, securities must be registered with the National Securities Registry, under the National Banking and Securities Commission. The latter must authorise the placement of such securities before the investing public.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

For the National Banking and Securities Commission to authorise the registration of the securities on the National Securities Registry and their placement to the public, a procedure must be followed before the Commission and before the Mexican Stock Exchange. The Mexican Stock Exchange must grant a favourable opinion for the listing of the securities, provided the requirements set forth in the Securities Market Law and the general rules issued by the National Banking and Securities Commission are complied with.

In addition, the National Banking and Securities Commission has the authority to declare, as a precautionary measure, the suspension of the registration of the securities of an issuer in the National Securities Registry, and to cancel the registration of its securities.

7 What sanctions can the regulator impose?

In order to ensure compliance with its decisions, the National Banking and Securities Commission may use as enforcement measures:

- notice with warning;
- fines from 100 to 5,000 days of salary;
- an additional fine for each day the infringement persists;
- temporary, partial or total closure; or
- state action.

If the enforcement measures are inadequate, the National Banking and Securities Commission may request the competent authority to respond to the fact that the legitimate order was disobeyed.

Eligibility

8 Outside licensing considerations, are there any restrictions on which entities can be originators?

Mexican law does not establish restrictions in relation to who can act as originators in a securitisation. The only limitation is established in the General Law of Negotiable Instruments and Credit Operations, which establishes that only persons with the capacity to transfer the ownership or title of the goods or rights conveyed in trust may be originators.

Furthermore, with regard to bonds, the Securities Market Law establishes that domestic or foreign entities that have the legal capacity under the law to sign negotiable instruments may issue bonds.

9 What types of receivables or other assets can be securitised?

Mexican law does not impose any restrictions regarding the goods that can be conveyed to a trust and are subject to securitisation, provided they are to be used for a legitimate and specified end. Generally, in securitisation schemes, mortgages or leased real estate are contributed without impeding the use of other assets such as accounts receivable, automotive loans and federal participations of the states (and municipalities), among others.

10 Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

In the case of a public securities offer carried out in Mexico, any person, individual or entity, national or foreign, can acquire the securities subject to the issuance. However, a private securities offer that is not registered with the National Securities Registry must be made exclusively to institutional or qualified investors, or be offered to no more than 100 persons. It must be carried out under plans or programmes applicable generally to employees of the issuing company or entities that it controls or that control it, or be made to shareholders or partners of entities that carry out their corporate purpose exclusively or principally with the issuing company.

11 Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

In the case of securities registered in the National Securities Registry, securities are held only by brokerage firms, which will allot them to their clients. They must be deposited in a securities depository (SD Indeval), which will be responsible for their deposit, safekeeping, administration, compensation, liquidation and transfer.

Furthermore, with regard to assets that form the trust property, the originator may control the administration of such goods, or their administration may be entrusted to a third party. This is done through an administration agreement with the trustee, which will hold the title to such assets, in which case compensation will be established for the administrator who will be responsible for the assets of the trust.

Also, in accordance with the Securities Market Law, only financial institutions, brokerage firms and mutual fund management companies may act as trustees (for securitisation purposes).

12 Are there any special considerations for securitisations with a public-sector element?

According to the Securities Market Law, some public-sector issuers may request from the National Banking and Securities Commission the preventive registration of their securities generically. Such registration would have general effect and would permit the issuer to carry out issuances of the securities subject to such registration without limitation.

The National Banking and Securities Commission may only authorise preventive registration generically in the case of securities issued by:

- the United Mexican States;
- the Bank of Mexico;
- the Protection of Bank Savings Institute;
- international multilateral financial bodies to which Mexico belongs;
- credit institutions, in the case of debt instruments representing a liability at terms equal to or less than one year; and
- investment funds in debt, variable income, capital and limited purpose instruments, as well as investment companies specialising in retirement funds, in the case of shares representing their capital stock.

Transactional issues

13 Which forms can special purpose vehicles take in a securitisation transaction?

In Mexico these types of operations are generally carried out through a trust as an investment vehicle, to which the assets subject to the securitisation are conveyed. In turn, it is the trustee that issues the bonds or participation certificates. Nevertheless, Mexican law does not prohibit a company incorporated as an investment vehicle from engaging in such operations.

14 What is involved in forming the different types of SPVs in your jurisdiction?

In the case of trustees issuing bonds or participation certificates, it is necessary to execute a trust agreement, as well as an administration agreement of the assets conveyed in trust. This is normally executed with the originator, which preserves the administration of the assets. This implies, among other things, the negotiation of the trust agreement with the trustee, which can involve costs and time for the issuance of the bonds or participation certificates.

15 Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

In the case of secured transactions with a mortgage or real estate, the assignment will be governed by the place where the real estate conveyed in trust is located. In Mexico, the power to legislate in civil matters corresponds to each of the states and the federal district.

16 May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

Under Mexican law, there is the possibility of the trustee alienating the assets conveyed in trust and substituting them with others of the same nature, according to the eligibility criteria and according to the mechanisms that are established in the trust agreement.

17 What are the registration requirements for a securitisation?

If the bonds or participation certificates are placed through a public offer in Mexico, they must be registered in the National Securities Registry, following the authorisation of the National Banking and Securities Commission.

Furthermore, if the operation involves the transfer of real estate to the trustee, the latter must be registered in the public registry of property of the place where such real estate is located. If the transfer involves personal property, it must be registered with the Sole Registry of Security Interests over Moveable Property. Nevertheless, in the case of mortgage loans, their registration will not be necessary provided that the assignor retains the administration of such credit facilities.

18 Must obligors be informed of the securitisation? How is notification effected?

Mexican law establishes that in the case of mortgage loans, the institutions of the Mexican banking systems, the other financial entities and the social security institutes may assign such loans without notifying the debtor, provided that the assignor retains their administration. If the assignor ceases to retain the administration of such loans, it must notify the debtor in writing of the assignment.

19 What information must issuers disclose to investors and prospective investors? How must it be disclosed?

For issuers who wish to register their securities with the National Securities Registry in order to make a public offer, the Securities Market Law imposes the obligation of preparing a placement prospectus that includes the relevant information, as well as the rights and obligations of the issuer and of the investors in the securities. Such placement prospectus should include:

- the characteristics of the offer and of the securities;
- the destination of the funds;
- the price or rate;
- the financial, administrative, economic and legal situation of the issuer, its description and line of business, as well as the risk factors and contingencies to which it is exposed and the composition of the business group to which it belongs;
- the structure of the capital stock and its shareholding structure;
- the relevant transactions executed with related persons; and
- the operating income and its financial situation.

In addition, once the issuer has registered securities with the National Securities Registry, it must present to the National Banking and Securities Commission and the Mexican Stock Exchange, for dissemination to the general public by the latter:

- reports in relation to corporate acts; and
- quarterly and annual reports that include:
 - financial statements;
 - reports on corporate restructuring;
 - reports on relevant events;
 - reports on its policies and operations; and
 - reports on the positions the issuer holds in derivative financial instruments.

20 What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

When the assignment of the trust property involves the transfer of personal data, the trustee will assume the same obligations as the assignor that transferred such data, and it will comply with the Federal Law for Protection of Personal Data in Possession of Private Parties. In these cases the data controller must take the measures necessary to guarantee that the privacy notice provided to the data subject previously is respected at all times, by it and by the third parties with which it has a legal relationship.

The data controller, or third parties that intervene in any stage of the processing of personal data, must keep confidentiality. This obligation will continue after the termination of their relationship with the data subject or, as the case may be, with the data controller, an obligation that may be waived by the data subject.

The processing of personal data is subject to the consent of the data subject, which may be express or tacit. It will be considered tacit when the privacy notice has been made available to the data subject and she or he has not manifested opposition, thereby permitting their obtaining, use,

disclosure or storage. However, the data subject will have the right at any time to oppose to the processing of her or his personal data.

21 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on in securitisations?

The Securities Market Law prohibits the partners, members of the board of directors, general director, examiners and directors of securities rating agencies to maintain, directly or indirectly, shares representing the capital stock of the financial entities they rate, or act as or have the capacity of partners, board members, examiners or directors of such entities.

Furthermore, the securities rating agencies may not, under any circumstances, execute contracts with respect to securities issued by issuers with which their shareholders, board members or directors involved in the credit rating process of such securities have conflicts of interest.

The securities rating agencies must reveal to the public the ratings they carry out on securities registered in the National Securities Registry or that will be registered therein, as well as their modifications and cancellations.

For this purpose, each securities rating agency will have an internal manual which will contain the description of the rating process, and will specify the scale, nomenclatures and interpretation of the rating, as well as the policies and means of disclosure to the public of the opinions, ratings and analysis issued, along with their changes.

22 What are the chief duties of directors and officers of SPVs? Must they be independent of the originator?

The Securities Market Law establishes that the trust issuing bonds must have a technical committee containing at least 25 per cent independent members, and whose independence will be rated with respect to the originator, as well as the company that administers the trust property.

23 Are there provisions requiring originators and arrangers to retain some exposure to risk in a securitisation?

Mexican law does not provide any obligation to the originator nor the arrangers to acquire securities issued by the investment vehicle, or to retain any exposure to risk in this kind of transaction. Notwithstanding the above, the originator may provide collateral by means of the trust agreement to retain any level of exposure to risk along with the holders of the securities.

Security

24 What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

In securitisation operations, internal guarantees can be established in which the originator guarantees to the investors compliance with the obligations under such bonds. On the other hand, external guarantees can be established in which a third party partially or totally guarantees compliance with such obligations.

25 How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

The interest of investors is represented by negotiable instruments, bonds or participation certificates. These give investors the right to obtain certain returns derived from the flow of funds that the issuing trust receives. In case of non-compliance, the trust property can be attached in order to pay its obligations under such bonds.

26 How do investors enforce their security interest?

The assets assigned by the originator, together with its accessories, make up the trust property. In case of non-compliance by the issuing trust, the bond holders can demand, through the common representative in case of issuances carried out through a public offer, or individually, the payment of the past due interest. If applicable, they may attach the trust property to assert their rights under the bonds.

27 Is commingling risk relating to collections an issue in your jurisdiction?

By choosing the trust as an investment vehicle, as issuing trustee it may issue different series of bonds, preferred or subordinate. Investors in an issuance of preferred bonds will be paid prior to investors in subordinated bonds. Notwithstanding the above, under the Securities Market Law, it may be established that the assets conveyed to the accounts or subaccounts

that correspond to each series may only be used for complying with the obligations of the respective series, and may not be used for complying with the obligation under different series, even in the event of the bankruptcy of the issuing trust.

Taxation

28 What are the primary tax considerations for originators in your jurisdiction?

In the case of a trust dedicated to the acquisition or construction of real estate, the originators that contribute real estate assets to the trust and receive participation certificates for the total or partial value of such assets may defer the payment of the income tax caused by the profit obtained in the sale of such assets until such certificates are sold. They should then update the amount of tax caused, corresponding to each certificate that is sold for the period from the month of the contribution of the real estate to the trust until the month in which the participation certificates are sold.

In addition, when originators contribute real estate assets that are immediately leased to such originators by the trustee, they may defer the payment of the income tax caused by the profit obtained in the sale of the assets until the lease agreement terminates, provided it is not a term of more than 10 years or until the trustee sells such assets, whichever happens first.

29 What are the primary tax considerations for issuers in your jurisdiction?

The Income Tax Law establishes certain tax benefits for those trusts that are engaged in the acquisition or construction of real estate that is to be leased, provided that:

- at least 70 per cent of the trust property is invested in real estate;
- they are to be leased, and they are not sold for at least four years from the termination of their construction or their acquisition;
- the trustee issues participation certificates, whether they are placed before the investing public by a public offer or they are acquired by a group of investors composed of at least 10 persons that are not related parties, and in which none of them individually is a holder of more than 20 per cent of all the participation certificates;
- the trustee distributes among the investors at least once a year, no later than 15 March, at least 95 per cent of the tax result of the immediately prior fiscal year generated by the assets that make up the trust property; and
- it is registered in the Trusts Registry dedicated to the acquisition or construction of real estate.

30 What are the primary tax considerations for investors?

Investors in bonds that the issuing trust issues must pay the income tax for the interest they obtain derived from the bonds. In addition, they must request their registration in the Federal Taxpayers Registry; keep the documentation related to the income, withholdings and the payment of such tax; and file their annual declaration. There is an exception in the case of individuals that only obtain cumulative income for interest, in which case they can choose not to file their annual declaration and consider the withholding by the one obligated to pay such interest as a final payment – provided such income does not exceed 100,000 pesos.

The securities deposit company, responsible for paying the corresponding interest to the bond investors, will be obligated to withhold and deliver the income tax. They will apply the rate established by the Congress of the Union for the fiscal year in question on the amount of the capital that gives rise to the payment of the interest, as a provisional payment.

In addition, in the case of interest paid by companies that are not considered members of the financial system under the Income Tax Law and that arises from securities that are not placed before the investing public through the Mexican stock exchange or high trading volume markets, the withholding will be at the rate of 20 per cent on the nominal interest.

When residents abroad obtain income through a trust created under Mexican law, the trustee will determine the taxable amount and shall make the corresponding withholdings. In the case of trusts issuing securities placed before the investing public, the depositories of securities will be the ones that must withhold the tax on the income derived from such instruments.

Update and trends

On 10 January 2014, the 'financial reform' was published in the Official Federal Gazette, amending the legal framework applicable to the Mexican financial system. To the best of our knowledge, to date, there are no bills reforming Mexican law intended to amend such legal framework.

Bankruptcy**31 How are SPVs made bankruptcy-remote?**

The assignment to the trust of the assets subject to the securitisation involves a true transfer of property to the trustee, who must use them to meet the purposes established in the trust agreement. The obligations under the bonds will be fulfilled solely and exclusively with the trust property. In case of bankruptcy of the originator, the trust assets will be separated from the estate property subject to the bankruptcy.

32 What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

The assignment by the originator to the trust, duly registered in the corresponding registry, whether personal property or real estate, will involve an actual transfer of ownership. The obligations arising from the issuance of the securities will be complied with using the trust property, and this will not form part of the estate property in the event that the originator is declared bankrupt.

33 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

If the trust has been chosen as the investment vehicle, the judge handling the bankruptcy proceeding of the originator must separate the estate property subject to bankruptcy from the assets conveyed to the trust, even when they are in the possession of the originator, as provided in the Commercial Bankruptcy Law.



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