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Securitisation

Peru

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

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Law and Practice

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Background

In Peru, securitisations may be arranged by means of (i) a securitisation trust administered by a trustee (*sociedad titulizadora*) or (ii) a special purpose company (*sociedad anónima*). In both cases, the purpose of the trust and the social purpose of the company will be to acquire assets, and issue and repay securities. Since there is little experience in the Peruvian market of securitisation using a special purpose company (especially due to tax reasons), this analysis will focus on the use of a securitisation trust that is commonly used in the country.

A dominion in trust (*dominio fiduciario*) confers upon the trustee full authority over the assets comprising the trust estate, such as the right to manage, use, dispose of and replevin (ie, “claim and delivery” of) said assets, but these rights have to be exercised taking into consideration the objective for which the trust was set up and the limitations established in the trust indenture.

Accordingly, the trustee (and, therefore, the trust agent) becomes the manager and representative of the trust estate. Moreover, the assets comprising the trust estate are subject to the payment of the obligations and responsibilities contracted by the trustee while exercising the dominion in trust, including the securities and acts it performs to comply with the object of the trust and with the provisions set forth in the trust indenture.

The trustee can only be a corporation (*sociedad anónima*) authorised to serve as such by the Peruvian Superintendence on Capital Markets (SMV). Said corporation is subject to minimum requirements as to its infrastructure and capital, among other requirements.

Insolvency Laws

The general insolvency and bankruptcy law, Law 27,809, does not apply to autonomous estates such as trusts. In these cases, the legislation on capital markets would apply. Pursuant to Peruvian securities legislation: (i) the terms of the trust indenture would apply in a case of insolvency and if no clauses regarding insolvency have been set forth in the trust indenture, the general rules of the insolvency law would apply; and (ii) the SMV is entitled to appoint a liquidator.

The Peruvian securities legislation expressly sets forth that the assets of a securitisation trust will not be used to pay obligations of the trustor or of the trustee; in the latter case, obligations different from those contracted while exercising the dominion in trust are referred to.

In addition, this legislation sets forth that nullity due to simulation, annullability or inefficacy due to fraud may not be declared if they may cause harm to those who acquired securities through a public offering or who, having acquired them through a private offering, had acted in good faith and may suffer harm.

As a result, the provisions establishing the nullity of acts entered into by a person pursuant to the insolvency regulations do not apply.

Likewise, the person or persons obliged to transfer assets may not, unless otherwise agreed, request rescission due to injury, resolution or reduction of his or her payment due to hardship, or resolution due to non-compliance by the purchaser of due payment of the agreement by which they are obliged to transfer the assets.

True Sale v Secured Loan

In Peru, trusts in general (and not only securitisation trusts) have the effect of almost transferring ownership of the assets to the trustee for the benefit of the creditor and facilitating the foreclosure of the trust and sale of the assets by the trustee in an event of default. In addition, the terms for the foreclosure of the trust and sale of the assets should be more efficient than the process for the foreclosure of a mortgage and/or a pledge.

However, only securitisation trusts (unlike other types of trusts) are protected from nullity, annullability or inefficacy in the manner set forth above.

Protection for Transferred Assets

In a secured loan, the rules of the insolvency law regarding the “suspicion period” would apply. Certain acts executed by the debtor in the year prior to the date of commencement of the bankruptcy proceeding may be declared ineffective. This period of time, known as the “suspicion period”, implies that encumbrances, transfer agreements and other legal acts may be declared ineffective in the bankruptcy proceeding if they:

- were executed under gratuitous title or for valuable consideration, but not related to the normal development of the debtor’s activity;
- affect the debtor’s estate; and
- were executed or entered into within the previously mentioned one-year period.

In addition, a judge may declare ineffective the creation of any type of security interest created during the suspicion period, if such security interest is considered to have been established to commit a fraud against the creditors. However, such encumbrances cannot be declared ineffective if the following requirements are met:

- they are related to the usual and normal operation of the debtor's business;
- they have not caused damages to the debtor's patrimony; and
- they are reasonable.

All these requirements would be analysed by a court, which would be competent to declare the ineffectiveness of the encumbrances if any of the above-mentioned requirements are not met.

However, in the case of a securitisation trust, all the protection rules against nullity, annullability and inefficacy mentioned above would apply.

Opinion of Counsel

Opinion of counsel is normally obtained in order to support the bankruptcy remoteness of the transfer. The material conclusions and qualifications are:

- that trust agreements are a valid and legally binding agreement under the laws of Peru;
- that the trust agreement will be deemed to have created a perfected estate in trust as described therein and have full third-party effectiveness when registered with the Peruvian Contracts Public Registry (*Registro Mobiliario de Contratos*);
- any transfer under a securitisation trust agreement will be deemed as a true sale and the agreement will not be recharacterised as a loan secured by the assets;
- based on that characterisation as a sale, neither the assets nor any proceeds thereof will constitute part of the trustor's insolvency estate; and
- the enforceability of the securitisation trust agreement may be limited by bankruptcy, insolvency, fraudulent conveyance, fraudulent transfer, reorganisation, moratorium, *proceso concursal* and liquidation to the extent required by the Securities Law, or other similar laws relating to or affecting creditors' rights by general equitable principles – regardless of whether enforcement is sought in equity or at law – including, principles regarding good faith and fair dealing, and by any principles of public policy (*orden público*) and good morals in force in Peru.

Other Relevant Insolvency Law Aspects

It is important to mention that there are no relevant precedents regarding the insolvency of a securitisation trust. The above-mentioned rules have not been tested and there is no knowledge of the opinion of Peru's courts regarding these rules.

1.2 Special Purpose Entities

As mentioned above, securitisation trusts are generally used instead of special purpose corporations for tax reasons and for the following:

- a trust creates an autonomous estate different from the estate of the trustee, the trustor or the beneficiaries;
- a trust is released from, and is not liable for, the obligations of any of the parties;
- a trust is solely subject to the payment of the obligations, fees and expenses incurred by the trustee in exercising its faculties; and
- if there are insolvency rules in the corresponding trust indenture, the insolvency rules of Law 27,809 will not apply to a securitisation trust.

For the reasons stated above, a special purpose entity (SPE) is not recommended for a securitisation. If an SPE is used, the appointment of independent directors and establishment of an audit committee and investment committee are recommended to address corporate governance issues. In addition, the prohibition of operations or incurring debt not related to the securitisation operations is recommended.

The principal risks are the suspicion period, as described in **1.1 Insolvency Laws**.

It is not usual to use an SPE for securitisations, so it would not be usual to obtain the opinion of counsel to support the bankruptcy remoteness of an SPE.

1.3 Transfer of Financial Assets

There are requirements to ensure a transfer of financial assets is valid and enforceable by the transferee against the transferor and its creditors. First, the trust agreement needs to be incorporated in a public deed before a public notary. In addition, when the securities will be publicly offered, the trust indenture needs to be registered in the Public Registry (*Registro Mobiliario de Contratos*) and in those registries where the assets are registered, if applicable (ie, if the assets are real estate, the trust indenture needs to be registered in the corresponding entry of the Public Registry of Real Estate). Second, the assets have to be transferred in accordance with their nature. For example, if the assets are real estate, the transfer needs to be registered in the Public Registry of Real Estate; if there is an assignment of rights, this has to be duly notified to the assigned counterparty.

The notarisation requirement is applicable in a true sale and a secured loan. The registration requirement is applicable only in the case of mortgages and security trusts, and it is advisable in the case of pledges.

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Public registration gives the security interest priority from the time and date of filing with the Public Registry, which effectively minimises the risk of a subsequent competing charge-holder taking priority over the same asset.

While public registration does go some way to addressing priority, it should be borne in mind that the priority of security interests can be varied with the consent of the secured creditors. This agreement should be registered in the Public Registry and should survive in the case of an insolvency of a borrower incorporated in Peru.

Registration is also a requirement for a public offering of securities.

1.4 Construction of Bankruptcy-Remote Transactions

A bankruptcy-remote transaction can be constructed using a security trust.

The security trust is regulated by Law 26,702, the Finance and Insurance Systems General Law (the Banking Law). It also creates an autonomous estate different from the estate of the trustee, the trustor or the beneficiary. The trustee in this case is an entity authorised by, and under the supervision of, the Superintendence on Banking, Insurance and Private Pension Funds (the SBS). A trust may be created on any kind of property or rights. The security trust would also protect the transferee from bankruptcy of the originator or transferor.

The material conclusions and qualifications of legal practitioners who provide legal opinions for such transactions would be:

- that the trust agreement is a valid and legally binding agreement under the laws of Peru;
- that the trust agreement is enforceable thereunder in accordance with its terms against the transferor except for any limitations that may arise from bankruptcy, insolvency, reorganisation, moratorium, fraudulent conveyance or transfer, or other similar laws relating to, or affecting the rights of, creditors generally; and
- that the trust agreement will be deemed to have created a perfected estate in trust as described therein and have full third-party effectiveness when registered with the Peruvian Contracts Public Registry (*Registro Mobiliario de Contratos*).

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

In Peru, fiduciary transfers of financial assets from the originator or an intermediary operating company are generally not

subject to taxes. Notwithstanding, a fiduciary transfer may be subject to income tax when the assets that are the subject matter of the transfer are intended not to come back to the originator at the liquidation of the SPE.

2.2 Taxes on SPEs

The SPE under a *fideicomiso* structure is deemed to be a transparent vehicle for tax purposes, for which reason any income earned at the SPE level is allocated, on a yearly basis, to the originator (in the case of banking trusts), or to the specific person appointed as taxpayer (in the case of securitisation trusts).

2.3 Taxes on Transfers Crossing Borders

In principle, any fiduciary transfer is not subject to taxes in Peru, regardless of whether such transfer occurs within the country's boundaries or is a cross-border transfer.

2.4 Other Taxes

There are no other relevant tax issues arising in connection with securitisation transactions in Peru.

2.5 Obtaining Legal Opinions

It is not customary to issue legal opinions in connection with fiduciary transactions. Generally speaking, what is requested is the issuance of a memorandum describing the tax rules to which attention will need to be paid at the settlement, during the life of the structure and at its liquidation.

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

Even though transferors may not register the transfer of some assets (ie, participation rights in contracts) as a sale and securitisation bonds as their own debt and not one of the trust, that has not created an issue around the legal treatment of the transfer as a true sale. However, as mentioned above, there is no precedent in which this characterisation as a true sale has been tested.

3.2 Dealing with Legal Issues

Lawyers are not permitted to give legal opinions regarding any accounting treatment.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

Material Laws and Regulations

The material laws and regulations applicable to public offerings are the Peruvian Securities Law, approved by Supreme Decree

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No 093-2002-EF, and the Peruvian Regulations on Securitisation, approved by CONASEV Resolution No 001-97-EF/94.10.

Material Forms of Disclosure

In the case of public offerings, the following requirements must be complied with.

- A filing application with the SMV requesting registration of the securities and of the prospectus. The following documents shall be attached to the application:
 - (a) a copy of the trust indenture duly executed by the parties that shall be registered in the public registries;
 - (b) an affidavit stating that the characteristics of the securities to be issued comply with the requirements set forth by Cavali ICLV (the Peruvian clearing house) when the securities will be represented by account entries; and
 - (c) a copy of any document by which rights, duties or charges in addition to those provided for in the trust indenture are established (eg, guarantees, funds management and service agreements).

The prospectus containing the information required in the guidelines set forth in the Manual for the Fulfilment of the Requirements Applicable to Public Offerings of Securities and in the Common Rules on the Determination of the Contents of Informative Documents. The prospectus shall include financial projections of the future cash flow.

- The following financial information of the trustee and the trust estate:
 - (a) individual audited financial information for the last two fiscal years;
 - (b) non-audited individual financial information corresponding to the last quarter, and financial ratios;
 - (c) last annual consolidated audited financial information;
 - (d) non-audited consolidated financial information corresponding to the last quarter;
 - (e) annual reports for the last two fiscal years; and
 - (f) the opening balance of the trust estate.
- A sworn statement of no relation between the originator and the trustee.
- A placement agreement.
- Written consents from the experts participating in the prospectus, if any.
- A declaration executed by the originator and the trustee about the agreement for the delivery of information to the SMV.
- A declaration from the originator about the effects derived from the fiduciary transfer in its financial profile and its net worth.

- Reports by two rating agencies. The rating companies shall not be related to the trustee, the originator and/or the enhancers.

Under a private offering (which is usually directed to institutional investors), although authorisation from the SMV is not necessary, the documents mentioned above are generally used and meet the regulatory requirements set forth above in order to raise capital from local pension funds, mutual funds and insurance companies. However, in the case of private offerings, only one rating is usually required.

Principal Regulators

The principal regulator is the Superintendence on Capital Markets, which has jurisdiction over public offerings in Peru and over securitisation trustees (*sociedades tituladoras*).

Violations of Required Disclosure

Pursuant to the Peruvian Public Offering Regulations, the issuer and its main officers (chief executive officer or similar) are responsible for the entire content of the prospectus. The chief financial officer and the general accountant of the issuer are responsible for the financial information of the issuer. Lawyers who sign the prospectus are liable for the legal information included in the prospectus. The underwriter/lead arranger and its lawyers are responsible for the information disclosed in the prospectus but they have a due diligence defence. The special experts are responsible for the specific information included in the prospectus that they have accepted to include as their opinion.

If there is any violation on required disclosure, the SMV may apply a penalty of up to 700 tax units (for 2019, a tax unit was equivalent to PEN4,200) and may cancel the authorisation of any entity authorised by the SMV involved in the violation (ie, broker dealer or the securitisation trustee).

Public Market v Private Market

In general, the Peruvian debt market is mainly formed by public debt. According to a Report of the Peruvian Central Bank, as per May 2019, the sovereign debt has increased and represents 14.7% of the gross domestic product (GDP). The private corporate debt growth was 24.1% during the last 12 months but still represents 3.5% of the GDP.

The principal investors are private pension funds, mutual funds and insurance companies.

Regarding investments of the private pension funds, as of May 2019, only 3% of their portfolio is formed of securitisation debt instruments.

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The regulatory emphasis in the capital market is on public offerings and on regulating the investment of private pension funds.

In addition, the Peruvian government has granted certain temporal tax benefits to real estate securitisation trusts (FIBRAs), which are conditional on their meeting certain specific requirements. Tax benefits include the following:

- any lease fees received by the FIBRA and allocated to investors who are individuals are subject to a reduced income tax rate of 5%;
- investors may defer income tax payments resulting from their contributions to the FIBRAs; and
- capital gains obtained from the transfer of participation certificates in a FIBRA through the Lima Stock Exchange are tax-exempt, provided that such certificates accomplish certain trade volume.

Securitisation trusts must comply with the following requirements in order to qualify as FIBRAs:

- at least 70% of the net worth must be invested in real estate assets capable of generating a rent, which must be achieved after 12 months of the first placement of securities;
- all real estate assets generating a rent may be transferred only four years after they were acquired or after their construction is completed;
- at least 95% of the annual net profits must be distributed;
- the participation certificates in the securitisation trust must be placed through a public offering among at least ten non-related investors; and
- a technical committee must be appointed.

Obtaining Legal Opinions on Compliance

The usual language used by firms when issuing legal opinions on the compliance of such rules is as follows:

“As signatories of a prospectus, this firm declares, having performed an investigation within the scope of its competence and in an appropriate manner in accordance with the circumstances, which leads the firm to consider that the information provided or incorporated by reference, as the case may be, complies in a reasonable manner with the requirements set forth in the regulation in force (that is, it is presented in a correct, sufficient, timely and clear manner) and that, with respect to the occasions in which said information is relied upon for a statement issued by an expert in the matter or is the result of said statement, there are no reasons for considering that the referred statement contravenes the foregoing requirements, or that said information differs from what is expressed herein.

However, the firm declares that anyone wishing to purchase the offered securities must do so based on their own assessment of the information presented in the prospectus with respect to the value and to the proposed transaction. The purchase of the securities presupposes the acceptance by the subscriber or purchaser of all the terms and conditions of the offering, as they appear in the prospectus”.

4.2 General Disclosure Laws or Regulations

Please see 4.1 Specific Disclosure Laws or Regulations.

4.3 Credit Risk Retention

There are no laws or regulations on credit risk retention. In securitisation, the obligation to repay the bonds issued is exclusively of the trust estate and not of the trustor, unless there is a specific agreement stating a recourse against it, through a security agreement, personal guarantee (*fianza*) or similar arrangements.

4.4 Periodic Reporting

There are regulations requiring the trustee to periodically report information to the SMV and to the Lima Stock Exchange if the securities are registered at this institution.

Securitisation trustees must file with the SMV:

- their financial statements (annual and quarterly) and annual financial statements have to be audited;
- their annual reports;
- reports related to changes to their by-laws, their management staff and board of directors;
- reports regarding the execution of securitisation trust indentures where securities will be placed by means of a private offering;
- reports concerning the transfer of their shares by more than 5% of their capital, among other documents;
- any information regarding security agreements granted by them for the benefit of the trusts that they administer; and
- any other information requested by the SMV.

In addition, regarding securities placed by means of a public offering, trustees have to file with the SMV:

- any material fact (*hecho de importancia*) regarding the trust the same day it occurs;
- annual audited financial statements and quarterly financial statements;
- quarterly financial ratios;
- change of the trust agent;
- quarterly reports regarding all the actions performed by the trustee regarding the trust during the quarter;
- amendments to the trust agreement; and
- any other information requested by the SMV.

The SMV regulates and enforces those rules. The penalties vary depending on the seriousness of the non-compliance. Fines may be up to 700 Peruvian tax units and the SMV may cancel the authorisation of the trustee depending on the significance of the violation.

4.5 Activities of Rating Agencies (RAs)

Rating agencies must obtain authorisations from the SMV to initiate activities and they are regulated by this governmental entity.

It is obligatory to have at least two ratings in the case of public offerings of debt instruments. However, in the case of private offerings and for an investment in debt instruments by some institutional investors (ie, private pension funds and insurance companies), at least one rating is required.

The SMV both regulates and enforces its own regulations. The penalties vary depending on the seriousness of the non-compliance. Fines may be up to 700 tax units and the SMV may cancel the authorisation of a rating agency depending on the significance of the violation.

4.6 Treatment of Securitisation in Financial Entities

As set forth in the legislation, securitisation trustees must maintain a capital and a net worth of PEN750,000. This amount has to be updated on a yearly basis using the Consumer Price Index from the National Institute of Statistics and Informatics. For 2019, the amount was PEN1,499,725.

In addition, this amount has to be increased by 0.5% of the value of the assets of all trusts the trustee is managing. Alternatively, the trustee may only increase by 0.05% of the value of the assets of all trusts the trustee is managing, but in this case it has to grant a security equivalent to 0.5% of the value of the assets. This security may only be a bank deposit, a letter of credit or a certificate of deposit.

The SMV regulates and enforces its regulations. The SMV reviews the quarterly financial statements delivered by the securitisation trustees to verify any non-compliance. If there is a deficit, it has to be covered during the next three months from the earliest of the date of the delivery of the financial statements or the requirement from the SMV.

4.7 Use of Derivatives

There are no specific laws or regulations that apply to the use of derivatives. The only rules concern disclosure in the case of the use of derivatives by issuers of securities registered with the SMV.

The SMV enforces the above-mentioned rules regarding disclosure on derivatives. The penalties vary depending on the seriousness of the non-compliance. Penalties may be up to 700 tax units and, depending on the significance of the violation, the SMV may cancel the authorisation of the securitisation trustee.

4.8 Specific Accounting Rules

We do not have the opinion of a certified accountant regarding this issue.

4.9 Investor Protection

The main rules regarding investor protection are related to the disclosure of information. Peru also has the rules mentioned in **4.1 Specific Disclosure Laws or Regulations** regarding protection in the case of public offerings.

4.10 Banks Securitising Financial Assets

Banks and other entities supervised by the SBS need a prior authorisation from the SBS to act as transferor in the following cases:

- when the transferor is related to the beneficiary of the trust;
- when the trust will be formed by loan portfolio, unless they are classified as a loss or provisioned to 100%; and
- when the trust will be formed by recovered assets or investments, unless they are provisioned to 100%.

In the case of transfer of investments of insurance companies, they will need the prior authorisation of the SBS even when the investment is provisioned.

The filing with the SBS has to include:

- the board of directors' resolution;
- a draft of the trust agreement;
- an identification of the assets to be transferred, including their characteristics, book value, depreciation and performance;
- effects in the bank and its ratios;
- identification of any risk for the transferor; and
- identification of any enhancement.

The SBS has 60 business days to approve the request.

4.11 SPEs or Other Entities

As explained above, trusts are used instead of corporations or other entities.

The material factors used in choosing trusts are bankruptcy remoteness and the protection provided to trusts in Peruvian legislation.

The managing entities are securitisation trustees that have to be authorised by the SMV.

4.12 Activities Avoided by SPEs or Other Securitisation Entities

Securitisation trustees may only administer securitisation trusts pursuant to the terms and conditions of the securitisation agreements. Their exclusive purpose is to administer trusts. They cannot perform any other activities without the prior authorisation of the SMV.

The SMV is in charge of regulating and enforcing this exclusive purpose rule. The penalty for non-compliance may be the cancellation of the authorisation.

4.13 Material Forms of Credit Enhancement

The material forms of credit enhancement used in Peru are over-collateralisation, cash reserves or deposits and guarantees.

4.14 Participation of Government-Sponsored Entities

Government-sponsored entities do not usually participate in the securitisation market. However, some entities, such as Fondo Mi Vivienda, have participated as transferor in securitisation transactions.

Fondo Mi Vivienda is a for-profit entity that is wholly owned by the Peruvian State, established with the principal goal of providing lower and middle-income working families and individuals who are most likely to be part of the population most affected by the quantitative and qualitative housing deficit in Peru with access to financing to purchase or improve their residences. One of its key goals is to continue to provide innovative mortgage products and enhance the existing loan programmes that target lower-income borrowers.

Under its organisational documents, it may also act as a trustee of mortgage securitisation transactions for financing housing projects. In the event that it acts in such capacity, it will be required to comply with specific regulations issued by the SMV in connection with such transactions.

4.15 Entities Investing in Securitisation

The most common type of entities investing in securitisation are pension funds, investment funds and insurance companies. For a description of these investors, see 7.5 **Investors**. However, due to existence of FIBRAs, the percentage of retail investors is expected to increase in the next years.

In general, all principal investors are allowed to invest in securitisations.

5. Documentation

5.1 Bankruptcy-Remote Transfers

The public deed of the trust indenture is the main document in a securitisation transaction. It must include at least the following information:

- the specific purpose of the trust;
- individualisation of the assets being transferred, indicating whether they are owned by the originator or whether they belong to third parties or are future assets;
- the method and term of the transfer;
- the name of the trust estate;
- the rights and faculties of the originator, the trustee and the trust beneficiaries, expressly describing the terms and conditions of the securities, and the limitations imposed on the faculties of the trustee, among other conditions;
- any additional guarantees established;
- the terms and conditions of the trust estate;
- the destination of the assets upon termination of the trust; and
- any other information established by the SMV.

5.2 Principal Warranties

The principal representations and warranties are those made by the grantor related to:

- existence;
- authorisation for the execution of the trust agreement and non-infringement of its by-laws or regulations;
- validity and enforceability of the transfer of assets;
- no restrictions or limitations regarding the transfer of the assets;
- non-existence of previous pledges or encumbrances over the assets;
- non-existence of a breach of any material regulation or a default of its material agreements;
- non-existence of a material adverse change or event from the date of its last financial statements; and
- no violation of any legal, contractual or other provision or order as a consequence of the execution, performance or fulfilment of the agreement.

Regarding enforcement, see 6. **Enforcement**, but usually an event of default would occur if any representation is false or materially incorrect on the date it was furnished and this authorises the trustee to initiate the enforcement procedure set forth in the trust agreement.

5.3 Principal Perfection Provisions

The principal provisions regarding perfection are the obligation of registering the trust agreement in the corresponding public

registry (including the one of the SMV in the case of public offerings) and the notices or prior authorisations that have to be delivered when applicable (for example, in the case of public concessions or assignment of rights). This firm usually specifies in the trust agreement the manner in which each asset will be transferred to the trust and the specific procedure that the grantor has to comply with as conditions for the offering of the securities. However, Peruvian legislation allows the transfer of future assets and this firm specifies the steps and terms with which the grantor has to comply for this transfer.

Regarding enforcement, see **6. Enforcement**, but usually an event of default would occur if the perfection provisions are not complied with and this authorises the trustee to initiate the enforcement procedure set forth in the trust agreement.

5.4 Principal Covenants

The principal covenants are related to:

- the transfer of assets;
- fulfilling the obligations of material agreements, particularly those whose rights may be assigned;
- the using of proceeds;
- complying with legislation;
- paying enforceable taxes;
- keeping insurance policies;
- ensuring that the necessary concessions, permits, licences and authorisations are kept in force;
- informing the trustee regarding any material event (ie, those related to bankruptcy, embargo, attachments and interim relief) or a fact or situation that may be reasonably expected to give rise to a material adverse effect; and
- delivering financial statements, amendments to material agreements and other material reports.

Examples of negative covenants would be:

- agreeing on corporate reorganisations or acquiring other companies;
- participating in other activities or businesses not associated with its corporate purpose;
- supporting amendments to its material agreements that may give rise to a material adverse effect;
- making transfers or leasing of assets;
- entering into transactions with affiliates on terms that do not reflect arm's-length negotiation; and
- formalising agreements on derivatives for speculation purposes without observing the prudential practices of the industry in which it participates.

Regarding enforcement, see **6. Enforcement**, but usually an event of default would occur if the covenants are not complied

with and this will authorise the trustee to initiate the enforcement procedure set forth in the trust agreement.

5.5 Principal Servicing Provisions

The principal servicing provisions are related to the appointment of the servicer (usually the grantor acts as servicer in the case of accounts receivable since it knows its clients better) and the obligations of the services (ie, establishing the procedures to collect the accounts receivable, informing any default cases, demanding payment of any past due accounts receivable in court and out of court).

The servicer usually acts in accordance with a power of attorney granted by the trustee so that it may adopt any action and enter into any public or private instrument that may be required or convenient for the effective collection of, application for, arrangement for the collection of, claim, obtaining or recovery of any amount due.

Regarding enforcement, see **6. Enforcement**, but usually an event of default would occur if the servicing provisions are not complied with and this authorises the trustee to substitute the servicer and/or initiate the enforcement procedure set forth in the trust agreement.

5.6 Principal Defaults

The principal defaults used in securitisation are:

- non-payment;
- non-compliance of obligations by the grantor;
- cross-defaults of the grantor;
- false representations or warranties;
- final court orders, resolutions or awards against the grantor that may cause a material adverse effect;
- any bankruptcy proceeding against the grantor;
- any intent or execution, seizure or expropriation of the assets of the grantor; and
- if the transfer is not duly perfected pursuant to the trust agreement.

5.7 Principal Indemnities

The principal indemnities are granted in favour of the trustee in order to hold it harmless from and against any and all claims, losses, obligations, liabilities, costs, damages, penalties, actions, judgments, suits, expenses or disbursements of any nature that may be imposed on, incurred by, or asserted against the trustee arising from, in connection with, or related to the trust agreement or any action taken or omitted by the trustee.

5.8 Other Principal Matters

Other principal matters are the characteristics of the securities to be issued, any conditions for their issuance, the accounts of

the trust management, the rules regarding the dissolution and liquidation of the trust, the rules regarding decisions to be made by the holders of securities (ie, the existence of an assembly, its quorum and majorities) and the rules regarding the replacement or removal of the trustee and any other agent.

6. Enforcement

6.1 Other Enforcements

In Peru, the trust is enforced through extra-judicial proceedings as established in the trust agreement and the trustee itself is in charge of the enforcement, which is due to the fact that the trustee holds the possession in trust of the assets or rights transferred to the trust estate. Accordingly, the trustee may transfer the assets and/or rights in its possession provided that this is expressly stated in the trust agreement. Therefore, besides the parties' will, there is no legal requirement that determines the form of sale of the assets, with the type of trust being irrelevant.

The main benefit of extra-judicial enforcement of the security interest established on the property is that the enforcement is carried out based on the market value and thus the property does not devalue, as happens in judicial enforcement (due to the time that the proceeding takes and the reduction of its value as a result of the calls for auction made for purposes of the coercive enforcement).

A mechanism established in the Law of Bankruptcy (to protect the equity of a debtor company that becomes involved in bankruptcy proceedings) orders the suspension of the enforceability of all obligations that are outstanding as of the date of publication of the commencement of the bankruptcy proceeding. In this regard, once the existence of a bankruptcy proceeding is declared and disclosed, the judicial or extra-judicial enforcement of any security created by the debtor is suspended.

However, there are exceptions to the rule in those cases where the property has been furnished as a security interest to back third-party obligations or obligations originated subsequent to the date of publication, in which case they may be enforced.

In addition, the unenforceability of the debtor's obligations does not prevent creditors from going after the assets of third parties that have established collaterals or personal security interests in its favour, which shall be subrogated to the original creditor as a matter of law. Therefore, the enforcement proceedings filed against such third parties shall not be affected by the involvement of the secured debtor in bankruptcy proceedings.

It is important to point out that a security trust shall not be affected by a bankruptcy or insolvency proceeding since – as

mentioned above – it creates an autonomous estate. Therefore, the creditor may enforce the security trust any time without any limitation.

6.2 Effectiveness of Overall Enforcement Regime

There are no relevant precedents of enforcement of securitisation agreements, so it is impossible to give an opinion regarding the effectiveness of the enforceability of trust agreements.

7. Roles and Responsibilities of the Parties

7.1 Issuers

In a securitisation the issuer is the trustee – not the trustor (or originator) – and the disclosure of information is based on the fact that there are some assets that are segregated from the originator, and such assets will be supporting the repayment of certain debt securities. See 7.6 **Trustees** regarding their responsibilities and types of businesses.

7.2 Sponsors

In the Peruvian securities market it is common to use lead arrangers and/or financial advisers (*entidad estructuradora*) but they do not assume an underwriting commitment.

According to Peruvian regulations, only brokers, companies within the financial system who are allowed by law to underwrite, investment banks, or any other entities authorised by the SMV may act as underwriters or lead arrangers.

The role of the underwriter or lead arranger consists mainly in conducting due diligence on the grantor, establishing if the securities could be purchased by institutional investors, reviewing information to be provided to risk rating agencies or appraisers, structuring the issuance and choosing the marketing strategies for the issuance.

7.3 Underwriters and Placement Agents

The placement agent is usually a broker dealer (*sociedad agente de bolsa*) related to the sponsor. The placement agent must be a company duly registered and authorised by the SMV to act as such.

The broker dealer is responsible for the placement and allocation of the securities, and they usually have only best effort underwriting commitments.

7.4 Servicers

As stated above, grantors usually act as servicers. Since there are no regulations regarding their role, their principal obligations will be set forth in the trust agreement and include establishing

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the procedures to collect the assets, considering one or more clients in default, informing of any of the default cases, demanding the payment of any past due accounts in court and out of court, and requesting information.

The servicer will, in accordance with a power of attorney granted by the trustee and exercising the general powers it has to appoint the individual(s) to represent it, be vested with the respective general authorities and powers required for the processes and actions to be carried out.

7.5 Investors

The principal investors are as follows.

Pension Funds

Pension funds in Peru can be managed by the State (through the Pension Standardisation Office, or ONP) or by a specially licensed private pension fund manager (AFP).

Public pension funds are subject to investment policies contained in the ONP's internal guidelines. If a certain investment is approved, the ONP (as technical secretary in charge of implementing the public pension funds' investment decisions) shall have the capacity to enter into securitisation transactions.

AFPs are legal entities subject to the regulation of the SBS. In general terms, the investments made by AFPs (on behalf of the private pension plans they manage) are heavily regulated. Provided that these requirements are complied with, AFPs shall have the capacity to enter into securitisation transactions.

Regarding limits, in the case of private pension funds, the principal requirement is that the assets have to be eligible assets, too. In addition, there are limits but these would depend on the type of the fund and the securities.

Funds

Investment funds (*fondos de inversión*) are set up and managed by fund management companies. When investing, the fund management companies act in their own name, but with effect for and against the separate estates.

Investment funds whose shares are placed by means of a public offering and their corresponding fund management companies are subject to the law and regulations applicable to investment funds (respectively, the Investment Funds Law, as amended, and the Investment Funds Regulations, as amended).

Mutual funds are open-ended funds (*fondos mutuos*) set up and managed by fund management companies. Hence, fund management companies create a separate or autonomous estate or

fund (*patrimonio autónomo*) – ie, assets are separated from the fund management companies' assets.

When making dispositions over fund assets, the fund management companies act in their own name, but with effect for and against the separate estates.

Insurance Companies

Insurance companies, which are regulated and supervised by the SBS, are subject to the regulations applicable to investments carried out by the insurance companies, but have the legal capacity to enter into securitisation transactions.

7.6 Trustees

The trustee can only be an open-ended corporation authorised to serve as such. Said open-ended corporation is subject to minimum requirements as to its infrastructure and capital, including exclusivity rights as to its activities, among other requirements.

The trustee must comply with the following obligations, among others:

- to perfect the transfer of assets comprising the trust estates that they control;
- to take necessary measures to preserve, protect and defend its right as trustee;
- to prepare its own financial statements and the financial statements of each trust estate, in accordance with the Regulations on the Securitisation of Assets (the Regulations);
- to keep the trust assets separate from its own assets and from the assets comprising other trust estates;
- to keep a record for each trust;
- to make sure that the trust is not used as a means to impair the interests of the creditors of the originator or third parties, or to obtain undue benefits;
- to account for its work to the people indicated in the trust indenture;
- to provide the information and documents required by the SMV; and
- to call the trust beneficiaries' meeting or a meeting of the holders of the securities issued under the trust, when so requested by holders representing at least 20% of the rights backed by the trust estate.

For each trust, the trustee must designate an individual, called a "trust agent" (*factor fiduciario*), who personally assumes the conduct of the trust operations. In addition, if the trustee deems it convenient, the trustee may designate a managing commission. The decisions of this commission are binding upon the trust agent.

The dissolution of the trustee only affects its equity and not the trust estates that it controls. When a trustee begins a liquidation process, the SMV must designate the liquidator. The dissolution and liquidation of the trustee constitutes grounds for the removal and replacement of the trustee.

8. Synthetic Securitisations

8.1 Synthetic Securitisation

There is no prohibition for engaging in a synthetic securitisation.

8.2 Engagement of Issuers/Originators

This type of structure has been seen when the grantor (usually a financial entity) wants to improve its capital or credit risk, or when the securities to be offered need a special enhancement by a trust.

8.3 Regulation

The SMV would be the entity regulating a synthetic securitisation.

8.4 Principal Laws and Regulations

There are no special rules regarding regulatory capital in the case of synthetic securitisation. The rules explained above will apply.

8.5 Principal Structures

Securitisation trusts are generally used instead of special purpose corporations for synthetic securitisations.

8.6 Regulatory Capital Effect

There are no special rules regarding regulatory capital in the case of synthetic securitisation. The rules explained above will apply.

9. Specific Asset Types

9.1 Common Financial Assets

Pursuant to the Securities Market Act (*Ley del Mercado de Valores*), to set up a trust estate, only those assets freely available to their owners can be transferred to the trust.

Assets subject to securitisation include: credit portfolios and other portfolios involving assets that generate cash flows, whether created upon the signing of the trust indenture or not; personal property; designs, technical studies and other means and assets for the development of a project; and cash flows to be generated in the future, originating from the use of infrastructure projects and public services, among others.

As can be seen from the above list, securitised assets can be divided into two groups: (i) those existing when the assets are transferred to the trust (current assets); and (ii) those not existing at that moment, but which are expected to exist in the future (future assets). In turn, future assets can be subdivided into future goods, in respect of which the originator somehow guarantees their existence, and the uncertain hope referred to in Article 1,409 of the Civil Code, in which case the originator is not liable for the future existence of the transferred assets.

As regard to present assets, the Securities Market Act only provides that they must be individualised, or must be ready to be individualised, for their transfer, while in the case of third-party and future assets, it also provides that the trust indenture must indicate what party assumes the risk of their acquisition and/or existence.

The transfer of current assets must be carried out according to the nature of the assets, as in the case of future assets; however, in the latter case it is worth pointing out that the transfer can only be perfected once the assets exist or thereafter (not before), if so determined in the trust indenture.

The most common financial assets securitised are:

- real estate;
- rights under contracts (receivables) and bank accounts; and
- financial instruments.

9.2 Common Structures

The structure would be the same for each type of financial asset mentioned in **9.1 Common Financial Assets**: a securitisation trust. However, different rules regarding the transfer will apply. For example, in the case of real estate and assignment of rights, the Peruvian Civil Code will apply. In the case of movable assets, the Law on Pledges (*Ley de Garantía Mobiliaria*) will apply. In the case of securities, the General Corporation Law (*Ley General de Sociedades*) and the Securities Law (*Ley de Títulos Valores*) will apply. Also, in some cases, there may need to be a review of whether a special authorisation may be needed or special regulations will need to be complied with (ie, in the case of concessions).

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