

THE INTERNATIONAL
CAPITAL MARKETS
REVIEW

EIGHTH EDITION

Editor
Jeffrey Golden

THE LAWREVIEWS

THE INTERNATIONAL
CAPITAL MARKETS
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Jeffrey Golden

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Thomas Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Caroline Fewkes

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-67-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY LLP

ASHURST LLP

BHARUCHA & PARTNERS

BORENIUS ATTORNEYS LTD

DE PARDIEU BROCAS MAFFEI

DLA PIPER MARTÍNEZ BELTRÁN

G. ELIAS & CO.

INTERNATIONAL COUNSEL BUREAU

KING & WOOD MALLESONS

MAPLES AND CALDER

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

MORRISON & FOERSTER LLP / ITO & MITOMI

NADER, HAYAUX & GOEBEL, SC

NIEDERER KRAFT FREY AG

NIELSEN NØRAGER LAW FIRM LLP

PAKSOY

PETER YUEN & ASSOCIATES

IN ASSOCIATION WITH FANGDA PARTNERS

PINHEIRO NETO ADVOGADOS

P.R.I.M.E. FINANCE FOUNDATION

RUSSELL McVEAGH

SIDLEY AUSTIN LLP

SIMMONS & SIMMONS LLP

TIAN YUAN LAW FIRM

TOKUSHEV AND PARTNERS

URÍA MENÉNDEZ ABOGADOS, SLP

VIEIRA DE ALMEIDA

WEERAWONG, CHINNAVAT & PARTNERS LTD

CONTENTS

PREFACE.....	vii
<i>Jeffrey Golden</i>	
Chapter 1 AUSTRALIA.....	1
<i>Ian Paterson</i>	
Chapter 2 BRAZIL.....	24
<i>Ricardo Simões Russo and Gustavo Ferrari Chauffaille</i>	
Chapter 3 BULGARIA.....	32
<i>Viktor Tokushev</i>	
Chapter 4 CHINA.....	42
<i>Lei (Raymond) Shi</i>	
Chapter 5 COLOMBIA.....	53
<i>Camilo Martínez Beltrán and Sebastián Celis Rodríguez</i>	
Chapter 6 DENMARK.....	63
<i>Peter Lyck and Brian Jørgensen</i>	
Chapter 7 FINLAND.....	74
<i>Juha Koponen, Ari Syrjäläinen and Mark Falcon</i>	
Chapter 8 FRANCE.....	86
<i>Antoine Maffei and Olivier Hubert</i>	
Chapter 9 GERMANY.....	117
<i>Stefan Henkelmann</i>	
Chapter 10 HONG KONG	126
<i>Vanessa Cheung</i>	

Contents

Chapter 11	INDIA	144
	<i>Vishnu Dutt U</i>	
Chapter 12	IRELAND	154
	<i>Nollaig Murphy</i>	
Chapter 13	JAPAN	181
	<i>Akihiro Wani and Reiko Omachi</i>	
Chapter 14	KUWAIT	194
	<i>Abdullah Alharoun</i>	
Chapter 15	LUXEMBOURG	205
	<i>Frank Mausen and Henri Wagner</i>	
Chapter 16	MEXICO	229
	<i>Julián Garza, Gunter A Schwandt and Jenny Ferrón</i>	
Chapter 17	NETHERLANDS	237
	<i>Marieke Driessen and Niek Groenendijk</i>	
Chapter 18	NEW ZEALAND	255
	<i>Deemle Budhia and Lucy Becke</i>	
Chapter 19	NIGERIA	265
	<i>Fred Onuobia, Ukamaka Okoli and Ayodele Ashiata Kadiri</i>	
Chapter 20	PORTUGAL	275
	<i>José Pedro Fazenda Martins and Orlando Vogler Guiné</i>	
Chapter 21	RUSSIA	286
	<i>Vladimir Khrenov</i>	
Chapter 22	SPAIN	301
	<i>David García-Ochoa Mayor and José María Eguía Moreno</i>	
Chapter 23	SWITZERLAND	311
	<i>Francois M Bianchi, Daniel Bono, Andrea Giger and Till Spillmann</i>	
Chapter 24	THAILAND	320
	<i>Patcharaporn Pootranon and Veerakorn Samranweth</i>	

Contents

Chapter 25	TURKEY.....	332
	<i>Ömer Çollak, Ökkeş Şaban and Nazlı Tönük Çapan</i>	
Chapter 26	UNITED ARAB EMIRATES	346
	<i>Gregory J Mayew and Silvia A Pretorius</i>	
Chapter 27	UNITED KINGDOM.....	361
	<i>Anna Delgado, Tim Morris, Thomas Picton, Paul Miller and Jonathan Walsh</i>	
Chapter 28	UNITED STATES	373
	<i>Mark Walsh and Michael Hyatte</i>	
Appendix 1	ABOUT THE AUTHORS.....	389
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	407

PREFACE

This book serves two purposes – one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury – if ever it did – of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, the client certainly may have multi-jurisdictional ambitions or, even if unintended, its activities often may risk multi-jurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local, but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could, or should, best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in both our domestic and international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

Not long ago, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical

aspects of our discussion and ground them in the specific example of capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited, that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard, or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them, than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual and direct exchanges of information between lawyers from different jurisdictions. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the appendices to this book may help to identify local counterparts in potentially relevant jurisdictions (three new jurisdictions – China, the Netherlands and Switzerland – having been added this year). And, in that case, I hope that reading the content of this book may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration for our contributing experts, as I wrote in the preface to the last edition, continues. It remains, too, a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amid the growing interdependence of our professional world.

Jeffrey Golden

P.R.I.M.E. Finance Foundation

The Hague

November 2018

MEXICO

Julián Garza, Gunter A Schwandt and Jenny Ferrón¹

I INTRODUCTION

The Mexican securities regulatory framework includes federal regulations, general laws and specific rules applicable to all capital markets participants. The National Banking and Securities Commission (CNBV)² is the central regulator of the Mexican Stock Exchange (the Bolsa)³ and the Institutional Stock Exchange (BIVA – see Section II.i, *A new stock exchange*)⁴ and of all other capital markets participants, such as underwriters, broker dealers, issuers and custodians.

The key capital markets statutes include (1) the Securities Market Law, which provides the general operational framework for securities commercial acts, and (2) the general rules and regulations issued by the CNBV (particularly relevant are the General Provisions Applicable to Issuers and Other Participants of the Securities Market), the Mexican Central Bank and the Stock Exchanges, which include: general regulations applicable to issuers of securities and other market participants, Mexican Stock Exchange Internal Regulations, BIVA Internal Regulations, Indeval Internal Regulations, general regulations applicable to the stock exchange and general regulations applicable to broker-dealers. Also, the General Law of Negotiable Instruments and Credit Transactions provides the regulatory regime for the special purpose vehicle that is widely used in securitisations transactions: the Mexican trust (or *fideicomiso*). It also sets forth the basic rules applicable to trust certificates, which are used in many Mexican structured finance transactions also regulated by the Securities Market Law as fiduciary stock certificates.

A separate legal framework that is important to consider when working on a capital markets transaction is the Mutual Funds Regulations, including the Investment Regime of Specialised Retirement Fund Investment Companies and the General Financial Provisions of the Pension Fund System.

Other legislative and regulatory regimes may apply depending on the type of underlying assets involved, for example (1) civil legislation when dealing with mortgages, (2) special requirements and formalities for the transfer of certain types of receivables, and (3) requirements for the transfer of receivables by local or municipal governments.

The General Provisions, which also apply to securitisations transactions, are considered the most important secondary rules relating to securities, after the Securities Market Law.

1 Julián Garza and Gunter A Schwandt are partners and Jenny Ferrón is an associate at Nader, Hayaux & Goebel.

2 Comisión Nacional Bancaria y de Valores.

3 Bolsa Mexicana de Valores.

4 Bolsa Institucional de Valores.

Further regulations enacted by the CNBV and the Stock Exchanges may apply to public offerings related to securitisations. The CNBV acts as the main supervisory and regulatory authority in connection with publicly issued securities.

The main finance regulator in Mexico is the Ministry of Finance and Public Credit (the Ministry). The Ministry is responsible for facilitating transactions and promoting the development, expansion and competitiveness of the market. The Ministry acts through the CNBV, which is an independent agency and the main regulator of the Stock Exchanges. Some of its most important powers include the supervision and regulation of market participants, the authorisation of public and private offerings, the power to investigate, request information and issue advice and warnings to market participants, approval of the internal operation of the Stock Exchanges, and managing and overseeing the National Securities Registry.⁵

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Relevant capital markets transactions

Some of the most relevant recent capital markets transactions include the following:

- a Vista Oil & Gas, SAB de CV launched the first special purpose acquisition company (SPAC) on the Bolsa for 11.689 million pesos (see Section II.ii – *Special purpose acquisition companies*);
- b GMéxico Transportes, SAB de CV, BECLE, SAB de CV, Banco del Bajío, SA, Grupo Traxión, SAB de CV and Vista Oil & Gas, SAB de CV made their debut on the Bolsa;
- c the new FIBRAs⁶ – Fibra Nova, Fibra UPSite, Fibra Educa and Fibra Storage – were placed on the market (see Section II.ii – *FIBRA*);
- d Grupo Industrial Maseca, SAB de CV and First Majestic Silver Corp delisted their shares from the Bolsa; and
- e the first securitisation of collection rights of APP Coatzacoalcos-Villahermosa under a public-private partnership agreement entered into with the Ministry of Communications and Transportation for the repair and conservation of a federal highway, through the issuance of trust certificates in the Bolsa.

In addition to the local exchange, the Bolsa manages the International Trading System, which is an electronic conduit to trade shares listed on other stock exchanges. In 2017, 124 new foreign companies were listed on the International Trading System. This figure represents the highest number of new entities listed since the International Trading System started operations in 2003. Foreign companies may be listed on both Stock Exchanges together with local companies.

A new stock exchange

After many months of preparation, the Ministry granted Central de Corretajes (CENCOR) authorisation in August 2017 to organise and operate a new stock exchange named BIVA. It started operations in July 2018. BIVA aims to increase the number of public companies in Mexico in the next three years by 30 per cent, and to increase the Stock Market's average

5 Registro Nacional de Valores.

6 Fideicomiso de Inversión en Bienes Raíces.

daily trading volume by 50 per cent during the same period. In order for BIVA to exist, the Mexican regulators amended five general rules issued by the CNBV and the Central Bank. BIVA's infrastructure will run on Nasdaq's X-Stream trading and on First Derivatives for data management. A BIVA index will be created by the FTSE (the FTSE BIVA Index), which will include FIBRAs and other structured instruments, not only shares of publicly listed companies.

Mexican presidential elections

On 1 July 2018, a new president was elected, who will take office on 1 December 2018. Mr López Obrador, who won the presidency with more than 53 per cent of the votes, has announced that he will propose several amendments and changes to federal regulations; however, he has not yet indicated any plans to amend capital markets regulation. Mr López Obrador has indicated that he will redirect government spending and reduce current expenses of the government while increasing investment through the participation of private parties, including through concessions and public-private partnerships. Structured finance products such as equity development certificates (CKDs),⁷ FIBRAs and CERPIs (see definition in subsection below) may continue to be useful vehicles for such purposes.

ii Developments affecting derivatives, securitisations and other structured products

New instruments and products have recently been introduced to the Mexican capital markets and existing products have been sophisticated by market participants, with more than 70 CKDs, 16 FIBRAs, four FIBRA Es and two SPACs listed on the Bolsa. The Mexican capital markets have entered into a new stage of complexity and regulatory challenge that will create interesting new ventures in the years to come.

New provisions applicable to the Investment Regime of Specialised Retirement Fund Investment Companies

On 5 January 2018, new general provisions that establish the Investment Regime of Specialised Retirement Fund Investment Companies (the IR Provisions), which replace the previous IR Provisions, were published in the Official Gazette, and on 26 January 2018, new General Financial Provisions of the Pension Fund System (the CUF – jointly with the IR Provisions, the Provisions), which replace the previous CUF, were published in the Official Gazette.

Mexican pension funds, through each specialised retirement fund investment company (known as a *siefore*) they manage (in compliance with their investment regime and diversification limits and requirements set forth in the applicable regulation), will be allowed to invest in warrants attached to publicly offered shares (jointly warrants and shares, hereinafter referred to as Units) of a Mexican company, the underlying assets of which are shares of the same Mexican company. In other words, the foregoing means that *siefors* will be allowed to invest in SPACs.

In order to invest in Units, the *siefore* must carry out an appraisal of the Units in accordance with the principles set forth in the Risk Management Policies and Procedures Manual of each pension fund (known as an *afore*), and the corresponding committee shall perform a similar analysis to the one performed in connection with structured securities

7 Certificados de capital de desarrollo.

and FIBRAs. Likewise, the CUF provides that a *siefore* that intends to trade warrants as part of a Unit on the secondary market, must obtain prior authorisation from the National Commission for the Pension Saving System (CONSAR).⁸

Siefores (in compliance with their investment regime and diversification limits and requirements set forth in the relevant regulation) will be allowed to invest in projects abroad through the purchase of investment project trust certificates (CERPIs),⁹ provided at least 10 per cent of the fund's maximum authorised amount is invested in Mexico.

In the event of non-compliance with the aforementioned requirement, the amount invested by a *siefore* in the corresponding CERPI shall be taken into consideration by the *siefore* when calculating its investment limits in foreign securities.

Special purpose acquisition companies

In August 2017, Vista Oil & Gas, SAB de CV launched the first SPAC on the Bolsa for 11.689 million pesos. SPACs are publicly traded vehicles that are formed to facilitate a business combination – they are also known as ‘blank cheque companies’. SPACs issue Units that are listed on the Mexican securities markets, which consist of shares and warrants (or portions of warrants). Warrants have the shares of the public company as underlying assets. Each whole warrant entitles the holder to purchase one share of common stock upon the business combination at a preferential price. The warrant acts as compensation for investors.

Shareholder approval is required to execute the business combination. Primarily institutional (including pension funds) and retail investors participate in these kinds of offerings. A public offer may be carried out globally (Mexican public offer plus Rule 144A or Regulation S). Sponsors acquire ‘founder’ or ‘insider’ Units, typically resulting in the ownership of a percentage of common stock of the company.

The main advantages of SPACs are timing and flexibility: (1) the process of listing a SPAC (90 days) is quicker than that of an initial public offering (nine to 10 months); and (2) the regulatory requirements for SPACs are more flexible and less restrictive than those of initial public offerings and, therefore, SPACs managers have more flexibility in conducting their business. Essentially, SPACs provide a sponsor with immediate access to funding to conduct a specific transaction (merger, acquisition or asset sale) within a time frame of 12 to 24 months and, once the transaction is completed, a new publicly traded company shall be formed.

CERPI

CERPIs are investment project trust certificates that are issued through a trust and placed through the Mexican Securities Market. CERPIs (similarly to CKDs) resemble the model of international private equity funds, with corporate structures that rely heavily on the expertise and track record of a fund manager. CERPIs typically invest in real estate, private equity, debt, energy and infrastructure, and potential sponsors may be, among others, private equity funds, real estate developers, asset managers and energy services providers.

Through CERPIs, fund managers may access resources from pension funds to be invested or co-invested in projects outside Mexico. Projects shall remain under the management scope

8 Comisión Nacional del Sistema de Ahorro para el Retiro.

9 Certificados bursátiles fiduciarios de proyectos de inversion.

of the sponsor or manager of the CERPI. The foregoing is possible thanks to the recent amendment to the aforementioned Investment Regime of Specialised Retirement Fund Investment Companies.

CERPIS provide for less stringent corporate requirements and approvals of investors, giving fund managers more flexibility; however, at least 10 per cent of the fund's maximum authorised amount must be invested in Mexico and a mandatory 2 per cent co-investment by the sponsor or manager in each sponsored project is required. CERPIs provide a flexible corporate governance because different series of CERPIs may be issued, including preferred series.

FIBRA

A FIBRA is an investment trust vehicle under Mexican law dedicated to the acquisition and development of real estate assets in Mexico intended for leasing. (The FIBRA is similar to a real estate investment trust (REIT) in the United States). This vehicle has provided a new investment opportunity for investors in recent years.

The current legal structure of a FIBRA stems from a series of reforms enacted over several years to:

- a* various provisions of Mexican tax laws and regulations;
- b* securities legislation;
- c* the investment regime of pension fund administrators enabling tax-friendly investment in FIBRAs by Mexican pension funds; and
- d* annual omnibus tax regulations issued by the Ministry of Finance.

The main benefits of an investment in a FIBRA (relative to other investments) are:

- a* the potential for a high return on the investment (on a cash basis) owing to the requirements for distribution of net taxable income, and the potential for capital appreciation of real estate trust certificates commensurate with increases in the value of the real properties held by the FIBRA;
- b* access to the real estate market as an investment option through a security that may be traded easily and has a readily identifiable market price;
- c* broader diversification with respect to geographical exposure and property type for investors seeking to invest in the Mexican real estate market or generally for an investor's investment portfolio;
- d* FIBRAs may serve as a vehicle to attract foreign investment into Mexico; and
- e* applicable tax benefits. FIBRAs must distribute at least 95 per cent of net taxable income annually to investors.

Between 2017 and 2018, five FIBRAs were launched in Mexico, including Fibra Nova, Fibraestructura, UPSite Mexico, Fibra Educa and Fibra Storage, and in 2017, Fibra Hotel issued its third successful follow-on, proving there is a thirst for this type of instrument from Mexican and international investors.

A particularly positive note about FIBRAs (as opposed to CKDs) is that they have regularly been structured both with a national listed tranche and with a foreign tranche issued through Rule 144A and Regulation S regulations. The foregoing has permitted the diversification of the investor base, which is otherwise dominated by *afores*.

FIBRA E

The FIBRA E is an investment vehicle intended for energy and infrastructure projects that issues trust certificates (CBFEs)¹⁰ listed on the Stock Exchanges. One of the key features of a FIBRA E is the tax benefits that it provides its investors, as the investment vehicle and the portfolio companies through which investments are held in the infrastructure and energy assets are deemed transparent from a tax perspective. The FIBRA E is a hybrid that draws on two US financial products: REITs and master limited partnerships. Mexico adopted its own version of the REIT (the FIBRA – as described above) in recent years. As provided by the Securities Law, a CBFE shall grant its holder a *pro rata* property right with respect to the trust assets.

Under a FIBRA E, a corporate sponsor will contribute to the FIBRA E equity interest in certain Mexican legal entities (promoted companies) that own and operate assets for the performance of specific activities, namely infrastructure, electricity (generation, distribution, and transmission) and energy. The sponsor will receive cash or CBFEs in return for its contribution to the FIBRA E. In order to structure the contribution of the applicable assets and the operation of the business of the FIBRA E, relevant tax, legal and accounting issues must be taken into account. Regulatory and contractual approvals such as licences, permits, public grants and concessions, and debt covenants must also be taken into consideration.

In August 2017, the Mexican securities regulator issued its approval for the first multi-FIBRA E registration programme for a total issuance amount of up to 50,000 million pesos. The programme will allow the sponsor, CKDIM, to create sectorial FIBRA Es for energy and infrastructure projects.

In February 2018, the Federal Electricity Commission placed the first FIBRA E focused on the energy sector. The issuing trust will receive 100 per cent of the collection rights under a certain commercial operation agreement for electric power transmission and the proceeds from the issuance will be used to modernise and expand the national transmission grid. The public offering was placed on the Bolsa and other international markets. Another FIBRA E issued in 2018 was for the construction of the new Mexico City International Airport.

CKD

The most common and widely used structured instrument in Mexico as of today is the CKD, which is a trust certificate listed and traded on the stock exchanges, the purpose of which is to serve as a means to invest in companies and infrastructure, real estate and industrial projects. CKDs grant the right to participate in a portion of the proceeds, assets or rights that comprise the trust assets. The CKD trust shall have the purpose of investing in projects or in equity of target companies.

CKDs do not provide an unconditional payment obligation of principal and interest as they are equity-like securities. They impose certain corporate governance obligations similar to those of publicly traded companies. Both Mexican and foreign investors are allowed to invest in CKDs if their investment regime allows, as long as they state in writing to the placement agent or the underwriter that they are aware of the risks associated with these types of certificates.

The vast majority of CKD issuances that have come to market in Mexico during the last few years have been in connection with the infrastructure and real estate industries, although

10 Certificados bursátiles fiduciarios de inversión en energía e infraestructura.

applicable law allows for the funds raised through CKDs to be invested in other areas. As previously indicated, the success of a CKD heavily relies on the management team in charge of identifying and developing the respective projects.

iii Cases and dispute settlement

The CNBV has the main jurisdiction regarding oversight and regulation of the activity of all capital markets participants; its supervisory authority includes powers to sanction in the event of non-compliance and powers to enforce those sanctions. Any resolution entered into by the CNBV may be appealed before federal administrative courts using a writ for an *amparo* proceeding. However, any disputes existing between financial firms and consumers must be first resolved by the National Commission for the Defence of Users of Financial Services, CONDUSEF.

Increased antitrust oversight

As a result of recent reforms to antitrust law, the Mexican Antitrust Commission, COFECE, now has enhanced powers and has increased its oversight and investigative activity, with a number of investigations that have concluded with record fines. In 2017, COFECE launched an investigation against banks and other financial intermediaries for potential collusion and manipulation of the primary and secondary markets. The potential ramifications of the investigation are substantial. The investigation has prompted the CNBV to commence a similar investigation. This investigation is the largest inquiry to date into public debt sales and is expected to conclude within the next 12 months.

iv Relevant tax and insolvency law

There are very specific rules that apply to Mexican trusts, which should be carefully analysed when implementing a securitisation or a structured finance transaction. In the case of securitisations, it is generally intended that the transfer of assets into a trust is treated as a sale for legal purposes but not for tax purposes, inasmuch as the settlor of the assets retains a right to reacquire the transferred assets once payment of the corresponding securities has been made. The trust should not be classified as a separate entity for tax purposes. Intermediaries and brokers must determine and withhold the income tax applicable on income earned by securities holders.

In general, the tax regime applicable to securitisations and structured finance transactions is defined by the terms and nature of the securities being issued, and tends to be the same or similar to the regime applicable to the assets underlying the securities or the type of structure.

v Role of exchanges, central counterparties and rating agencies

Exchanges

Any stock exchange operating in Mexico requires approval by the Ministry of Finance and the favourable opinion of the Central Bank and the CNBV. Any concession granted to create and operate a stock exchange must be provided in consideration of the better development of the market. To date, two stock exchanges operate in Mexico – the Bolsa and BIVA – both located in Mexico City. They are both supervised by the CNBV and their own independent committees and they each have the ability to sanction their members and to delist certain securities, subject to first obtaining the opinion of the CNBV.

Both stock exchanges have issued their own internal regulations, which establish the internal procedures for listings of all kinds of instruments, and the terms and conditions for trading, record-keeping, listing and maintenance fees, and disclosure of information.

Central counterparties

Providing the service of a central counterparty (CCP) is considered a public service under Mexican regulation, and therefore requires a public concession granted by the Ministry of Finance and the favourable opinions of the Central Bank and the CNBV.

Only two concessions have been granted by the federal government to operate a CCP in Mexico; the Contraparte Central de Valores, which clears transactions on the Bolsa and BIVA, and Asigna, Compensación y Liquidación, which is the CCP for MexDer for derivatives transactions. The Central Bank has exclusive powers to supervise all CCPs, as well as approving the operations of any CCP.

Rating agencies

A rating agency requires authorisation from the CNBV to operate as such. The main purpose of a rating agency is the habitual and professional rendering of services comprising the analysis, opinion, evaluation and report of the credit quality of securities. The authorisation granted by the CNBV is non-transferable under any circumstances.

Rating agencies are supervised by the CNBV and must follow the processes and methods established by the CNBV through the issuance of general provisions.

III OUTLOOK AND CONCLUSIONS

Mexican capital markets have developed exponentially during the past decade, particularly in terms of regulations and new instruments designed to attract investment in projects and additional value for both companies and investors. *Afores* remain the main investors in the sort of transactions described in this chapter. An extra effort is required to make these instruments more accessible to retail investors as well. The regulation is quite vast and generally consistent. We expect changes to occur under the new president's administration but not a blockage of investment in capital market deals. We need to expand the investment base in favour of better economic, social and infrastructure conditions for Mexico. The outlook is promising inasmuch as there are sufficient funds and projects to continue investments. The sophistication of Mexican capital markets is reaching the top of its game and continues to improve. The challenge remains to implement those projects and investments in a more efficient manner and facilitate access for small and medium-sized companies to the market.

ABOUT THE AUTHORS

JULIÁN GARZA C

Nader, Hayaux & Goebel, SC

Julián Garza is partner of Nader, Hayaux & Goebel. His practice areas include banking, finance, mergers and acquisitions, capital markets, telecommunications and structured finance.

Julián has worked in some of the largest structured finance and capital markets transactions, representing both sponsors and financial intermediaries. His most recent cases include securitisation deals related to infrastructure projects, and local and cross-border issuances of securities, including FIBRAs (the Mexican equivalent of a US real estate investment trust) and CKDs (development capital certificates). Julián also regularly works in financing transactions, specialised banking, financial and telecommunications regulatory work, debt restructurings, structuring and implementation of equity funds, including in the real estate and infrastructure markets. His mergers and acquisitions practice extends to a variety of industries, including real estate, telecommunications, financial intermediaries and infrastructure facilities, advising on foreign investment acquisitions and joint venture transactions, among others.

Julián is a graduate of Universidad Panamericana (attorney at law 1997, with honours). He has a master of law degree from the University of Texas at Austin (1999). He worked as foreign associate at Mayer Brown LLP (Chicago, 2002–2003). He is a professor of international financial law and financial intermediaries at Universidad Panamericana in Mexico City and has been a lecturer of Mexican business and commercial law at the University of Texas at Austin.

GUNTER A SCHWANDT

Nader, Hayaux & Goebel, SC

Gunter A Schwandt specialises in capital markets, mergers and acquisitions (M&A), structured finance, secured transactions, cross-border lending and real estate finance. Gunter is an expert in highly complex public issuances and securitisations and has developed in-depth expertise in CKDs (development capital certificates) and FIBRAs (the Mexican equivalent of US real estate investment trusts), advising sponsors and underwriters alike.

To date he has advised the sponsors in the structuring and launch of seven CKD funds placed on the Mexican Stock Market, focused on the real estate industry and the energy and infrastructure sectors, as well as on four FIBRA transactions, focused on the retail and hotel industries. On the corporate M&A side, Gunter advised MetLife in the sale of its Mexican

pension fund business to Principal Financial Group and Pemex in the sale of its 50 per cent stake in Gasoductos de Chihuahua to IEnova for US\$1.325 billion.

Gunter also advised Grupo Salinas in its joint venture with Televisa in Iusacell, the later unwinding of that joint venture and the ultimate sale of Iusacell to AT&T for US\$2.5 billion. Gunter spent a year working at international law firm Mayer Brown LLP in Chicago. He graduated as an attorney (with honours) from the Universidad Iberoamericana. He later received his LLM (with honours) from the Northwestern University School of Law and a Certificate in Business Administration from the Kellogg School of Management.

JENNY FERRÓN C

Nader, Hayaux & Goebel, SC

Jenny Ferrón specialises in securities and capital markets, real estate, banking and finance and mergers and acquisitions. As an associate at Nader, Hayaux & Goebel, Jenny has been involved in high-level transactions, including advising FibraHotel with the establishment of the first equity shelf programme for a FIBRA in Mexico. The five-year programme was established for an amount of 10,000 million pesos, of which 4,599 million pesos was issued under the first issuance of the equity programme, and advising Artha Capital on the successful launch of its fifth public fund (CKD) for an aggregate amount of 12,000 million pesos in Mexico.

Jenny received her LLM in corporate, banking and finance law from Fordham Law School (*summa cum laude*), having graduated as an attorney from the Panamerican University (*magna cum laude*). She is also a professor of negotiable instruments and credit transactions at the Ibero-American University.

Prior to joining Nader, Hayaux & Goebel, Jenny worked as an analyst at Goldman Sachs in New York.

NADER, HAYAUX & GOEBEL, SC

Paseo de los Tamarindos
No. 400-B, Piso 7
Bosques de las Lomas
05120 Mexico City
Mexico
Tel: +52 55 4170 3000
Fax: +52 55 2167 3099
jgarza@nhg.com.mx
gschwandt@nhg.com.mx
jferron@nhg.com.mx
www.nhg.mx



ISBN 978-1-912228-67-6