

THE INTERNATIONAL  
CAPITAL MARKETS  
REVIEW

TENTH EDITION

Editor  
Jeffrey Golden

THE LAWREVIEWS

THE  
INTERNATIONAL  
CAPITAL MARKETS  
REVIEW

TENTH EDITION

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# PREFACE

Well, we did not see that one coming!

When the ninth edition of this volume appeared a year ago, we did not see the coming pandemic, lockdowns and working from home (WFH).

We knew even then that there would be new challenges ahead for the capital markets. We knew, for example, that key interbank offered rates (IBORs), benchmarks on which so much financial market activity relies, would be undergoing a period of change and that market participants would have to face up to the adoption of alternative rates and consider adjustments to legacy transactions based on LIBOR or other previously used pricing sources. No one said LIBOR migration would be easy. And that challenge has not gone away. The message from many key regulators is that, pandemic and other operational complications notwithstanding, the shift remains on track. LIBOR, supporting as it does hundreds of trillions of dollars of market activity, is slated for replacement by the end of 2021!

But we did not see and anticipate other challenges brought about by covid-19, basic as some of these may have been, and hidden as they may also have been, in notice provisions and other boilerplate buried in the back recesses of our transaction documents. How do you give effective notice to offices closed (often with the force of law) and with the decentralisation of WFH? If none of the methods contemplated by the parties' agreement can be used, may a different method be used instead?

Challenges though there may be, the capital markets have nonetheless shown their resilience. As I write this preface, Jack Ma's Ant Group has just filed for an initial public offering in Hong Kong and Shanghai that is expected to raise about US\$30 billion, in what could be the world's largest offering ever.

And so international capital markets lawyers are still in business, still relevant. But our *modus operandi* may have changed a bit. In this world of WFH, we keep company with the books on our bookshelves more than we do with the other lawyers in the building. In circumstances such as these, there are ever more compelling reasons to keep this particular volume on our shelf. We can expect to turn more often to published answers when we cannot consult the practitioner in the office next door as easily.

As I have written before, 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 market (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 (even WFH), no longer enjoys the luxury – if ever it did – of focusing solely

on a home market within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and increasingly technology permits practitioners to tackle international issues.

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities may often risk multi-jurisdictional impact, in which case, 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 offered 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 and also as to where things in that jurisdiction could, or should, best be headed (based on the best practice 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 us as 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), notwithstanding that traditional approaches to contract construction may have differed between courts in different jurisdictions.

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 at least to know how experienced courts have answered similar questions.



There is no reason to think that ICM practitioners would be situated any differently, from judges in this regard or would be less in need of or benefit less from a comparative view when facing the often technical and complex problems confronting them. 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 (with new jurisdictions having been added this year – Austria and Taiwan). 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. As I wrote in the preface to the last edition, my admiration for our contributing experts 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 both the growing interdependence of our professional world and, now, the coronavirus pandemic and its impact on the global economy.

Best wishes for this difficult period. Stay safe, stay well and stay alert.

**Jeffrey Golden**

Joint Head of Chambers

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London

October 2020

# MEXICO

*Julián Garza, Gunter A Schwandt and Jenny Ferrón C<sup>1</sup>*

## I INTRODUCTION

The Mexican securities regulatory framework includes federal regulations, general laws and specific rules applicable to all capital market participants. The National Banking and Securities Commission (CNBV) is the central regulator of the Mexican Stock Exchange – Bolsa Mexicana de Valores (BMV) and Bolsa Institucional de Valores (BIVA) (jointly, the Stock Exchange) – and of all other capital market participants, such as underwriters, broker dealers, issuers and custodians. The key capital market statutes include the Securities Market Law, which provides the general operational framework for securities-related commercial acts, and the general rules and regulations issued by the CNBV (particularly the General Provisions Applicable to Issuers and Other Participants of the Securities Market (the General Provisions) and the General Provisions Applicable to Entities and Issuers Regulated by CNBV that Contract External Audit Services for Basic Financial Statements), the Bank of Mexico (the Central Bank) and the Stock Exchange, which include:

- a* general regulations applicable to issuers of securities and other market participants;
- b* the Stock Exchange Internal Regulations;
- c* BIVA Internal Regulations;
- d* Indeval (the central securities depository for the Mexican securities market) Internal Regulations;
- e* general regulations applicable to the Stock Exchange; and
- f* general regulations applicable to broker-dealers.

The General Law of Negotiable Instruments and Credit Transactions provides the regulatory regime for the Mexican trust – the special purpose vehicle that is widely used in securitisation transactions. It also sets out the basic rules applicable to trust certificates, which are used in many Mexican structured finance transactions and are regulated by the Securities Market Law as fiduciary stock certificates. When working on capital market transactions, it is also important to consider the separate legal framework provided by the mutual funds regulations, which include the investment regime governing specialised retirement fund investment companies and the general financial provisions of the pension fund system.

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

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

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

Further regulations enacted by the CNBV and the Stock Exchange 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 Exchange. Some of its most important powers include:

- a* the supervision and regulation of market participants;
- b* the authorisation of public and private offerings;
- c* investigating, requesting information and issuing advice and warnings to market participants;
- d* approval of the internal operation of the Stock Exchange; and
- e* managing and overseeing the National Securities Registry.

The Pension Funds System Commission (Consar) is particularly important in the securities market in Mexico as it has oversight of and authorises (together with the Ministry and the Central Bank) the investment regime, levels of liquidity and market risk for pension fund managers, which are institutional investors that typically participate in these types of transactions.

## II THE YEAR IN REVIEW

### i Developments affecting debt and equity offerings

#### *Mexican political environment*

The first part of 2019 was characterised by uncertainty and a financial slowdown in the country due to cancellation of infrastructure projects started by the past administration and tensions in local and global economy. From June to December 2019, an increase in economic activities restarted and financial sectors started seeing new activity. However, because of the covid-19 pandemic, the first part of 2020 saw a second slowdown for the country and for the global economy; as a result, activity in Mexican capital market-related transactions slowed significantly, particularly with respect to equity offerings. The uncertainty brought by a crisis of the magnitude of covid-19 will always hit capital markets first, inasmuch as adequate pricings and risk appetite are difficult to attain. Nevertheless, potential issuers in certain industries (including those most affected by the crisis, such as hospitality and infrastructure) continue to be active in finding structures to raise funds that in the short to medium term may be attractive to institutional investors. Public debt offerings in the first half of 2020 have amounted to approximately US\$16 billion, which shows that although market conditions are more expensive, the market remains relatively stable. Private debt offerings (or similar financings, including securitisations) have maintained good expectations, particularly to the extent that they contemplate a secure source of payment.

***Proposed amendments to the investment regime of specialised retirement fund investment companies and the general financial provisions of the pension fund system***

The past year saw several regulatory changes proposed by the CNBV, the Ministry and Consar. There is an upcoming overhaul of the investment regime of specialised retirement fund investment companies and the general financial provisions of the pension fund system, and these amendments will impact pension fund investments in the capital markets. A bill was introduced and approved by Congress and is subject to approval under the legislative process. Some of the most significant proposed amendments include the following:

- a* a new operating model for pension fund managers whereby they will operate through specialised retirement fund investment funds that replace the specialised retirement fund investment companies;
- b* specialised retirement fund investment funds will have access to greater investment opportunities than specialised retirement fund investment companies, including the possibility of investing directly in securities registered in the National Securities Registry not offered through a public offering (subject to certain conditions);
- c* fees charged by pension fund managers will have an additional component that will be calculated on the basis of the investment returns received by pension holders through their investments in the specialised retirement fund investment funds; and
- d* pension holders will be allowed to withdraw their voluntary deposits from their retirement funds at any time.

Furthermore, Consar intends to introduce significant amendments to the financial regulation of pension fund managers, including restrictions on participation in initial public offerings (IPOs) where an affiliate of the pension fund acts as underwriter (except for FIBRAs and debt offerings), margins on costs and fees charged by sponsors in the instruments known as CKDs (equity development certificates) and CERPIs (investment project trust certificates issued through a trust and placed through the Mexican securities market), and additional market risk regulation for pension funds, which is expected to push sponsors to create new corporate governance structures, ethics manuals and conflict of interest provisions, among other measures. The amendments could have a significant impact on the structuring and offering of new structured products in the Mexican capital markets, possibly leading to a more institutionalised and professionalised market.

***United States–Mexico–Canada Agreement***

The United States–Mexico–Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA), came into effect on 1 July 2020. The USMCA includes significant changes to NAFTA, which the parties had entered into in 1994. Among the most notable of these differences are changes for automobile makers, stricter labour and environmental standards, intellectual property protections and digital trade provisions.

Furthermore, the USMCA also introduces significant changes to the financial services sector, which could have an impact on the Mexican capital markets. Among other things, US and Canadian financial institutions are granted access to payment and clearing systems operated by Mexican governmental entities and are allowed to provide new financial services within the Mexican territory where local financial institutions would otherwise be allowed.

The enactment of the USMCA has been viewed favourably by global investors and should be a positive stimulus for the Mexican economy.

***Tax incentives for initial public offerings and interest payments to non-resident holders of corporate bonds***

Pursuant to a Presidential Decree issued by President López Obrador, in 2019, 2020 and 2021 a reduced 10 per cent income tax rate may be applied by Mexican resident individuals and by non-resident individuals or entities on the profits obtained by those taxpayers from the sale of shares issued by Mexican companies that qualify as Mexican residents for tax purposes, provided that the sale takes place through an authorised stock exchange and subject to compliance with other relevant conditions. The Decree also provides a new tax incentive for those Mexican residents who are required to apply withholding tax on interest paid to non-resident holders of publicly traded bonds issued by Mexican-resident companies placed through an authorised stock exchange, consisting of a tax credit equivalent to 100 per cent of the withholding tax (and creditable only against the withholding tax). The credit will be available provided that no tax is withheld when making the payment to non-residents, who must reside in countries that have entered into a tax treaty or into a broad agreement for the exchange of information with Mexico; it is also established that the credit will not give rise to a refund or offset against other taxes.

***Covid-19***

Covid-19 emerged as a disruptive factor for the world economy in late 2019 and early 2020. In Mexico, a *force majeure* health contingency was declared by the General Health Council in early April 2020, which granted extensions for certain periodical reporting obligations of issuers. Although it is too soon to predict the impact of the pandemic on the Mexican capital markets, among other consequences, issuers can expect a delay in the response terms for new issuances by the CNBV.

***Increase in debt offerings***

Offerings of debt securities in Mexico have included public offerings of registered long-term and short-term debt securities, documented through notes. In some cases, notes are placed through Rule 144A or Regulation S of the Securities Act of 1933. Debt markets in Mexico have become more sophisticated in the past year and have seen an increase in offerings, particularly through the last quarter of 2019 and the first half of 2020, examples of which are provided below. Structured finance transactions, including through securitisations, are more common in private offerings.

***Notable capital market transactions***

Some of the most significant recent capital market transactions include:

- a* Mexican hotel investor FibraHotel's structuring of a US\$10 billion bond programme; and
- b* Total Play Telecomunicaciones notes issuance for US\$109.9 million, due in 2025.

In addition to the local exchanges, the Stock Exchange manages the International Quotation System (SIC), which is an electronic trading platform for shares listed on other stock exchanges. Over the past 12 months, 614 new foreign companies (or instruments) were listed on the SIC. Foreign companies may be listed alongside local companies on both the local exchanges of the Mexican Stock Exchange.

**ii Developments affecting derivatives, securitisations and other structured products**

New instruments and products continue to develop in the Mexican capital markets, and existing products have been made more sophisticated by market participants, with currently 86 CKDs (77 listed on BMV and nine listed on BIVA); 22 CERPIs (16 listed on BMV and one on BIVA); 17 FIBRAs, which are similar to real estate investment trusts (REITs) (16 listed on BMV and one listed on BIVA); four FIBRA Es, which are investment vehicles intended for energy and infrastructure projects that issue trust certificates (CBFEs) (all listed on BMV); and two special purpose acquisition companies (SPACs) (listed on the Stock Exchange). During the past year, 10 CKDs, four CERPIs, one FIBRA and one FIBRA E were listed on the Stock Exchange. The Mexican capital markets have entered a new stage of complexity and regulatory challenge, which will produce interesting new ventures in the coming years.

**SPACs**

The first SPAC was listed on the Stock Exchange by Vista Oil & Gas, SAB de CV in 2017 for 11,689 million pesos and, in March 2018, Promecap Acquisition Company, SAB de CV listed the second SPAC, for 4,407 million pesos with the purpose of investing funds in family-owned companies, private equity and public companies engaged in fast-growing sectors over a 24-month period.

SPACs are publicly-traded vehicles formed to facilitate a business combination. They are also called '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 a public company as underlying assets. Each whole warrant entitles the holder to purchase one share of common stock in the event of a business combination at a preferential price. Warrants act as compensation for investors. Pursuant to the new regulatory measures proposed by Consar, when pension funds act as investors in a SPAC, the money raised through the SPAC IPO must be held in escrow until the SPAC identifies a merger and acquisition (M&A) opportunity to pursue with the invested funds, and sponsors must identify an M&A opportunity within 18 months of the IPO and execute the transaction within 24 months. These measures also stipulate rules for the alignment of interests and high standards of corporate governance. The new regime is expected to be approved by the Ministry and enter into force during the second half of 2020.

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

Some of the advantages of SPACs include:

- a* timing: the listing period for a SPAC (90 days) is shorter than that for an IPO (nine to 10 months);
- b* flexibility: the regulatory requirements for SPACs are more flexible and less restrictive than those of IPOs; therefore, SPAC managers have more flexibility in conducting their business; and
- c* tax structure: contributions for future capital increases are treated as debt for Mexican tax purposes, which facilitates reimbursement to investors in the event that the SPAC is not successful. Essentially, SPACs provide a sponsor with immediate access to funding

to conduct a specific transaction (merger, acquisition or asset sale) within a 12 to 24 month time frame, and once the transaction is completed, a new publicly traded company must be formed.

### ***CERPIs***

Like CKDs, CERPIs resemble the model of international private equity funds, with corporate structures that rely heavily on the expertise and track record of the general partner (GP) or fund manager. CERPIs typically invest in real estate, private equity, debt, energy and infrastructure, and potential sponsors may be, among other things, private equity funds, real estate developers, asset managers and energy services providers.

Through CERPIs, GPs or fund managers may access resources from Mexican pension funds to be invested or co-invested in projects outside Mexico, although projects must remain within the management scope of the sponsor or the CERPI manager. Investments of this kind are possible following the above-mentioned recent amendment to the investment regime for specialised retirement fund investment companies.

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

### ***FIBRAs***

FIBRAs are similar to REITs in the United States. This vehicle provides a new investment opportunity for investors. The current legal structure of the FIBRA stems from a series of reforms enacted over the past several years in the following areas:

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

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

- a* the potential for a high return on investment (on a cash basis) because of the requirements for distribution of net taxable income, and the potential for capital appreciation of real estate trust certificates commensurate with increases in value of the real properties held by the FIBRA;
- b* access to the Mexican 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 geographic exposure and property type for investors seeking to invest in the Mexican real estate market or generally for their 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 to investors on an annual basis.

A particularly positive aspect of FIBRAs (in contrast to CKDs) is that they have regularly been structured with both a national listed tranche on the Stock Exchange and a foreign tranche issued through Rule 144-A and Reg-S regulations; this has permitted the diversification of the investor base, which is otherwise dominated by Mexican pension funds (pension fund managers).

Recently, investors have pushed for a change in the management structure of FIBRAs to internalise their external advisers and managers following the model of US REITs, most of which have an internal management structure.

During the past year, FIBRAs have increased their participation in the debt market in Mexico, with global debt offerings by FibraHotel and Fibra Uno, among others.

### **FIBRA E**

One of the key features of a FIBRA E is the tax benefits that it provides to its investors, as the investment vehicle and the portfolio companies through which investments are held in infrastructure and energy assets of this kind are deemed transparent from a tax perspective. The vehicle is a hybrid that draws on two US financial products: REITs and master limited partnerships. Mexico adopted its own version of REITs in 2001, under the name of FIBRAs, as described above. As provided by the Securities Law, the CBFEs must grant their holders a pro rata property right with respect to 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. 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 with a total issuance amount of up to 50,000 million pesos. The programme will allow the sponsor, CKDIM, to create sectoral 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 commercial operation agreement specifically 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 Stock Exchange and on other international markets.

The federal government has started several important infrastructure and oil and gas projects that will require important capital and debt investments and could create opportunities for new government-issued FIBRA Es; these projects include the creation of a trade corridor and the construction of complementary infrastructure in the Isthmus of Tehuantepec, a three-airport system to serve Mexico City, the Maya Train project, to connect tourist destinations in Yucatán, and construction of the Dos Bocas oil refinery.



### **CKDs**

The most commonly used structured instruments in Mexico are CKDs, which are trust certificates listed and traded on the Stock Exchange whose purpose is to serve as a means of investment in companies, and in infrastructure, real estate and industrial projects. CKDs grant the right to participate in a portion of the proceeds, assets or rights that constitute the trust assets. A CKD trust must have as its object investing in projects or in the equity of target companies.

CKDs do not provide an unconditional payment obligation in respect of principal and interest, as they are equity-like securities. They impose certain corporate governance obligations similar to those of publicly traded companies. If their investment regime allows, Mexican and foreign investors are allowed to invest in CKDs 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 notes.

The vast majority of CKD issuances that have come to market in Mexico during the past few years have been aimed at the infrastructure and real estate sectors, although the applicable law allows the funds raised through CKDs to be invested in other areas. As previously indicated, the success of a CKD relies heavily on the management team in charge of identifying and developing the projects concerned.

The first generation of CKDs are about to start their divestment and liquidation processes, moving into exits and asset sales and other divestiture options, which will create new opportunities and challenges in the capital markets.

### **iii Cases and dispute settlement**

The CNBV has the main jurisdiction regarding oversight and regulation of the activities of all capital market participants; its supervisory authority includes powers to sanction in cases of non-compliance and powers to enforce such sanctions. Any resolution issued by the CNBV may be appealed before federal administrative courts using a writ for *amparo* proceedings. However, any disputes existing between financial firms and consumers must first be resolved by Condusef, the National Commission for the Defence of Users of Financial Services.

### **Increased antitrust oversight**

As a result of recent reforms to the 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 resulted in the imposition of record fines. In 2017, Cofece launched an investigation into banks and other financial intermediaries for potential collusion and manipulation of the primary and secondary markets. The investigation concluded in June 2019 and the authority has issued a preliminary statement indicating that it found plausible evidence of anticompetitive conduct and probable liability on the part of the financial institutions. The Cofece procedure is expected to conclude in the first half of 2021.

### **iv Relevant tax and insolvency law**

There are very specific rules that apply to Mexican trusts that should be carefully analysed when implementing a securitisation or a structured finance transaction. In the case of securitisations, the transfer of assets into a trust is generally to be treated as a sale for legal 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 as or similar to the regime applicable either to the assets underlying the securities or to the type of structure.

## **v Role of exchanges, central counterparties and rating agencies**

### ***Role of exchanges***

Any stock exchange operating in Mexico requires the approval of the Ministry and a favourable opinion from the Central Bank and the CNBV. The grant of any concession to create and operate a stock exchange is subject to considerations regarding the best interests of the market and its development. To date, two exchanges operate in Mexico: BMV 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 even delist certain securities, subject to first obtaining the opinion of the CNBV.

The two exchanges have issued their own internal regulations establishing their internal procedures for listings of all kinds of instruments, along with terms and conditions for trading, record-keeping, information publishing, and listing and maintenance fees.

### ***Central counterparties***

The provision of the service of central counterparty (CCP) is considered a public service under Mexican regulations; therefore, the grant of a public concession by the Ministry and a favourable opinion from the Central Bank and the CNBV are required.

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

### ***Rating agencies***

Ratings agencies in Mexico require authorisation from the CNBV to operate as such. Their main purpose is the habitual and professional rendering of services consisting of the analysis, opinion, evaluation and reporting of the credit quality of securities. The authorisation granted by the CNBV is non-transferable under any circumstances.

Ratings 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**

The Mexican capital markets have developed exponentially over the past decade, particularly in terms of regulation and new instruments designed to attract investment to projects and provide additional value for both companies and investors. Pension fund managers remain the main investors in the types of transactions described in this chapter. Furthermore, in terms of sophistication, the Mexican capital markets continue to improve and are fast approaching

the top of their game, although heightened policy uncertainty has slowed (and in some cases stopped) new issuances on the Stock Exchange. While tax, infrastructure and economic reforms over the past several years have helped stabilise the country, international and local investors face uncertainty in respect of some of the presidential administration's policies.

Mexican pension funds have recently been the target of a number of proposed amendments and initiatives that may have a substantial impact on their ability to deploy funds in projects and investments. The market for retirement fund administrators (known as AFOREs) and the market for CKD and CERPI sponsors and managers eligible to raise funds from the pension funds are likely to consolidate. Additional eligibility requirements may shrink the market or alternatively may direct pension funds to invest in fewer projects and to take shelter in governmental investments.

Mexico's capital markets need to reach out to a broader array of institutional investors. There have already been several transactions in which investors included high net worth individuals who met the eligibility criteria.

Also, in view of the current crisis, a significant number of companies and businesses will face restructuring and refinancing. It is imperative for Mexican financial institutions to find structured finance alternatives that can utilise the solid balance sheet available in many Mexican companies in securitisation (or similar) transactions, implemented through public or private offerings, to obtain financing in a manner that provides comfort for investors in relation to the performance of the underlying assets and to the covenants assumed by the issuer and any step-in rights they may have, while at the same time affording competitive rates to issuers.

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

Julián has worked on some of the largest structured finance and capital market 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 US real estate investment trusts) and CKDs (development capital certificates). Julián also regularly works in financing transactions, specialist 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 other matters.

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

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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 on the Mexican stock market of seven CKD funds 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 subsequent unwinding of that joint venture and the ultimate sale of Iusacell to AT&T for US\$2.5 billion. Gunter also spent a year working at international law firm Mayer Brown LLP in Chicago. He graduated as an attorney (with honours) from the Ibero-American University. He later received his LLM (with honours) from the Northwestern University Pritzker School of Law and a certificate in business administration from the Kellogg School of Management.

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Jenny Ferrón C 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 on 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 the first issuance of the equity programme was 4,599 million pesos, 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 University School of Law (*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.

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