PANAMA

Law and Practice

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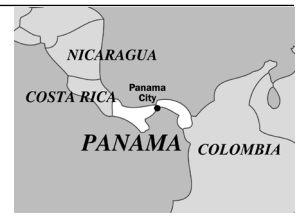

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Like elsewhere, most securitisations carried out in Panama are structured in the following manner: a special purpose vehicle (SPV) is formed by an originator that owns assets that it intends to securitise. The SPV performs an offering of securities (usually debt instruments such as bonds or notes) and uses the proceeds received from the offering to purchase the assets from the originator. The originator receives cash, the SPV receives the assets and the flows generated by the assets are used by the SPV to pay the sums due under the securities to investors, who are creditors of the SPV and not of the originator.

A properly structured securitisation should prove to be beneficial for all parties thereto. Benefits for originators include access to a new (and potentially cheaper) source of funding, improved liquidity and risk profile, and the opportunity to expand operations with cash received. Benefits for investors include the possibility of investing in securities that do not carry the risk of the originator itself and the repayment of which only depends on the quality and performance of the assets securitised.

For the aforementioned benefits to materialise, certain requirements must be fulfilled, none of which is more important than achieving a "true sale" of the assets from the originator to an insolvency-remote SPV. Achieving a true sale of the assets is a fundamental element in any securitisation since it is necessary for the assignment of ownership of the assets from the originator to the SPV, thus removing the assets from the patrimony or estate of the originator and granting the SPV sole and exclusive title to the assets, insulating them from the financial risk of the originator and rendering them unavailable to fulfil obligations of the originator in the case of insolvency.

As elsewhere, securitisations and secured loans or securities offerings in Panama are similar but not identical transactions. For example, financing may be granted by an entity and secured by constituting guarantees, such as mortgages or pledges, over real estate, movable property and other assets of the debtor. In these cases, the assets are not transferred to the creditor through a true sale and remain property of the debtor but the creditor has a preferential mortgage or pledge right over them. In cases of insolvency, the creditor may proceed with the foreclosure of the mortgage or pledge and use the funds received therefrom as payment of the loan owed by the debtor and, until the secured creditor is paid in full, these assets would not be available to fulfil obligations that the debtor has acquired with other creditors.

Legal Opinion

It is common practice in securitisations that a Panamanian attorney issue a legal opinion regarding the true sale of credits to an insolvency-remote SPV. In these opinions, the attorney usually concludes that, after reviewing signed documentation, a true sale to an insolvency-remote SPV has occurred because all formalities (signed contract, payment of price, delivery of credits, etc) have been satisfied.

As is customary elsewhere, among the assumptions and qualifications that attorneys make in these opinions are the following:

- the genuineness of all signatures;
- the authenticity of all documents submitted as originals and the conformity to the originals of all documents submitted as copies;
- the due organisation, existence, good standing, capacity, power and authority of all parties to execute the contract and perform their obligations thereunder; and
- the transaction is not one that would be deemed or exposed to be declared null and void under the Insolvency Law.

Voidable Transactions

The insolvency treatment of individuals and legal entities not regulated by special laws is regulated by Law 12 of 2016 (the Insolvency Law). This law does not apply to the insolvency of banks, insurance companies, broker dealers and other special entities that are regulated by other statutes. Under the Insolvency Law, there are certain transactions that may be deemed or declared null and void even if they fulfil the requirements to be considered a true sale of assets.

Under the Insolvency Law, the liquidation of a non-regulated entity may only be declared by a court of law. The court may declare the liquidation of a non-regulated entity if a petition for that purpose is filed before it by the non-regulated entity itself (deemed a voluntary liquidation) or by a creditor of the non-regulated entity (deemed a forced liquidation).

For a liquidation proceeding to commence, a resolution declaring the liquidation of the entity must be issued by a competent court. This resolution must contain, among other information, the date on which the entity entered a state of insolvency (the insolvency date). In the absence of special circumstances, the insolvency date will be deemed to be the date on which the petition requesting the declaration of the liquidation of the entity was presented to the court.

The following are transactions that will be deemed null and void if they were performed within the 12 months prior to the insolvency date:

- any act or contract on a gratuitous basis and those which, although performed in exchange of a consideration, should be considered as gratuitous, due to the excess in value of that which the originator has given to the other party in the transaction;
- the constitution of a pledge or mortgage, or any other action for purposes of securing previously contracted debts or to grant them a more senior preference or ranking over other debts; and
- the payment of debts that were not due and payable at the time of payment, as well as the payment of debts that were due and payable when the obligation was paid with consideration in-kind.

In addition, at the request of the liquidator or any creditor, the following actions of the originator may be declared null and void by a competent court: (i) fraudulent acts or contracts, being understood as fraudulent when the parties make false warranties or representations about facts or occurrences; and (ii) any sales or dispositions of assets, whether on a gratuitous or onerous basis, in which the entity in liquidation performed the act or contract for purposes of setting aside assets against the interest of creditors.

1.2 Special Purpose Entities

It is recommended that the receivables be sold to an SPV endowed with traits that would increase remoteness from the insolvency of the originator. Panama law offers two SPVs that comply with these criteria: the corporation (*sociedad anónima*) and the trust (*fideicomiso*). In this chapter, the focus will be on trusts more than on corporations because, in securitisations, the former is more frequently used than the latter. Nevertheless, corporations have been used as SPVs in securitisations and, therefore, we will provide a brief description thereof.

Corporations

The type of Panama corporation that has been used in securitisations is regulated by Law 32 of 1927, as amended (the Corporations Law). A corporation is constituted when two or more parties, called underwriters (*suscriptores*), enter into and sign a document known as articles of incorporation (*pacto social*) and that document is recorded with the Public Registry of Panama.

Once it has been constituted, a corporation is deemed to be a juridical person (*persona jurídica*) with full legal capacity to enter into contracts, perform transactions, file suits and be sued and, in general, to be the title holder of rights and incur in obligations. Among others, the articles of the corporation must express its share capital and the quantity of shares into which that capital is divided.

The board of directors of a corporation is charged with the management of its business but the Corporations Law identifies certain actions that require approval of the shareholders, such as the sale of a majority of assets, guaranteeing obligations of third parties and amending the articles of incorporation. For securitisations that will use a corporation as SPV, usually a new corporation is constituted to participate in the transaction.

Corporations have been used as SPVs in securitisations because the securitised assets sold thereto by an originator are property of the corporation and are not part of the estate or patrimonies of individuals related to it, such as shareholders and directors. If the receivables are transferred by means of a true sale, they will, in addition, have ceased to be part of the estate of the originator and would not be available to creditors thereof.

Finally, the articles of incorporation of a corporation may include provisions that limit the powers of both directors and shareholders when it comes to the management of the corporation and the underlying assets. However, if a corporation is going to be used as an SPV, investors should require that the directors and shareholders not be controlled by the originator to avoid possible consolidation with the assets of the originator and for them to be able to act with complete independence in relation to the management of the assets, particularly in the case of default, without interference from the originator.

Trusts

Trusts are regulated by Law 1 of 1984 as modified by Law 21 of 2017 (the Trusts Law). A trust possesses the characteristics of being a separate estate or patrimony that is constituted when a settlor (*fideicomitente*) transfers assets or rights to a trustee (*fiduciario*) that is charged with the management of those assets or rights solely for achieving a particular purpose determined by the settlor in the trust agreement. The Trusts Law sets forth the minimum information that must be included in a trust agreement and requires that persons regularly acting as trustees obtain a licence from the Superintendence of Banks of Panama (Superintendencia de Bancos de Panamá; the SBP).

A trust can be constituted to accomplish a purpose for the benefit of a beneficiary (*beneficiario*), which may be the settlor itself, or it may be created only to achieve the purpose set forth by the settlor. Once constituted, a trust may, through the trustee, enter into contracts and transactions and, in general, acquire rights and obligations in the same manner as other legal entities.

Trusts are particularly attractive for securitisations because, once the settlor transfers assets or rights to the trustee, the assets constitute a stand-alone patrimony or estate managed by the trustee and the assets that comprise the trust are separate from the assets of the settlor, trustee and beneficiary, if any. Due to

the foregoing, the assets of the trust will not be available to pay debts due to creditors of the settlor, trustee or beneficiary in the context of an insolvency or otherwise, provided that the transfer of the assets to the trustee met all requirements to be considered a true sale and is not a transaction that could be deemed or declared null and void under applicable insolvency laws.

Solvency of SPV

It is also of the essence that the SPV that will receive the assets be constituted in such a way that the SPV itself not become insolvent. Ensuring that the SPV operates on a solvent basis may be achieved by placing restrictions that limit the capacity of the SPV to perform activities other than holding the assets that are part of the securitisation. These restrictions may include prohibiting the SPV from acquiring debts, giving the assets in collateral or in any way encumbering them, disposing of the assets or performing other similar operations, except in instances required for purposes of the transaction.

Some of the aforementioned limitations may be imposed by inserting them as covenants in the transaction documentation while other restrictions may be created by including them in the constitutive documents of the SPV. If the SPV that will be used for a securitisation is a trust or a corporation, the laws that regulate both permit that limitations as those defined above be set in their constitutive documents.

Independence of SPV

The parties should evaluate constituting the SPV in a manner that guarantees complete separation and independence from the originator. The SPV should be an entity that is identifiably distinct from the originator and, therefore, it would be preferable that, to the extent possible, the SPV not be created in such a way that it be deemed a subsidiary or affiliate of the originator. Interested parties will find out that Panamanian trusts and corporations present solutions that address the foregoing because the necessary independence is achieved if the SPV is constituted as either: (i) a trust managed by a trustee that is not part of the originator or its economic group; or (ii) a corporation with a board of directors comprised by individuals that are not controlled by the originator or its group.

Legal Opinion

It is common practice that a Panamanian attorney issue a legal opinion stating that the SPV is insolvency remote. In these opinions, the attorney usually concludes that, after reviewing signed documentation, the SPV is insolvency remote because ownership of the assets was transferred thereto by means of a true sale and, in so doing, the transferred assets would not be deemed to be part of the patrimony or estate of the originator for insolvency, reorganisation or liquidation purposes and, therefore, the transferred assets would not be available to fulfil obligations that the originator has acquired with third parties. Please see the Legal Opinion section of **1.1 Insolvency Laws** for information about the assumptions and qualifications made by attorneys giving these opinions.

1.3 Transfer of Financial Assets

Various provisions in Panama's Civil Code, Commerce Code and other laws have served as the basis for securitisation transactions that have been carried out in Panama since the early 1990s. Panama law permits the sale of both present and future credits and other intangible or incorporeal rights. The capacity to sell both present and future credits and other rights allows for the securitisation of flows resulting from existing assets as those that will be generated by receivables that come into existence in the future.

The transfer of property in Panama is most frequently performed by means of a purchase and sale contract (*contrato de compraventa*). In a purchase and sale contract, one party (the seller) is obligated to deliver a determinate (or determinable) object (asset or service) and the other party (the buyer) is obligated to pay a determined (or determinable) price in money for that asset or service.

Articles 1234 and 1278 of the Civil Code allow the sale of incorporeal rights and credits. Furthermore, Articles 1122 of the Civil Code and 197 of the Single Text of Decree Law No 1 of 1 July 1999, as amended (the Securities Law) permit the sale of future credits and other incorporeal rights. Future credits and rights may be transferred even before the contracts that will create them have been entered into and formalised or the securities that represent them have been granted or issued. The capacity to sell future credits and other rights allows for the securitisation of future flows in Panama.

Given their intangible nature, credits and other incorporeal rights are usually sold by means of a special form of purchase and sale agreement known as an assignment contract (*contrato de cesión*) rather than through a simple purchase and sale agreement. In an assignment contract, the assignor transfers or assigns ownership title over the credits to the assignee.

General Requirements

Under Panama law, it is advisable that certain formalities and actions be met for a true sale of present or future credits to be deemed to have occurred, with effects not only between buyer and seller but also in relation to third parties such as the debtor of the transferred credit, creditors of the seller and third parties, in general. The requirements that must be fulfilled to achieve a true sale are the following:

- the contract must be in writing;

- the contract needs to have a date certain;
- the credits need to be identified or determinable;
- the price must be set or be determinable;
- the price must be paid in money;
- delivery of the credits must have occurred; and
- the debtor must be notified of the sale of the credits.

Contract must be in writing

The agreement must be in writing for purposes of constituting evidence of the existence of the obligations that arise therefrom, as set forth by Article 1103 of the Civil Code. An important advantage of the contract being in writing is that the signatures of the parties should be considered as proof of their intent or volition to enter into the agreement and be bound thereunder.

Date certain

Article 1278 of the Civil Code requires that the agreement have a date certain (*fecha cierta*) for the transaction to have effects against third parties, including creditors of the seller. The date certain of a document will be that on which the signatures of the parties have been recognised or acknowledged before a notary public. Having the agreement in the form of a public deed (*escritura pública*) also endows it with a date certain.

Credits

The credits should, if possible, be identified in the agreement although this is not necessarily required since they only need to be determinable, as provided for by Article 197 of the Securities Law. The assets are deemed determinable if they can be identified from the content of the documentation and without need for buyer and seller to enter into a new contract or perform any further action. For the assets to be determinable, parameters, formulas, descriptions, procedures and other content may be included in the agreement.

Price

The price to be paid for the assets must be identified in the contract or at least be determinable from the content of the agreement without need for buyer and seller to enter into a new contract or perform any further action. In a purchase and sale operation, the price must be paid in money. The price may be in US dollars without incurring exchange rate concerns because the US dollar is legal tender in Panama.

Delivery

For a true sale to occur, it is of the essence that delivery of the assets take place. Article 1231 of our Civil Code states that a seller that has entered into a purchase and sale contract is obliged to deliver the asset to the buyer. Under Articles 1232 and 1234 of our Civil Code, delivery of incorporeal assets such as credits is considered to have occurred if the contract is in the form of a public deed. The foregoing provisions are over a century old. Article 197 of the Securities Law, originally enacted in 1999, provides that delivery of "future credits and other incorporeal rights" shall be deemed to occur if: (i) the transfer is in the form of a public deed; or (ii) the signatures of the parties are merely recognised by notary public.

Notice to debtor

It is important that the debtor be notified of the transfer of the credit for the debtor to be obliged to cease making payments owed under the receivable to the seller thereof and to begin making payments to the buyer. Notifying the debtor is not necessary for a sale to have occurred between the parties, but if the debtor is not notified, Article 1279 of the Civil Code states that the debtor that continues to pay amounts due under the credit to the previous owner is properly complying with its payment obligations under the credit, even though the party that receives payment has already sold the credit. Therefore, if the debtor is not notified, the debtor may continue to pay amounts due under the receivable to the previous owner of the credit, from whom the buyer of the credit must procure payment.

Regarding the performance of notice to debtors, provisions of the Commerce Code state that debtors must be notified in the presence of two witnesses or a notary public. In the context of the transfer of future credit for securitisation, however, Articles of the Securities Law allow for notice to be given to the debtor in any form as long as it is in writing, without needing to notify the debtor in the presence of witnesses or a notary public.

With respect to certain secured credits (such as mortgage loans), the loan document and the mortgage guarantee must be in the form of a public deed, which deed must be registered with the Public Registry. If a mortgage is constituted to secure a debt documented by means of a simple loan contract, the assignment agreement whereby a mortgage loan is securitised must, to comply with the requirements for a true sale mentioned above, be registered with the Public Registry of Panama. If, however, the mortgage is constituted to guarantee an obligation – evidenced by an obligation that may be transferred by mere endorsement (for example, a negotiable instrument such as a promissory note) – the assignment contract does not have to be recorded with the Public Registry and notice need not be given to the debtor because provisions of the Civil Code state that the mortgage right is deemed transferred when the obligation is transferred by mere endorsement.

If the requirements mentioned above are fulfilled, a true sale of assets has occurred under Panama law, having effects not only between seller and buyer (SPV) but also in relation to the debtor of the receivables, creditors of the seller and any other third party. Having met the requirements, the transaction is not a mere promise to deliver the assets which could require further

actions from the parties but, instead, full title and ownership of the assets would be deemed to have been transferred to the estate of the buyer-SPV, guaranteeing the insolvency remoteness that is of the essence for a properly structured securitisation.

Secured Loans

Securitisations and secured loans or securities offerings in Panama are similar but not identical transactions. In Panama, financing may be granted by an entity and secured by constituting guarantees, such as mortgages or pledges, over real estate, movable property and other assets of the debtor. In these cases, the assets are not transferred to the creditor by the execution of a purchase and sale contract (*contrato de compraventa*) and the assets remain property of the debtor. Instead, the debtor and the creditor enter into a loan agreement and, in addition, they execute a pledge agreement (*contrato de prenda*) or a mortgage agreement (*contrato de hipoteca*) whereby the debtor constitutes a lien over certain assets in favour of the creditor and grants the creditor a preferential pledge or mortgage right, as the case may be, over the assets given in collateral.

Consequences

Various challenges may arise if one or more of the requirements of a true sale are not met and the consequences will depend on the particular formality that was not complied with. For example, failure to notify the transfer of the receivables to the debtors allows them to continue to pay amounts due under the credits to the previous owner of the receivable, from whom the buyer of the credit must afterwards procure payment.

Consequences are more significant if the parties signed the agreement but the document is not in the form of a public deed or the signatures of the parties were not recognised by a notary public. Given the fact that the parties signed the sales or assignment agreement, a contract would exist between the parties and they would be reciprocally obliged thereunder but the transaction would not be effective against third parties.

Furthermore, delivery of the assets would not be deemed to have occurred, which means that the assets would still be property of the seller and available for payment of obligations to other creditors, which may even seize the assets in order to secure payment of debts owed to them by the seller. If this is the case and delivery of the assets has not taken place, the seller under the signed agreement will still have an obligation to deliver the assets and the buyer will still have a right to receive them. In this state of affairs, the buyer would be deemed, at best, an unsecured creditor of the originator. Panama insolvency laws state that the declaration of liquidation of a non-regulated party will cause bilateral contracts that have not been fully executed (perfected), or that have only been partly executed, to be declared as terminated by means of summary process.

1.4 Construction of Bankruptcy-Remote Transactions

In addition, trusts are also used as SPVs for the purposes of securing other types of structured financings such as covered bonds and project financings.

In these cases, the debtor-originator also transfers (or encumbers) assets to (or in favour of) a trust to constitute collateral for the payment obligations of debt or securities, but these differ from securitisations in several aspects, including:

- the debt is incurred or the securities are issued by the debtor-originator and not the trust;
- the investors are creditors of the debtor-originator and not the trust;
- in case of transfer (as opposed to the creation of a security interest) the debtor-originator does not "sell" the assets to the trust/SPV but instead transfers them "in trust" (as settlor thereof in certain cases);
- the trust does not pay a price to the debtor-originator as consideration for transferring the assets to the trust; and
- the flows generated by the assets transferred to the trust are, in certain infrequent cases, not always directly used to pay sums due to investors under the notes because the same are obligations of the debtor-originator and not the trust, which allows the debtor-originator to use its own funds to pay amounts due to the investors without need for flows generated by the trust assets to be used to pay investors.

In the case of notes or loans secured by a collateral trust, the assets given in trust should not be consolidated with the assets of the debtor for paying debts due to other creditors and, even though the investors of the notes are creditors of the debtor and not of the collateral trust, the assets given in trust should be used to pay only amounts due to the investors, in accordance to the asset distribution provisions of the trust agreement, and not to pay sums owed to other creditors of the debtor. Therefore, if the insolvency, reorganisation or liquidation of the debtor is declared and the assets were properly transferred to the collateral trust, the assets given in trust should not be consolidated with the assets of the debtor and, as such, should not be available to fulfil obligations that the originator has acquired with third parties.

It is common practice in the case of notes or loans secured by a collateral trust that a Panamanian attorney issue a legal opinion regarding the transfer "in guarantee" of assets to an insolvency remote SPV. In these opinions, the attorney usually concludes that, after reviewing signed documentation, the assets have been duly transferred by the debtor to the SPV and, as a result, the transferred assets would not be deemed to be part of the patri-

mony or estate of the debtor for insolvency, reorganisation or liquidation purposes.

As customary elsewhere, among the assumptions and qualifications that attorneys make in these opinions are the following: (i) the genuineness of all signatures; (ii) the authenticity of all documents submitted as originals and the conformity to the originals of all documents submitted as copies; (iii) the due organisation, existence, good standing, capacity, power and authority of all parties to execute the contract and perform their obligations thereunder; and (iv) the transaction is not one that would be deemed or exposed to be declared null and void under the Insolvency Law.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Panama's tax regime is territorial, which means that only capital gains generated from operations undertaken within the territory of Panama will be subject to the payment of income tax. Panama's tax code states that gains obtained from the sale of movable assets will be subject to a capital gains regime and, therefore, the gains, if any, realised as a result of the sale of movable assets will be subject to the payment of income tax at a rate of 10%.

2.2 Taxes on SPEs

Since Panama's tax regime is territorial, only profits, dividends and other types of income generated from operations undertaken within the territory of Panama will be subject to the payment of income tax. Regardless of whether the SPV that will issue the securities and receive the assets is constituted as a trust or corporation, any Panama-source income it generates will be subject to the payment of income tax at a rate of 25%. If the securities issued by the SPV are debt instruments such as notes or bonds, the interest paid thereon by the SPV to the investors will be deductible as an expense for tax purposes.

2.3 Taxes on Transfers Crossing Borders

Interest payable on asset-backed securities issued by an SPV deemed to be generating Panama-source income will be taxable for investors located in Panama, who would have to file their annual return and pay the tax at individual or corporate income tax rates, as applicable. If the investors are located outside of Panama, the issuing SPV would have to withhold an amount equal to 50% of the tax payment that the investor would have to pay if located in Panama and pay the amount so withheld to the local tax authority.

However, if the asset-backed securities are registered with the Superintendent of the Securities Market of Panama, the Superintendencia del Mercado de Valores (SMV), interest payable thereon will only be subject to a 5% income tax, which would have to be withheld by the issuer. Moreover, interest payable would be exempt from any income tax payment or withholding if the securities are registered with the SMV and, in addition, are placed through a securities exchange or through an organised market.

2.4 Other Taxes

If the securities are registered with the SMV, any capital gains realised by a holder thereof on their sale or other disposition will be exempt from income tax in Panama, provided that the sale or disposition of the security is also made through a securities exchange or another organised market. If the securities are not sold through a securities exchange or another organised market:

- the seller will be subject to income tax in Panama on capital gains realised on the sale of the securities calculated at a fixed rate of 10%;
- the buyer will be obligated to withhold from the seller an amount equal to 5% of the aggregate proceeds of the sale, as an advance in respect of the capital gains income tax payable by the seller, and the buyer will be required to send to the fiscal authorities the withheld amount within ten days following the date of withholding;
- the seller will have the option of considering the amount withheld by the buyer as payment in full of the seller's obligation to pay income tax on capital gains; and
- in the event the amount withheld by the buyer is greater than the amount of capital gains income tax payable by the seller, the seller will be entitled to recover the excess amount as a tax credit by filing a special sworn income tax declaration with the fiscal authorities.

2.5 Obtaining Legal Opinions

It is common practice that a Panamanian attorney issue a legal opinion regarding the taxation aspects of a securitisation. In these opinions, the attorney usually concludes, after reviewing signed documentation, that: (i) the capital gains, if any, realised as a result of the sale of the credits to the SPV will be subject to the payment of income tax at a rate of 10%; and (ii) interests payable to noteholders, as well as any capital gains realised by a holder thereof on the sale or other disposition of the notes, will be exempt from income tax in Panama, provided that notes have been registered with the SMV and are listed and traded on a securities exchange or another organised market.

As customary elsewhere, among the assumptions and qualifications that attorneys make in these opinions are the following:

- the genuineness of all signatures;

- the authenticity of all documents submitted as originals and the conformity to the originals of all documents submitted as copies;
- the due organisation, existence, good standing, capacity, power and authority of all parties to execute the contract and perform their obligations thereunder; and
- the securities have been registered with the SMV and listed on a securities exchange or other organised market (if applicable).

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

No response provided.

3.2 Dealing with Legal Issues

No response provided.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

There are no securitisation-specific disclosure laws or regulations.

4.2 General Disclosure Laws or Regulations

The general rules for disclosure that apply to securitisation are set forth in the Single Text of Decree Law No 1 of 1 July 1999, as amended (the Securities Law).

The Securities Law contains provisions requiring the disclosure of information to investors in the context of public offerings of securities that are subject to registration with the SMV, including publicly offered asset-backed securities. The SMV is the regulator charged with the enforcement of these provisions. An originator that wishes to make a public offering of asset-backed securities is required by the Securities Law to prepare and file an Offering Memorandum (OM) detailing, among other information; (i) the terms and conditions of the securities; (ii) the risk factors related to the securities, the issuer and its industry; and (iii) financial, market, managerial and historical data of the issuer.

Issuers of securities through private placements or other offers exempt from registration should also use true and accurate information in their securitisation documents but they are not held to the same ongoing standards of disclosure and transparency set for the issuers of publicly offered securities.

The SMV is the principal regulator of these disclosure requirements.

The information contained in an OM filed with the SMV for a public offering of securities must be true and accurate and may not be false or misleading in any way. Including false or misleading statements in the OM, as well as not disclosing relevant information, is considered a very grave offence under the Securities Law which could lead the SMV to impose substantial monetary fines on the issuer and on individuals involved in the management of the issuer, without prejudice of any civil or criminal actions that investors could take against the issuer and its management.

The amounts of the monetary fines that the SMV may levy on the registered issuer due to including false or misleading statements in the OM or not disclosing relevant information can be:

- a sum that can be no less than the benefit that the offender received from the actions or omissions that constituted the offense but no more than twice the value of said benefit or, if said criteria cannot be applied;
- the higher of:
  (a) 5% of the assets of the offending party;
  (b) 5% of the assets used in committing the offence; or
  (c) USD1 million.

The amount of the monetary fine that the SMV may levy on the managers of a registered issuer due to very grave offences, such as the ones described above, can be up to the higher of 5% of the assets used in committing the offence or USD1 million.

4.3 Credit Risk Retention

As of the date of this chapter, Panama has not adopted credit-risk retention rules such as those set forth by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 of the United States, whereby the "sponsor" of a securitisation is generally obliged to retain and hold a minimum of the credit risk of any asset that, as a result of a securitisation, is transferred, sold, or conveyed to a third-party SPV.

4.4 Periodic Reporting

Issuers of securities registered with the SMV need to deliver financial statements to the SMV as part of the documentation that they have to file in the initial registration process and, once the SMV approves the registration of the securities for public offering, the issuer has an ongoing obligation to deliver quarterly unaudited financial statements and annual audited financial statements. Finally, registered issuers are obliged to disclose to the investing public any event that takes place after registration with the SMV and that may be deemed of importance for investors. An event is considered of importance for investors if it is

an event that would, when disclosed, have a significant effect on the market price of the security and if it would be an event that the holder of a security, or a prospective buyer or seller thereof, would grant relevance when deciding how to act in relation to the security. These importance events must be disclosed by the issuer to the SMV, the stock exchange (in the case of listed securities) and to the investing public in general no later than the next business day after the event took place.

The laws and regulations requiring periodic reporting by issuers of registered securities are enacted and enforced by the SMV. The data contained in financial statements must also be true and accurate and reporting false or misleading information is also considered a very grave offence under the Securities Law, as well as constituting a felony under Panama's criminal laws.

The amount of the monetary fine that the SMV may levy on the registered issuer due to reporting false or misleading information in financial statements can be:

- a sum that can be no less than the benefit that the offender received from the actions or omissions that constituted the offense but no more than twice the value of said benefit or, if said criteria cannot be applied;
- the higher of:
- 5% of the assets of the offending party;
- 5% of the assets used in committing the offence; or
- USD1 million.

The amount of the monetary fine that the SMV may levy on the managers of a registered issuer due to very grave offences, such as the ones described above, can be up to the higher of 5% of the assets used in committing the offence or USD1 million.

4.5 Activities of Rating Agencies (RAs)

Entities that wish to engage in the business of rating securities registered with the SMV in Panama, including asset-backed securities, must be approved by the SMV. Agreement 12 of 2001 of the SMV regulates the operation of rating agencies, as well as the process for their registration with the SMV.

To achieve registration, rating agencies must provide the SMV, in addition to other information and documentation, with the experience of their personnel in the business of rating securities, identification of technical and professional links with other rating agencies, a detailed description of the methodology that they will apply in the rating of securities and the procedures and criteria for reviewing and updating previously issued ratings.

The rating agency and all individuals involved in the issuance of a credit rating must maintain independence in relation to the ratings they assign. Independent status will not be achieved by individuals that, within the year before a rating was issued or updated, were the following in relation to the security or issuer being rated:

- director, officer, executive or partner;
- accountant or external auditor;
- beneficial owner of more than 5% of shares outstanding;
- creditor or debtor; and/or
- sponsor, broker, distributor or trustee.

Rating agencies are regulated by the SMV.

4.6 Treatment of Securitisation in Financial Entities

In Panama, banks are regulated by special sectorial legislation (the Banking Law) and they are supervised by the Superintendencia de Bancos de Panama (the SBP). The SBP plans to adopt regulations specifically applicable to securitisations based on Basel III guidelines by 2018. Therefore, it is anticipated that banking regulations will be in line with the Basel III guidelines on risk management and supervision for these types of structured financing arrangements.

Other than as described below, currently there are no regulations that provide capital or liquidity benefits for any transaction that complies with any specific rules on the substantive quality of the transaction, such as "single, transparent and comparable" of Basel and IOSCO or similar regimes.

Capital Adequacy

General capital adequacy and liquidity requirement rules applicable to originator banks are based on Basel Committee Standards. These rules are contained in the Banking Law and the regulations issued by the SBP. Capital adequacy requirements are established in Chapter V of the Banking Law and are further regulated by Agreement No 1 of 2015 and Agreement No 3 of 2016 issued by the SBP.

The Banking Law requires banks to maintain capital funds and tier one capital equivalent to at least 8% and 4%, respectively, of the risk-weighted total of all assets and contingent off-balance sheet operations. Agreement No 3 of 2016 of the SBP assigned risk-weights to assets held by banks. A risk-weighting of 35% is granted to mortgage loans in which the loan amount does not exceed 80% of the value of the asset and the asset is the primary house of the debtor. A risk weighting of 50% is assigned to other residential mortgage loans as well as to business and consumer loans that are guaranteed with mortgages over real property. A risk-weighting of 100% is granted to car loans with maturities of 5 years or less and to unsecured consumer loans with maturities of 5 years or less. Car and consumer loans with maturities of 5 years or more carry a risk-weighting of 125%.

Banks that pursue securitisations of pools of their mortgage, commercial, consumer and car loans with the aforementioned risk-weights could achieve relevant capital relief. However, the transfer by a bank of a significant amount of its assets is regulated by means of Agreement No 2 of 2004 of the SBP. A transfer or assignment of assets involving 25% or more of the bank's assets is deemed to have a significant impact and will require prior authorisation by the SBP in order to be carried out. Once the SBP authorises a transaction of this type, the originator bank would have to publish the approval in a national newspaper. The SBP may deny the request when there are issues of solvency or solidity of the bank, or if – because of the transaction – the bank will not comply with legal or regulatory limits, or upon the presentation of incomplete or incorrect information.

Liquidity

Liquidity requirements for banks are established by Chapter VI of the Banking Law and further regulated by the SBP in Agreement No 4 of 2008. Banks must at all times maintain a minimum amount of liquid assets equivalent to a percentage of the total gross deposits. Said percentage will not exceed 35%. Currently, the minimum liquidity index is set by the SBP at 30%. Nevertheless, that index will be 20% for banking entities that keep interbank deposits quarterly average greater than 80% of their total deposits.

The SBP regulates capital, liquidity and other requirements that apply to banks and is the entity charged with enforcing these regulations.

Among the assets that the SBP has deemed "liquid" for purposes of calculating the liquidity index are debt securities issued by domestic or foreign private entities and approved by the SBP which are actively traded in a stock market and have been accorded investment-grade status by a qualified, internationally-recognised credit rating agency, at market value. Securities that meet these criteria (for example, those issued as a result of a properly structured securitisation) should be assets that, if approved by the SBP, draw the attention of banks as low-risk investments with higher returns than other assets approved for complying with liquidity requirements such as cash, time deposits and other short-term investments.

4.7 Use of Derivatives

Article 197 of the Securities Law states that the SMV may issue provisions that regulate the offering; negotiation; and terms options, futures and other derivatives. The SMV may also create regulations that would provide protection to those who invest in derivatives. No such regulations have been issued as of the date of this chapter and, in their absence, parties may offer, negotiate and invest in derivatives, including any such that might be implemented for the purposes of a securitisation.

4.8 Specific Accounting Rules

No response provided; section answered at firm's discretion.

4.9 Investor Protection

Please see **4.1 Specific Disclosure Laws or Regulations** and **4.2 General Disclosure Laws or Regulations**.

4.10 Banks Securitising Financial Assets

Please see **4.6 Treatment of Securitisation in Financial Entities** for the principal laws and regulations that apply to banks that securitise any of their financial assets or invest in positions in securitisations.

There are no special laws or regulations for banks that vary for banks' disclosure, credit risk retention, reporting, accounting or other securitisation-specific rules that apply to other types of entities.

4.11 SPEs or Other Entities

Please see **1.2 Special Purpose Entities** for information on the rules that apply to the form of SPEs.

In the process of structuring a securitisation, the SPV should be designed and implemented in a manner that would differentiate it from an investment fund under Panama law. In Panama, investment funds are supervised by the SMV and are regulated by the Securities Law and Agreement No 5 of 2004 issued by the SMV.

Investment funds that publicly offer their participation quotas to persons domiciled in Panama must register with the SMV, may be self-managed or they have to engage a duly licensed investment manager to invest its assets and engage a custodian to hold its investments. Investment funds that are self-managed must hire duly licensed personnel that will be charged with the administration of the fund. For the SPV in a securitisation to differentiate itself from an investment fund subject to the aforementioned obligations, the securities issued by the SPV should not be considered "participation quotas", which are defined by the Securities Law as "any share, security, certificate of participation or investment or any other instrument or financial right that reflects a participation interest in an investment fund."

As participation quotas are customarily considered to be equity instruments (such as common stock), the securities issued by an SPV in a securitisation are designed to avoid being characterised as participation quotas; instead, they are designed to be debt instruments (such as notes or bonds) that would constitute obligations of the SPV (and not equity interests), so that the investors would become creditors of the SPV.

4.12 Activities Avoided by SPEs or Other Securitisation Entities

Please see **4.11 SPEs or Other Entities**.

4.13 Material Forms of Credit Enhancement

Credit enhancement techniques that have been implemented in Panamanian securitisations include: (i) subordination; (ii) reserve accounts; (iii) excess spread; and (iv) overcollateralisation. Subordination is fairly frequent and achieved by issuing securities in more than one tranche or series, such as, a senior note and a junior note. Flows generated by the securitised assets are first used to pay sums due under the senior notes and the remaining flows, if any, are used to pay the sums owed to the holders of the junior notes.

The constitution of a reserve account is also common in securitisation transactions. If the SPV is a trust, the trustee opens a bank account in the name of the trust and funds generated by the assets are deposited into the reserve account until sums deposited reach a certain minimum amount. After that minimum amount is deposited, no additional cash derived from the assets is deposited therein. The funds deposited in the reserve account remain in deposit and are only used to pay interest (and sometimes principal) to investors in stressed scenarios in which the flows generated by the underlying assets are not sufficient to perform payments of interest and/or principal to investors. Instead of having the cash deposited in a bank account, the issuer may request a third party with a high credit rating to issue, for example, a stand-by letter of credit whereby the guarantor agrees to deposit cash in the reserve account if needed.

Excess spread has also been implemented because originators try to make sure that the interest rate (and, therefore, the interest payments) that the debtors of the underlying assets would have to pay to the SPV exceeds the interest rate (and, therefore, the interest payments) that the SPV must pay to investors under the notes. Furthermore, the excess spread can usually be maintained because the SPV would have the right to unilaterally increase the interest rate (and, therefore, the interest payments) that the debtors of the underlying assets have to pay. We have experienced, however, securitisations in which the SPV's right to increase the interest rate of the receivables was limited to avoid defaults by debtors due to excessively high interest payments.

To achieve overcollateralisation, originators have also transferred to the SPV assets with an outstanding principal balance that exceeds the outstanding principal balance that would be owed to investors under the securities upon issuance. In other transactions, originators have transferred to the SPV receivables with an outstanding principal balance that is equal or barely higher than the outstanding principal balance that would be owed to investors but with safeguards in the transaction documents whereby, if the principal balance of the underlying assets dipped below the principal balance of the notes by a given percentage, payments of interest and principal to the holders of junior notes would not be made (but would be accrued) and all funds generated by the receivables would be used to pay interest and principal to the holders of the senior notes.

4.14 Participation of Government-Sponsored Entities

There are no government-sponsored entities that participate in the securitisation market.

4.15 Entities Investing in Securitisation

Securities resulting from securitisations have been offered both inside Panama as well as abroad in cross-border transactions. Most asset-backed securities offered primarily in Panama have been sold by means of public offerings subject to registration with the SMV and have been listed on the Panama Stock Exchange, the Bolsa de Valores de Panama (BVP). Securities of this type that are offered abroad (ie, not offered in Panama) by local issuers may be sold in a manner so that they are exempt from registration with the SMV.

Due to their perceived sophistication, asset-backed securities are mostly offered to, and acquired by, institutional investors such as banks, insurance companies and pension funds. This seems to be particularly true in private deals. In public offerings, retail investors may participate, although this is not frequent. Under the current rules of the BVP, once the issuer of an asset-backed security (or of any security, for that matter) posts the issue price, there is a window of thirty minutes in which any investor can offer to buy the security at a higher price. At the end of the thirty-minute span, the security will be sold to the investor that offered the highest price. Due to the foregoing, retail investors can acquire asset-backed securities if they outbid institutional investors and vice versa.

Insurance Companies

Asset-backed securities could prove to be sound investments for insurance companies duly licensed to operate in Panama. Law 12 of 2012, which regulates insurance companies, states that these entities need to create capital and technical reserves that must be comprised by certain eligible assets. One of these eligible assets are debt securities registered with the SMV and actively traded in a stock exchange authorised by the SMV. According to this law, up to 50% of the capital and technical reserves of an insurance company may be constituted by investments in these assets, which would include asset-backed securities.

Reinsurance Companies

Reinsurance companies that operate in Panama are regulated by Law 63 of 1996. Reinsurance companies are required to consti-

tute reserves composed by defined eligible assets. At least 75% of the assets that comprise these reserves must be investments made "inside Panama" while the remaining 25% of the reserves may be comprised by investments abroad. One of these assets are "mortgage securities" (*bonos* or *cédulas hipotecarias*) registered with the SMV. These securities seem to include mortgage-backed securities, in which case reinsurance companies may invest in them in order to create their reserves that must be composed by investments inside Panama.

Social Security Authority

The Social Security Authority of Panama (Caja del Seguro Social (the SSA)) may also invest in asset-backed securities. The SSA approved Resolution No 39,609-2007-JD dated 8 May 2007 (as amended by Resolution No 04,679-2008-JD of 24 July 2008), pursuant to its organic Law No 51 of 27 December 2005, dictating parameters for investments of its reserve funds. Thus, the SSA may invest in securities with home-mortgages collateral with over five years of constitution, over assets covering no less than 125% of the debt, with a term of no less than ten years in different projects and with a normal credit risk level. These securities must be publicly traded in a stock exchange or other organised market, duly recognised by the SMV. These investments may not exceed 5% of the total amount of reserves of the SSA and may not exceed 20% of the security's issuance.

Pension Funds

Private retirement and pension funds in Panama (pension funds) are regulated by Law No 10 of 1993, as amended (the Pension Funds Law) and by Agreement No 10 of 2005 (as amended to date, the Pension Funds Regulation) adopted by the SMV. The Pension Funds Regulation establishes that at least 80% of the financial assets acquired with the resources of a pension fund must be traded in a regulated financial market.

The Pension Funds Regulation also identifies the specific type of assets in which a pension fund may invest its resources. These assets include the following:

- debt securities duly registered with the SMV and publicly traded in a duly authorised stock exchange or any other local or foreign regulated market; and
- debt securities and shares issued by foreign states, central banks, financial institutions and corporations, of which at least 50% must have received a rating of investment grade or more from a local or international rating agency.

Pension fund managers may design and offer their pension funds. All pension fund managers must, however, offer at least one "basic" fund that must comply with the following investment limits for the asset types identified below:

- debt securities issued by banks with a general licence to operate in Panama (60%); and
- debt securities duly registered with the SMV and publicly traded in a duly authorised local stock exchange (50%).

The Pension Funds Regulation sets certain limits that apply when investing the resources of a pension fund in financial assets with a single issuer or debtor. The resources of a pension fund that may be invested in shares and debt securities issued by one single corporation may be, at the most, an amount which is the lower of the following two quantities: 10% of the patrimony of the fund, or 20% of the total assets of the corporation or financial institution that is the issuer of the securities, according to their latest audited financial statements. In no case can more than 20% of the investments of a pension fund – whether they are debt, equity or deposits – be placed with one single corporation or financial institution. Pension funds may invest resources that do not exceed more than 20% of their patrimony in assets of a corporation that is a part of its same economic group.

5. Documentation

5.1 Bankruptcy-Remote Transfers

The documents customarily used in Panama securitisations to perform an insolvency remote true sale of the assets are:

- the trust agreement (if a trust will be used as SPV) whereby the SPV that will receive the assets is constituted;
- a sales or assignment agreement pursuant to which the originator will sell and transfer the assets to the SPV; and
- a servicing agreement whereby the SPV will delegate the management and servicing of the assets to a servicer (the servicing agreement is not essential to perform a bankruptcy remote true sale but it warrants consideration given the key role a servicer plays in a securitisation.

5.2 Principal Warranties

Trust Agreement

In a trust agreement certain warranties and representations are made by the settlor and the trustee. Warranties customarily made by the settlor include:

- that it has full legal capacity, authority and intent to constitute the trust and enter into the trust agreement;
- that it has full legal title and ownership of the assets that will be given in trust; and
- that the assets were generated as a result of lawful activities and their source is not illicit in any way.

Representations usually made by the trustee in a trust agreement include:

- that the trustee has full legal capacity, authority and intent to enter into the trust agreement;
- that the trustee is duly licensed to engage in the trust business in Panama; and
- that the trustee has the operational capacity to manage the assets given in trust in accordance with the terms of the trust agreement.

Assignment Agreement

The originator or seller of the assets usually expresses, in the sale or assignment agreement pursuant to which it will transfer the assets to the SPV, certain representations and warranties in favour of the SPV as purchaser of the assets. The representations and warranties that the seller of the assets makes in the sale or assignment agreement are of importance because they relate to the condition and quality of the assets and, therefore, should be given careful consideration.

Warranties and representations made by sellers in favour of buyers in sale or assignment agreements vary depending on the nature of the assets but customarily include the following:

- the assets were lawfully originated and constitute valid and binding obligations of the debtors or payors thereof;
- the seller has full legal title and ownership of the assets that will be transferred, including the right to sell the assets;
- the seller has full legal capacity, authority and intent to enter into the agreement and perform its obligations thereunder;
- the obligations derived from the assets are being paid by the debtors in a timely manner or, if delinquent, that delinquency is not more than for a defined time period;
- the terms of the loan or other contract whereby the assets are originated have not been breached, waived, altered or modified;
- collateral granted in order to secure the assets (such as mortgages over loans) was duly constituted and is valid, existing and binding;
- the value of the debt represented by the asset did not exceed a defined percentage of the debtor's income and/or indebtedness; and
- the absence of litigation or dispute that adversely affected the assets being securitised.

Servicing Agreement

The entity engaged as servicer of the assets being securitised also makes certain representations and warranties to the SPV that engages it for purposes of servicing and managing the assets. These representations and warranties usually include:

- that the servicer has experience in the servicing and management of the assets being securitised;
- that the servicer has the operational capacity to service the receivables; and
- that the servicer will service and manage the assets in accordance with the standards and practices it applies when servicing its own assets, as well as giving due consideration to customary and usual standards of practices observed by prudent institutions that service assets that are comparable to the assets that the servicer manages for its own account.

5.3 Principal Perfection Provisions

Trust Agreement

In order for a trust agreement to be effective against third parties one of either of the following formalities must be fulfilled: (i) that the document be in the form of a public deed; or (ii) that the signatures of the parties be recognised by a notary public. If the trust agreement is not documented by means of public deed, therefore, the document should contain a provision whereby the parties agree to cause that their signatures be recognised by notary public.

Assignment Agreement

For a delivery of credits or other incorporeal rights to be deemed to have taken place under a sale or assignment agreement, and for said agreement to have a "date certain" and for it to be effective against third parties in general, one of either of the following formalities must be fulfilled: (i) that the document be in the form of a public deed; or (ii) that the signatures of the parties be recognised by notary public.

If the sale or assignment agreement is not documented by means of public deed, therefore, the document should contain a provision whereby the parties agree to cause that their signatures be recognised by notary public. If further requirements need to be met in order to perfect the transfer of the assets and/or accessory rights thereto (such as the recording of the assignment agreement with the Public Registry of Panama in case of mortgage loans not documented by means of a negotiable instrument), the contract should contain a provision in accordance with which the parties agree to comply with this formality in a specified timeframe.

Finally, the assignment agreement should contain a clause whereby the seller agrees to notify the debtors of the credits that these credits have been transferred to the SPV in order that debtors stop paying to the seller sums owed under the receivables and begin paying them to the SPV.

5.4 Principal Covenants

In securitisation transactions that use trusts as SPVs, certain positive and negative covenants are undertaken in the trust agreement while others are expressed in the notes issued by the

SPV. Typical positive and negative covenants, some of which are required by the Securities Law, are listed below.

Positive Covenants:

- Maintain in full force and effect its existence as a trust, and all of its rights and permits necessary for the conduct of its business.
- Ensure at all times that the claims of the most senior noteholders rank at least pari passu among themselves as to priority of payment and senior in right of security to all other debt of all other creditors of the issuer trust, including the most junior notes.
- Maintain an accounting and control system and other records, which together adequately reflect truly and fairly the financial condition of the issuer trust (and the collateral trust, if any) and the results of its operations in accordance with certain standards (such as International Financial Reporting Standards or IFRS).
- Prepare and furnish quarterly financial statements of the issuer trust (and the collateral trust, if any), audited financial statements for each fiscal year for the issuer trust (and the collateral trust, if any).
- Maintain at all times a firm of internationally recognised, independent public accountants.
- Give notice to investors of: (i) any event which has, or could reasonably be expected to have, a material adverse effect; or (ii) the occurrence of an event of default or any material breach or default under any securitisation document.
- Use proceeds of the issuance of the notes exclusively to purchase the assets and hold them in trust or cause their transfer to the collateral trust, if it applies.
- Preserve the trust assets and undertake all actions necessary to maintain the investors and other parties' interests in the trust assets in full force and effect.
- Execute, acknowledge where appropriate, and deliver all such documents necessary to carry out the interest and purposes of the securitisation documents.

Negative Covenants:

- Amend, modify or supplement the issuer trust or other transaction documents in any material respect.
- Engage in any business or any activity other than those activities limited or incidental to its line of business.
- Create or suffer to exist any debt (other than the notes) and incur or allow any lien on any of its assets to secure any obligations other than as contemplated in the securitisation documents.
- Enter into any arrangement to guarantee or become obliged for any obligation of another person.
- Make any loan, or make any acquisitions or investments in, or purchase any securities of any other person.
- Merge with any other person, liquidate, spin-off, wind up, dissolve, change or reorganise its legal form, or acquire any ownership interests or all of substantially all of the assets of any person.
- Voluntarily amend, modify or change in any manner, or waive any of its rights pursuant to, any agreement the effect of which could adversely affect the trust assets or the trustee's or the noteholders' rights under the notes.
- Sell, lease, transfer or dispose of any assets, except as set forth in the securitisation documents.
- Enter into any transaction not on the basis of arm's-length transactions.

The transaction documentation may provide that compliance with some of the foregoing positive and negative covenants may be waived by, for example, a majority of the holders of the securities issued.

5.5 Principal Servicing Provisions

Provisions related to the servicing and management of the assets are customarily contained in the servicing agreement entered into by and between the SPV and the servicer. These provisions set forth the rights and duties of the servicer which regularly encompass the following:

- maintaining accounting records for the assets being serviced;
- hiring staff for these purposes;
- physically keeping any documentation related to the assets;
- collecting any and all sums due from the debtors;
- opening and maintaining bank accounts in which the funds from the assets will be deposited;
- calculating (sometimes in concert with the paying agent) amounts due to investors and other parties on payment dates;
- assisting in the use of said funds in order to make payments to investors and other parties under the securities and other deal contracts; and
- preparing and delivering to the SPV and other parties reports regarding the status of the assets.

5.6 Principal Defaults

The events or situations that would constitute a default in a securitisation differ between transactions, sometimes depending on the complexity of the structure and, on other occasions, due to the nature of the assets. However, typical events of default contained in a senior note include, in summary:

- if, on the maturity date or any payment date, the issuer fails to make any interest payment or principal payment to investors;

- if, on any payment date, the outstanding balance of the notes exceeds the principal balance owed to the SPV resulting from the underlying assets;
- if any representation or warranty made by the issuer in connection with the issuance, sale and purchase of the note or with any securitisation document, shall prove to have been inaccurate in any respect which was material when made;
- if the issuer shall fail to perform or observe any term, covenant or agreement contained in the note or any other securitisation document; or
- if the issuer shall become insolvent or make an assignment for the benefit of creditors or be declared bankrupt, or if any governmental authority having the power to do so orders the liquidation of the issuer trust's assets or the suspension of its business operations.

If an event of default occurs and is not cured or waived, the holders of the notes are customarily granted the right to declare all payments owed under the notes as due and payable and instruct the trustee or the servicer, as the case may be, to sell the securitised assets and use the funds from the sale to pay amounts due to investors under the notes.

5.7 Principal Indemnities

In Panamanian securitisations, trustees, servicers, paying agents and other parties involved usually require that the documentation contain provisions whereby they are exempt from responsibility and/or will be indemnified in case they incur any loss or damage in the performance of their services. Provisions of this type usually include the following:

- in the performance of its duties, the agent will be able to act on the basis of any document that it believes to be authentic and to be executed or presented by an authorised person;
- in the performance of its duties, the agent will be able to request, before taking any action, written opinions of legal or accounting advisers and the agent will not be responsible for any action taken in good faith on the basis of these opinions;
- in the performance of its duties, the agent will be able to act through qualified third parties without responsibility for the negligence of these third parties;
- in the performance of its duties, the agent will not be responsible by any action that it takes or omits to take in good faith that it believed to be within the powers and authorisations conferred to it under the corresponding transaction document; and
- the agent will be indemnified from any loss, damage or responsibility incurred in connection with the performance of its duties and obligations, provided that such loss, damage or responsibility is not caused by fraud, gross negligence or wilful misconduct.

5.8 Other Principal Matters

There are no other principal matters covered in securitisation documentation in Panama.

6. Enforcement

6.1 Other Enforcements

No response provided.

6.2 Effectiveness of Overall Enforcement Regime

No response provided.

7. Roles and Responsibilities of the Parties

7.1 Issuers

The parties involved in securitisations carried out in Panama usually include the following: an originator; the investors; an SPV or a trustee, if a trust is used as the SPV; a servicer of the assets; a paying agent; an investment bank; a guarantor; a credit rating agency; and a stock exchange.

7.2 Sponsors

A credit enhancer, guarantor or sponsor of some sort is also frequently engaged in a securitisation. For example, a credit enhancer may grant an outright guaranty whereby it undertakes to pay all or part of the amounts due to investors if the issuer does not perform these payments. In other transactions, the issuer is obliged to maintain cash in reserve in order for it to be able to make payments of interest or principal at any given moment when the flows from the securitised assets are not sufficient to cover said payments. Instead of having the cash deposited in a bank account, a guarantor may issue a stand-by letter of credit whereby it agrees to deposit cash in the reserve account, if needed.

Moreover – in the case of mortgage-backed securities in Panama, for example, the transfer of mortgage loans documented by means of regular loans (and not in the form of a negotiable instrument such as a promissory note) – the transfer needs to be recorded with the Public Registry of Panama to be effective against third parties, including creditors of the originator. In these securitisations, the SPV issues the securities, uses funds to pay the originator for the assets and acquires ownership of the credits but said right will not have effects against third parties until the aforementioned registration is performed. This process involves a certain level of paperwork and can be time consuming. In order to guarantee that the recording of the transfer in the Public Registry will be performed, a guarantor, such as an insurance company, issues a performance bond in favour of the

SPV whereby it guarantees to the SPV that it will pay cash to it for an amount equal to the principal balance of any mortgages that have not been recorded with the Public Registry as transferred to the SPV in a given timeframe.

7.3 Underwriters and Placement Agents

A financial entity is commonly engaged to assist the originator with matters related to the structure of the transaction and/or the strategy regarding marketing and placement of the securities. This entity is usually an investment bank or a securities broker-dealer which provides the originator with counsel related to the financial aspects of the securitisation. This entity may also commit to underwrite all or part of the securities being offered and/or search for investors willing to buy the securities. If the broker-dealer will be involved in seeking investors and assisting the issuer in the placement of the securities, the broker-dealer will most likely require a licence from the SMV to engage in the broker-dealer business in Panama.

7.4 Servicers

Once an SPV acquires the assets being securitised as a result of a true sale, the SPV acquires full title to enforce all rights and privileges corresponding to it as owner thereof, including the right to collect the proceeds from the assets, determining the payment policies, modifying their interest rates, allowing for the creation of further liens over the assets, enforcing real and personal guarantees and managing the assets in general. However, the SPV usually delegates these functions to a servicer by means of a servicing agreement.

The servicer shall administer the assets subject to the terms and conditions of the servicing agreement and following the same standards the servicer employs in managing its own business. Rights delegated to the servicer frequently include rights to modify interest rates of the assets, initiate judicial or extrajudicial procedures to collect delinquent sums, assist in preparing and filing financial and tax reports and collect tax refunds owed to the SPV. The servicer chosen to manage the securitised assets will depend on the nature of the assets. Banks and finance companies are customarily contracted as servicers if the securitised assets are receivables from loans, credit card transactions and diversified payment rights. If the assets being securitised are the future flows expected to be generated by a toll road, the entity engaged as servicer is usually a toll road operator.

7.5 Investors

Most securities issued as a result of securitisations that have been performed in Panama are debt instruments such as notes, bonds and other obligations. As a result, investors that have participated in securitisations usually become creditors of the issuing entity. The role of investors in securitisations are similar to those of investors in other debt instruments. This includes, for example, voting (that is, if they have been granted a voting right) when this is required, for example, for the purposes of allowing the issuer to perform actions prohibited by the structure (such as selling assets or incurring further debt) or in order to approve or reject changes to the terms and conditions of the deal documentation proposed by the issuer or some other party.

7.6 Trustees

If a trust will be used as the SPV in a securitisation, the trustee will play a key role in the transaction because it will be the entity that will issue the securities on behalf of the trust and will also be charged with management of the assets being securitised in accordance with the deal documentation.

The Trusts Law adopted a specific supervision framework for companies engaging in the trust business as trustees. The SBP has the exclusive authority to regulate and supervise trustees, which may only be persons holding a trustee licence or otherwise authorised by law to act as trustees. Any party that intends to be authorised to engage in the trust business as a trustee must prove to the SBP that it complies with minimum financial, technical, legal, managerial and operational requirements to perform the trust business.

Regarding the rights of the trustee, it is important to clarify that, even though a trustee acquires ownership of the assets given in trust, these rights are acquired by the trustee only on a fiduciary basis and the trustee must manage the assets in strict compliance with all limitations, restrictions and other terms and conditions set forth in the trust agreement.

Under Panama law, a trust can only be constituted by a settlor. However, the settlor of a trust for securitisation purposes does not have to be the originator. This could even be preferable because the settlor of a trust does not receive cash in exchange for the assets it gives in trust. The reason why the originator does not have to be the settlor of a trust, without prohibiting the originator from transferring the assets being securitised to the trust, is that a trust can, acting through its trustee, enter into contracts and transactions. As such, a trust that has received funds by issuing securities can use those funds to acquire the assets from the originator, without the originator having to be the settlor of the trust.

Certain securitisations in Panama use a two-trust structure. In this case, the originator (or an affiliate thereof) first constitutes a trust that will be the issuer of the securities (an issuer trust). Afterwards, the trustee of the issuer trust (the issuer trustee) would act as settlor in the constitution of a guarantee or collateral trust (a collateral trust) with a trustee that is usually independent from the originator and the issuer trustee.

In these two-trust structures, the issuer trustee uses the proceeds of the issuance to pay for the assets being securitised but, instead of the issuer trust holding the assets, it causes the same to be delivered to the collateral trustee for them to constitute the property of the collateral trust. An important advantage offered by this two-trust structure is the independence that exists between the collateral trustee and the issuer trustee. This independence should provide the investors assurance that, in cases of default, the assets securitised can be sold and the funds received from that sale be used to pay investors without requiring any action from the issuer trustee. Finally, the assets that comprise the trust property of the collateral trust constitute an estate or patrimony that is not only separate from that of the originator but of the issuer trust as well and are, therefore, not available to pay debts owed to the originator or the issuer trust.

The role of trustees in securitisations usually encompass the following:

- issuing the notes;
- in the case of a public offering, registration of the securities with the SMV and listing in the BVP;
- use of the proceeds of the issuance to pay the originator for the assets being securitised;
- administration of the securitised assets for and on behalf of the trust and in accordance with the trust instrument;
- constitution of a collateral trust and causing the transfer of the assets to that collateral trust in the case of a two-trust structure;
- engagement of the servicer, paying agent, broker dealer and other third parties; and
- collection and use of the flows received from the assets to pay amounts due to investors and third parties, including service providers, as per a "waterfall" set forth in the transaction documentation.

Other parties that have been involved in securitisations carried out in Panama include: (i) a paying agent; (ii) a credit rating agency; and (iii) a stock exchange.

Paying Agent

The SPV usually engages a securities registration as well as a transfer and paying agent. This agent will keep a record or registry containing information of the securities or notes and the holders thereof, which typically includes names and address of the holders as well as the number of the certificates issued to the holder (if securities are in the form of physical certificates), date of issuance and authentication of the certificates, amount of principal, and each and every transfer or replacement of the certificates.

The paying agent also assists the SPV with the transfer, replacement and cancellation of the notes. The securities are only transferable pursuant to annotations made by the paying agent in the registry mentioned above and only those persons identified in the registry as holders of securities shall be deemed the owners thereof. Finally, the paying agent is charged with the task of calculating sums owed to the investors and paying these amounts when due, with funds received from the SPV.

Credit Rating Agency

Issuers in securitisations frequently request a credit rating agency to rate the securities that will be offered. In our experience, credit rating agencies focus primarily, but not exclusively, on four main factors:

- the quality of the underlying assets;
- credit enhancements;
- that the transfer of the assets from the originator to the SPV complies with all requirements to be considered a true sale; and
- the insolvency-remoteness of the SPV.

Securities offered as a result of securitisations have received both local and international credit ratings.

Stock Exchange

Securities resulting from securitisations have been offered and placed through the BVP, which is the local stock exchange. Before offering the securities through the BVP, the issuer must register or list the securities with the exchange. For this purpose, certain documentation has to be filed with the BVP for review and approval, including the Offering Memorandum of the securities. Since the BVP is a private company whose members are local broker-dealers, the issuer has to engage a broker-dealer that is a member of the BVP for that broker to offer and sell the securities through the BVP for and on behalf of the issuer. Securities that have been previously registered with the SMV for public offering are the only ones that can be sold through the BVP.

8. Synthetic Securitisations

8.1 Synthetic Securitisation

Synthetic securitisations are not prohibited under Panama law but, to the best of our knowledge, no synthetic securitisations have been performed in Panama as of the date of this paper. If securities were issued as a result of a synthetic securitisation, they would most likely be subject to the provisions of the Securities Law and its regulations and their issuers would be supervised by the SMV.

8.2 Engagement of Issuers/Originators
See **8.1 Synthetic Securitisation**.

8.3 Regulation
See **8.1 Synthetic Securitisation**.

8.4 Principal Laws and Regulations
See **8.1 Synthetic Securitisation**.

8.5 Principal Structures
See **8.1 Synthetic Securitisation**.

8.6 Regulatory Capital Effect
See **8.1 Synthetic Securitisation**.

9. Specific Asset Types

9.1 Common Financial Assets
Receivables that have been securitised in Panamanian transactions include those derived from consumer loans, mortgage loans, maritime loans, credit cards, toll road operations, construction payment obligations and diversified payment rights (remittances). In the case of consumer, mortgage and maritime loans, the securitisations have mostly been of rights or credits resulting from operations (loans) that, at the moment of the transaction, had been executed and were existing. In the case of transactions related to credit cards, toll road operations, construction payment obligations and diversified payment rights, the rights or credits securitised had not, at the moment of the transaction, come into existence.

9.2 Common Structures
Consumer Loans
Notes are issued by an issuer trust, registered with SMV as part of a public offering, listed and placed through the BVP and paying interest at a fixed rate. The consumer loans are sold by the originator to a collateral trust constituted by the issuer trust for the benefit of the noteholders and other secured parties. Originating banks have been engaged by the collateral trustee to service the consumer loans.

Credit Card Receivables
Banks in Panama have also securitised credit card receivables. Securitisations of receivables from VISA and Mastercard credit cards granted to their clients, for example. This is a securitisation of future flows because banks sell, in advance, the rights they may become entitled to in the future as a result of credit card transactions performed by their clients.

Flows from Toll Roads
Future revenues to be collected by operators of Panamanian toll roads have also been securitised. ICA Panama, S.A., the initial operator of one of Panama's largest toll roads, obtained financing by performing a securitisation of future flows it expected to receive from toll road operations. More recently, state-owned enterprises ENA Norte, S.A. and ENA Sur, S.A. (successor to ICA Panama, S.A.) performed similar transactions in order to buy back the concessions granted by the state for operating the toll roads.

Mortgage Loans
Mortgage loan securitisation is also an active market in Panama. Since 1999, for example, Banco La Hipotecaria, S.A. (BLH) (a local bank) has securitised more than USD500 million in mortgage loans. The structure used by BLH for securitising mortgage loans is similar to the one implemented for the consumer loan securitisation described above

Construction Payment Obligations
Instruments known as non-objection certificates (*certificados de no objeción* ; CNOs) exist under Panama law to evidence a payment obligation that a government entity has acquired with a contractor in connection with public works. CNOs are issued by the corresponding government entity pursuant to a turn-key construction contract, usually based on the advance of works and expressly provide for payment of the stated amount at a later date. CNOs constitute autonomous, unconditional and irrevocable payment obligations of the State that are transferrable and, therefore, practical for the purposes of financing. A securitisation of CNOs was performed in 2017 for purposes of financing the construction of Line 2 of the subway of Panama.

The regulations governing CNOs provide that their assignment or sale requires complying with certain formalities. The rules that regulate the requirements for transferring CNOs vary depending on the government entity that issues the same but, in general, the assignment of the CNOs must, at least, be notified to the authority that issued them and to the Office of the General Comptroller of the Republic (Contraloría General de la República; (the CGR)) and it may even be required that the assignment agreement be countersigned by a representative of the issuing authority and/or the CGR.

Diversified Payment Rights (DPRs)
Payment rights resulting from remittances of cash by persons located in Panama to recipients abroad have also been securitised. Banco General, S.A. has performed two such transactions in 2012 and 2016. In both cases, Banco General sold its DPRs existing at the time, as well as any generated thereafter, to a Cayman SPC that paid for the DPRs with funds received from notes that it issued and loans it contracted.

Auto Loans

Banco Delta, S.A., a general licence local bank (Banco Delta), is currently in the process of structuring a securitisation of auto loans originated by Banco Delta and granted by the same to debtors in Panama. Banco Delta, acting as settlor, has constituted with MMG Trust, S.A. (MMG Trust), acting as trustee, the issuer trust of auto loan notes. MMG Trust, as trustee of the issuer trust of auto loan notes, has filed a petition with the SMV requesting authorisation for said trust to carry out a public offering of auto loan notes in series under a revolving programme for an amount of up to USD50 million. Each series of notes will be issued by MMG Trust, acting as trustee of the issuer trust of auto loan notes, upon request by Banco Delta, as settlor of said issuer trust, and will be secured by a collateral trust to be constituted by MMG Trust, acting as settlor on behalf of the issuer trust of auto loan notes, with MMG Bank Corporation (MMG Bank), acting as collateral trustee. The funds received from the issuance of each series of auto loan notes will be used to acquire auto loans from Banco Delta that will be transferred by the latter to the collateral trust constituted for securing the corresponding series of auto loan notes.

Morgan & Morgan is very active in the capital markets sector in Panama, its practice focuses on public and private offerings, some with cross-border components. The firm has participated on behalf of both issuers and underwriters, local and international, including offerings made in other jurisdictions (such as 144A and Regulation S). Morgan & Morgan has also played a key role in the development of Panama's capital market; one of the firm's partners participated in the drafting of special legislation for real estate investment funds (also known as REITs) and set a milestone acting as counsel for the first such funds successfully registered in the Superintendence of Securities of Panama as part of an initial placement in the local stock exchange.

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Francisco Arias is a partner in the corporate law department and heads the securities and capital markets practice group of the firm. He has over 20 years of legal experience, first in New York as an associate at Kronish, Lieb, Weiner & Hellman (today Cooley Kronish); and then in Panama as a partner of Arias, Fábrega & Fábrega. As head of the firm´s capital markets practice, Mr Arias leads a team that advises both issuers and underwriters in several transactions – including but not limited to capital raising through public and private offerings, capital markets regulatory work and listings on the Panama Stock Exchange.

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