

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Securitisation

Peru

Andrés Kuan-Veng and Carlos Arata
Rubio Leguía Normand

practiceguides.chambers.com

2021

Trends and Developments

Contributed by:

Andrés Kuan-Veng and Carlos Arata

Rubio Leguía Normand see p.7



The Peruvian economy has faced immense challenges during 2020, with GDP expected to fall by 13.9% according to the International Monetary Fund's "World Economic Outlook" report. Lawyers and bankers have had to innovate and revisit common and typical financial structures in light of this landscape. In that regard, the past year has created opportunities in the capital markets arena, which has seen the emergence of securitisation as an efficient and useful financing technique to face the crisis.

The main developments in securitisation trends and practices in 2020 include the following:

- amendments to the Asset Securitisation Regulations;
- the enactment of Resolution No 001-2020-SMV (administrative precedent) by the Superintendence of the Securities Market (SMV, for its initialism in Spanish);
- the issuance by the National Superintendence of Customs and Tax Administration (SUNAT) of an opinion regarding who is to be understood as the final beneficiary of the securities issued in securitisation structures;
- at the pinnacle of the COVID-19 crisis, the adoption by the Peruvian government of securitisation programmes created to serve as guarantees to safeguard the stability of the economy;
- the growth of local REITs (or FIBRA, for its acronym in Spanish); and
- the development of opportunities to carry out asset securitisation processes given the economic effects of the COVID-19 pandemic.

Regulatory Modifications

Amendments to the Securitisation Regulations

On 17 January 2020, Resolution No 006-2020-SMV-02 was published in the Official Gazette, modifying and amending sections 44, 48 and 50 of the Regulations for Asset Securitisation approved by the SMV.

The amendments focus on the filing documentation for the registration of securities before the SMV in the context of securitisation offerings.

The amendments aim to reduce costs during the filing process. By virtue of the amendment, the SMV will ask for simple copies of certain documents (as opposed to certified copies, which increase transaction costs), such as the corporate resolution that approves the securitisation, the trust incorporation and indenture agreement, and the financial statements of the trust.

The amendments also enhance the information to be disclosed in the filing, by adding the requirement of submitting a copy of the contracts and documents cross-referenced in the corresponding prospectus.

For the specific case of REIT structures and considering the growing interest among foreign investors in the Peruvian real estate market, the SMV also asks for the contracts signed with brokers that underwrite international offerings of REIT equity participation certificates.

In an attempt to follow the trend set by international practices, the SMV will admit risk rating reports issued by rating agencies supervised by the SMV or by rating agencies classified as nationally recognised statistical rating organisations (NRSRO) by the Securities and Exchange Commission (SEC).

Likewise, the amendments provide clarification about the term for the registration of securities offerings, setting a 30 business day timeframe for the SMV to register the offering. If the SMV has not issued a decision at the end of this timeframe, the request will be deemed to be denied. If the SMV formulates comments to the filing, it will have five days to issue its opinion after the observations have been remedied. Also, it is now expressly indicated that the registration of the securities offering cannot be renewed once it has expired.

If the SMV has not issued a decision within 30 business days regarding the registration of securities offerings issued under programmes (master agreements) that are already registered with the SMV, the amendments clarify that the process will be deemed to have been approved. Again, the amendments indicate that the registration of securities offerings will not be subject to renewal.

PERU TRENDS AND DEVELOPMENTS

Contributed by: *Andrés Kuan-Veng and Carlos Arata, Rubio Leguía Normand*

Finally, the requirement to submit a copy of the contract of the offering does not apply if the securities offering in question belongs to a programme (master agreement) of equity participation certificates of a REIT (provided that the terms and conditions set forth in the master agreements remain in force and unvaried).

Administrative Precedent No 001-2020-SMV

The most important development of the year in relation to the securitisation legal framework was the passing of Resolution No 040-2020-SMV/02, which invokes Article VI of the Law of General Administrative Procedure and establishes a mandatory and binding administrative precedent that is expected will not only guide the SMV, but will also place limits on securitisation companies and local financing schemes in future securitisation offerings.

The resolution was issued in the context of an administrative sanctioning proceeding begun by the SMV against a securitisation company (hereinafter, an ST for its initialism in Spanish). Said ST acted as the trustee of two securitisation trusts set under and pursuant to the Securities Market Law (LMV for its initialism in Spanish), which in reality served as a guarantee or collateral mechanism rather than a source of payment of securitised instruments (ie, the statutory purpose of a securitisation trust). In that sense, the ST acted beyond its charter and corporate purpose.

It is worth mentioning that the Peruvian legal framework contemplates two routes to set trust estates:

- the first, through companies duly chartered by the Superintendence of Banking, Insurance and AFPs and in compliance with the General Financial System Law (which allows for a broad modality of trusts, including guarantee trusts – LGSF); and
- the second, only applicable to securitisation trusts, through STs duly chartered by the SMV, and in compliance with the LMV.

Since STs require a charter issued by the SMV and may only carry out those activities that are expressly authorised by the LMV, the SMV is competent to impose fines or penalties against companies that act beyond their corporate purpose.

Therefore, the SMV acted within its remit when it identified that the ST carried out the incorporation of two trusts that did not comply with the securitisation institution regulated by the LMV.

The trusts structure challenged by the Mandatory Precedent

With respect to the first securitisation trust (F1), the Originator X transferred a real estate property, administrative licences (*titu-*

los habilitantes), cash flows and an intangible asset to the trust, in favour of an ST as the securitisation company. On behalf of F1, the ST issued a single participation certificate denominated as an “A Certificate” in favour of Originator X, granting the right to all the remaining funds flows upon the liquidation of the trust at the end of the term set forth in the pertaining documentation. At the same time, Originator X obtained a USD5 million credit line from a third party to carry out the construction of a real estate project, and pledged the “A Certificate” in favour of said third party as a guarantee.

When analysing the F1 structure, the SMV concluded that the purpose of the A Certificate was to serve as a guarantee of the obligations assumed by Originator X before the financing agent, in connection with the loan granted. Furthermore, the SMV determined that the A Certificate did not comply with the LMV or the Regulations for Primary Offerings (OPP) to be categorised as a security, since only one single certificate was issued and article 5 of the OPP Regulations indicates that the issuance of ten or fewer securities simultaneously or successively in a period of one year does not qualify as an issuance of securities.

In the case of the second securitisation trust (F2), Originator Z transferred real estate property and certain fund flows as assets to an ST as the securitisation company. On behalf of F2, the ST issued a single participation certificate called a “P Certificate” in favour of Originator Z. Simultaneously, a company named P, which acted as the developer of the real estate project, obtained USD10 million in financing for the execution of said project. Having an interest in the execution of the project, Originator Z granted the “P Certificate” as a pledge in favour of said third party, as a guarantee of the obligations of P.

With respect to this second trust, the SMV concluded that the incorporation of F2 and the issuance of the P Certificate did not satisfy the statutory test to be categorised as a security. Similar to the case involving F1, the SMV held that a single certificate does not satisfy the requirement of the issuance of “several” securities set forth in the LMV or the OPP Regulations. Likewise, the SMV concluded that F2 did not support the payment of the securities issued by the trust, but rather served as a guarantee in case the promoter failed to pay the loan granted by a third party.

For both F1 and F2, the SMV concluded that none of the trusts satisfied the requirements set forth in the LMV and the Securitisation Regulations to be considered as securitisation trusts. Both statutes require that securitisation trusts must support the payment of securities issued by the securitisation company, and can only backup (guarantee) third-party payment obligations in a complementary fashion. Even though the structures designed by the ST may have the appearance of a securitisation trust,

it was concluded that the ST carried out activities beyond its corporate purpose.

Because the structures of F1 and F2 did not comply with the regulations regarding securitisation trusts, the SMV concluded that they were not protected by the intangibility that shields the assets that comprise an independent estate as referred to in Article 311 of the LMV, nor can they be recognised as specific guarantees referred to in Article 3 of CONASEV Resolution No 141-98-EF/94.10.

Main consequences of the institutional position of the SMV

In view of the above, the SMV took the opportunity to set out four criteria as an administrative precedent:

- the SMV is authorised to access the information and documentation of securitisation companies and other entities authorised by the SMV, with respect to the assets under their administration, even those whose securities are subject to private offerings;
- it is legally possible to incorporate securitisation trusts with structures other than financing trusts or REITs, as set forth in the corresponding trust incorporation and indenture agreement, provided that they receive authorisation from the SMV;
- trust assets may be comprised of assets and/or credit assets that may or may not generate periodic flows; and
- it is not possible to constitute securitisation trusts that only support the payment of the rights incorporated in securities issued by third parties, whether they are intended to be placed through a public or private offering.

The main conclusion of the SMV is that the securitisation trust cannot be used exclusively as a guarantee or backup for the payment of securities issued by third parties, since the primary statutory requirement for an asset securitisation process is that it serves as a payment source, or as the constitution of REITs or any other purpose authorised by the SMV in accordance with its scope of competence and regulations. Adopting the opposing position would imply that the securitisation trust serves as a guarantee trust, subject to the rules of the LGSF.

It is worth pointing out that Article 291 of the LMV originally indicated that the assets under securitisation trusts exclusively supported the payment of the rights conferred to the holders of securities issued, with such assets serving as a guarantee, and that Article 6 of Law 29720 eliminated the term “exclusively” to expand the scope of securitisation schemes to different financial structures. Nevertheless, said amendment aimed to set a limit that would not affect the purpose of securitisation as a concept – ie, to back up and serve as a source of payment for securities (which explains why the SMV and not the SBS (*Super-*

intendencia de Banca, Seguros y AFP del Perú) is competent for such transactions). Therefore, when structuring the conditions, terms and qualities of the issuances of securities, the agreements of incorporation and other documents that are prepared must take into account the purpose of securitisation trusts and avoid denaturing their purpose, especially when granting guarantees in favour of third parties.

Likewise, the SMV took the opportunity to settle the discussion on the possibility that private issues in securitisation processes are excluded from its scope of supervision, since the charter of securitisation companies arises from the legal recognition granted by the LMV, and such companies are therefore obliged to comply with the securities market regulations, even when dealing with offers directed to institutional investors. As such, chartered entities are obliged to provide the information required by the SMV in its role as supervising body of the securities market.

Tax Authority (SUNAT)

Through Report No 046-2020-SUNAT/7T0000, SUNAT answered a series of queries related to securitisation trusts and determined that, in the securitisation trust, individuals who acquire securities or securitisation bonds issued with the entrusted assets serving as guarantee qualify as investors. Consequently, an individual who receives the earnings of such bonds as an investor holds the status of trustee and therefore qualifies as its final beneficiary. This query arises from the fact that the securities issued frequently change hands, and their owners (beneficiaries) must be able to be identified for the purposes of tax paying effects.

As such, SUNAT indicated that both securitisation trusts and mutual investment funds, in their capacity as legal entities, are obliged to file an informative affidavit identifying all their final beneficiaries, and to update it every time the information changes. There is no exception to this obligation (even in cases where the securities issued change ownership continuously).

Market Developments

Offers registered with the SMV in 2019 and 2020

In 2019, securitisation bonds amounting to PEN230 million were placed through primary public offerings. As of October 2020, no securitisation bonds have been placed through primary public offerings in 2020.

Leading cases

The first and main regulated REIT in Peru has a US500 million framework programme registered before the SMV, and has placed a total of US50 million in securitisation bonds in the market. It is projecting a return on distribution of 3% for 2020, and 7.85% for 2021, indicating publicly that it expects to recover

PERU TRENDS AND DEVELOPMENTS

Contributed by: *Andrés Kuan-Veng and Carlos Arata, Rubio Leguía Normand*

its financing for the year 2020 (around 20% of its pre-COVID annual contractual income). The soundness of this REIT and market interest was demonstrated even during the nationally declared state of emergency, since it is the only securitisation trust that has placed securities through a primary public offering in 2020.

On 27 November 2020, the SMV registered the largest programme in the history of the Peruvian securities market, for up to USD2 billion, with respect to a REIT that expects to make its first placement for the amount of up to USD32 million in December 2020 and that will include regional diversification with properties in Peru, Chile and Mexico; it will also be the first REIT listed on the Lima Stock Exchange.

Development of private offers

Although private offerings of securities are generally outside the scope of SMV supervision, Article 333 of the LMV states that private offerings of securitised instruments may only be offered to institutional investors. Likewise, the securities acquired by these investors may not be transferred to third parties, unless it is in favour of another institutional investor or unless the security is previously registered before the Public Registry of the Securities Market.

According to the Income Tax Law, in a securitisation carried out through a REIT, it is the investor who must pay the tax and not the trust itself. In this sense, the rates established by law have been quite attractive for the market: 5% for individuals, 29.5% for companies and 0% for institutional investors (which are listed in Resolution SMV No 021-2013-SMV-01). The preferential rate for institutional investors serves as an incentive to structure financing schemes through securitisation programmes aimed at institutional investors.

In addition, the average approval of a public offering usually takes approximately 30 business days, and the registration of securities entails the obligation to periodically disclose information as a material event (*hecho de Importancia*). In certain cases, such additional costs and the obligation to disclose information on a periodic basis have led companies to opt for securitisation schemes through private offerings.

Reactiva Peru

The programme through the securitisation scheme

The Peruvian declaration of emergency and mandatory social distancing had a negative impact on the local economy, decreasing spending and affecting the income of Peruvian companies. With this in mind, to protect the payment chain, the Peruvian government approved a guarantee programme to provide working capital, named *Reactiva Peru*, for up to PEN60 billion, through Legislative Decree 1455. This programme has two

financing forms: individual guarantee and portfolio guarantee, with the latter being a securitisation trust that facilitates the granting of national government guarantees.

The programme allows companies in the financial system (ESF for its initialism in Spanish) (with their own funding) to choose to provide working capital loans to those companies that meet the programme's eligibility requirements. In turn, the ESFs enter into a guarantee agreement with *Corporación Financiera de Desarrollo* (a Peruvian state-owned development bank – COFIDE for its acronym in Spanish) that establishes the terms for granting the national government's guarantee to the loans placed by the ESFs, which will be transferred to a securitisation trust to be administered by COFIDE as trustee and securitisation company and whose trustee is the Ministry of Economy and Finance.

In that sense, the ESFs transfer to the trust the credit portfolios they have placed under the programme. In consideration for the transfer of the loan portfolio, two certificates of participation of the trust are issued:

- one for the percentage covered; and
- one for the balance of the portfolio without additional guarantees.

The guarantees of the programme only serve as a backup if they are used exclusively in operations of the Central Reserve Bank of Peru (BCRP for its initialism in Spanish).

Why securitisation is the ideal mechanism

Securitisation is an ideal mechanism for the guarantee programme because it allows ESFs to obtain greater immediate cash flow by being able to trade certificates that are backed by the government.

Likewise, even though the financial entity granted the loan portfolio in a pass-through capacity, it will continue to be in charge of collecting payments from the loans and the companies that have obtained the loans from the ESFs, under the terms and conditions agreed upon.

COFIDE's involvement

Superintendent's Resolution No 00041-2020-SMV/02 approved provisions whereby COFIDE may act as a securitisation company in the *Reactiva Peru* guarantee programme and in the National Government's Guarantee Programme for the Credit Portfolio of the Companies of the Financial System under Legislative Decree No 1508.

Future Market Trends

Securitisations to restructure debts

Companies have been using securitisation structures to improve the management of their liabilities. A good example is that of a group of Peruvian schools that placed a second issue of social bonds in October 2020 through a private offering under its First Securitised Bond Programme, for an amount of USD17 million and a term of 15 years, thereby redeeming and cancelling outstanding securitisation bonds that were issued in 2014.

This case is worth highlighting because not only was it a securitisation process, but it also involved the issuance of thematic (social) bonds certified by an independent verifier, the occurrence of which has been increasing in the local market in recent years.

Securitisation for small and medium-sized enterprises (SMEs)

In the Peruvian market, securitisation trusts can help provide cash flow to SMEs, as local regulation does not limit their use to only originator companies with large-scale assets. The current lack of liquidity of local companies and the increased risk aversion of banks create an ideal space for SMEs to seek new financing schemes that allow them to obtain liquidity in the short term.

In this sense, the structuring costs that usually accompany this type of issuance have been reduced in the market as financing structures have been standardised and negotiation costs have been reduced. In recent months, securitisation companies have been promoting the demystification that asset securitisation implies higher costs (in terms of expenses and time) than traditional financing schemes, especially in the case of private offerings.

PERU TRENDS AND DEVELOPMENTS

Contributed by: Andrés Kuan-Veng and Carlos Arata, Rubio Leguía Normand

Rubio Leguía Normand is a leader in Peruvian business law with an undisputed reputation, and has maintained the highest ethical standards for 40 years. It has offices in three key cities in Peru, and fields a team of more than 80 lawyers who seek to meet clients' needs while providing the best solutions at the right time. It is the only Peruvian firm represented in TerraLex,

an association of 106 independent law firms, and also belongs to the Pro Bono Declaration for the Americas. Representative clients include Citibank, Bank of America Merrill Lynch, Banco Santander, Credit Suisse, Deutsche Bank, Barclays, Barrick, Nexa, Goldfields, Consorcio Minero Horizonte and China Harbour Engineering Company Ltd.

Authors



Andrés Kuan-Veng is a partner in the Financial and Corporate Group, specialising in capital markets, sovereign debt, corporate law, derivatives, securities, M&A, banking law, insurance and reinsurance, as well as other corporate operations. He is a financial lawyer with more than 20 years of experience in international operations in different sectors. Andrés has participated in public and private securities issues in the international market (including IPOs and issues under Regulation S and Rule 144-A), purchases of companies (including companies listed through OPAs), the financing and development of projects with special concentration in energy sectors (oil and gas, mining and electricity) and infrastructure (health, ports and roads), asset-backed financings (including securitisations), and banking regulation. He has led international and local equity and debt issues, as well as cross-border financings and successful M&A in the energy, mining and natural resources sectors. Before joining Rubio Leguía Normand, Andrés was principal partner at Estudio Muñoz for seven years, and was previously a senior associate at Rebaza, Alcázar & De Las Casas and a consultant to the International Monetary Fund in Washington, DC.



Carlos Arata is a partner in the Financial and Corporate Group, specialising in project financing, corporate financing, M&A and other corporate operations. He has significant experience in project finance, capital markets, corporate financing and M&A, especially covering the retail, energy, hydrocarbon, mining and infrastructure sectors, in both the local and international markets. Carlos notably advised on the capital increase for new contributions made by the other shareholder in the Quellaveco Mining Project, and advised Grupo Energía Bogota as the acquirer of Group Electro Dunas (comprised of six companies), among other matters. Before joining Rubio Leguía Normand, Carlos worked as an international associate at Sidley Austin LLP, DLA Piper LLP and Clifford Chance LLP in New York, where he had the opportunity to participate in the most important infrastructure projects in the country.

Rubio Leguía Normand

Av. Dos de Mayo 1321
San Isidro
Lima 27
Peru

Tel: +511 208 3000
Fax: +511 442 3511
Email: abogados@rubio.pe
Web: www.rubio.pe

