The Legal 500 Country Comparative Guides

Panama: Securitisation

This country-specific Q&A provides an overview of securitisation laws and regulations applicable in Panama.

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1. **How active is the securitisation market in your jurisdiction? What types of securitisations are typical?**

   Securities issued as a result of securitizations in Panama represent a small fraction of the securities publicly offered in the capital markets in the Republic of Panama and they are almost exclusively in the form of mortgage backed securities.

2. **What assets can be securitised (and are there assets which are prohibited from being securitised)?**

   There is no statute listing assets that can or cannot be securitized. Past securitizations have included mortgage loans, consumer or personal loans, credit card receivables, governmental construction payment obligations, diversified payment rights derived from remittances and export loans.

3. **What legislation governs securitisation in your jurisdiction? What transactions fall within the scope of this legislation?**

   There is no special legislation regulating securitizations, including what constitutes such transaction. Therefore, parties have significant discretion how to structure securitizations.

4. **Give a brief overview of the typical legal structures used in your jurisdiction for securitisations and key parties involved.**

   A trust (*fideicomiso*) is the special purpose vehicle most commonly used in securitizations. In Panama, 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.

   In securitizations using trusts, the structure of the transaction is usually as follows:

   - A trust is constituted by a settlor (which may or may not be the originator of the assets or an affiliate thereof),
   - The trust issues, through its trustee, securities (mostly debt instruments) to investors,
   - The trust uses the funds to acquire receivables from the originator, and
   - The flows generated by such receivables are used by the trust to pay, through its trustee, interest, principal and other amounts due to the investors under the issued securities, as the case may be.

5. **Which body is responsible for regulating securitisation in your jurisdiction?**

   No governmental body is responsible for securitizations per se, as such transactions are not regulated by statute. When securitizations include capital markets, particularly the issuance

of securities as part of a public offering subject to registration, securitizations fall within the purview of the local securities regulator (*Superintendencia del Mercado de Valores or SMV*).

6. **Are there regulatory or other limitations on the nature of entities that may participate in a securitisation (either on the sell side or the buy side)?**

   As indicated before, Panama has not adopted special legislation to regulate securitizations. Therefore, there are no statutory limitations on the nature of entities that may participate in a securitization (either on the sell side or the buy side).

7. **Does your jurisdiction have a concept of "simple, transparent and comparable" securitisations, following the BCBS recommendations?**

   No.

8. **Does your jurisdiction distinguish between private and public securitisations?**

   Not legally. However, securities that, as a result of a securitization, are publicly offered in Panama would have to be registered with the SMV and these could be considered "public securitizations". On the other hand, asset-backed securities offered in Panama by means of a private placement or other offer exempt from registration with the SMV may be deemed "private securitizations".

9. **Are there registration, authorisation or other filing requirements in relation to securitisations in your jurisdiction (either in relation to participants or transactions themselves)?**

   There are none, unless the structure contemplates the issuance of securities to the public, in which case the offer must be registered with the local securities regulator (*Superintendencia del Mercado de Valores*).

10. **What are the disclosure requirements for public securitisations?**

    Panama's securities law is modeled after the securities legislation in force in the United States and adopts the standards of disclosure thereof – namely, the materiality standard. In short, the law requires issuers of publicly offered securities registered with the SMV to disclose all relevant information in the offering memorandum and prohibits any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (in Spanish: "no podrán contener ni información ni declaraciones falsas sobre hechos de importancia, ni podrán omitir información ni declaraciones sobre hechos de importancia que deban ser divulgados en virtud de este Decreto-Ley y sus reglamentos o que deban ser divulgados para que las declaraciones hechas en dichos prospectos no sean tendenciosas o engañosas a la luz de las circunstancias en que fueron hechas.")

11. **Does your jurisdiction require securitising entities to retain risk? How is this done?**

As indicated before, Panama does not have a securitization law. Therefore, parties are at liberty to set forth such terms and conditions as they deem convenient pursuant to general principles of freedom of contract and such terms shall govern the relationship and be enforceable against thereto, except for those that are contrary to public policy.

12. **Do investors have regulatory obligations to conduct due diligence before investing?**

No.

13. **What penalties are securitisation participants subject to for breaching regulatory obligations?**

In Panama, the securities market is regulated by the Single Text of Decree Law No. 1 of 1 July 1, 1999, (as amended to date, 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 said 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, (a) the terms and conditions of the securities, (b) the risk factors related to the securities, the issuer and its industry, and (c) financial, market, managerial and historical data of the issuer.

The information contained in the OM 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 serious offence under the Securities Law and 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.

In addition to the foregoing, issuers 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. The data contained in financial statements must also be true and accurate and reporting false or misleading information is also considered a very serious offence under the Securities Law, as well as constituting a felony under Panama's criminal laws.

The amounts of the monetary fines that the SMV may levy on the registered issuer due to

very serious offences as the ones described above can be (a) a sum no less 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, (b) the higher of (i) 5% of the assets of the offending party, (ii) 5% of the assets used in committing the offence or (iii) US$1,000,000.00. The amounts of the monetary fines that the SMV may levy on the managers of a registered issuer due to very serious offences as the ones described above can be of up to the higher of (x) 5% of the assets used in committing the offence or (y) US$1,000,000.00.

Finally, registered issuers are obligated 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, to 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.

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

14. **Are there regulatory or practical restrictions on the nature of securitisation SPVs?**

No.

15. **How are securitisation SPVs made bankruptcy remote?**

Panama law allows for securitizations to be structured in a manner such that the SPV that will issue the securities and receive the assets being securitized will be considered “insolvency remote”.

1. True Sale

The most important requirement that must be fulfilled to achieve insolvency remoteness is that the transaction whereby the assets are transferred to the SPV for purposes of being securitized complies with all requirements for it to be considered a “true sale” of the assets. If this is achieved, full title and ownership of the assets would have been transferred from the originator to the SPV and, therefore, the assets of the SPV are deemed independent and separate from the estate of the originator and cannot be consolidated with the assets of the originator. As such, the insolvency of the originator should not, in general result in the insolvency of the SPV or otherwise affect the SPV or its assets, except under certain

circumstances expressly provided in the law.

2. Voidable Transactions

The insolvency treatment of individuals and legal entities that are not governed by special laws ("non-regulated entities") is governed 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 governed by other statutes. Under the Insolvency Law, there are certain transactions that may be deemed or declared null and void even if they fulfill the requirements to be considered a true sale of assets.

The following are transactions that will be deemed null and void if they were performed within the twelve (12) months prior to the date of the insolvency as determined in an insolvency proceeding (the "Insolvency Date"):

(a) 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,

(b) 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

(c) 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 transfers 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.

3. Insolvency Remote SPV

It is recommended that the receivables be sold to an SPV endowed with traits that would increase remoteness from insolvency of the originator. Trusts are particularly attractive as SPVs for securitizations 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.

16. **What are the key forms of credit support in your jurisdiction?**

In securitizations carried out in Panama, credit support techniques that have been applied include, among others, the following (a) subordination, (b) reserve accounts, (c) excess spread and (d) overcollateralization. Subordination is implemented by issuing securities in more than one tranche or series, such as, a senior note and a subordinated note. Flows generated by the securitized 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 under the subordinated notes.

The constitution of a reserve account is achieved by opening a bank account in the name of the SPV and funds generated by the securitized receivables are deposited into the reserve account until sums deposited reach a certain minimum amount. After said 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 under the securities in stressed situations in which the flows generated by the securitized assets are not sufficient to make payments of interest and/or principal to investors.

Excess spread has also been implemented in securitizations by structuring the transaction in such a way that the interest rate (and, therefore, the interest payments) that the debtors of the securitized receivables 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.

To achieve overcollateralization in a securitization, 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.

17. **How may the transfer of assets be effected, in particular to achieve a 'true sale'? Must the obligors be notified?**

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 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 formalized or the securities that represent them have been granted or issued. The capacity to sell future credits and other rights allows for the securitization of future flows in Panama.

Under Panama law, certain formalities must be satisfied 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 complied with to achieve a true sale are the following:

(a) The contract needs to have a date certain,

(b) The credits need to be identified or determinable,

(c) The price must be set or be determinable, and

(d) Delivery of the credits must have occurred.

Date Certain. Article 1278 of our Civil Code requires that the purchase 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 which occurs from the day on which the signatures of the parties have been recognized 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.

Identification of 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.

Identification of 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 in exchange rate concerns, because the US dollar is legal tender in Panama.

Delivery of Credits. For a true sale to occur, it is of the essence that delivery of the credits or receivables take place. Article 1231 of our Civil Code states that a seller that has entered into a purchase and sale contract is obligated 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 (a) the transfer agreement is in the form of a public deed or (b) the signatures of the parties to the agreement are merely recognized by a notary public.

Notice to Debtor. 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 of the receivable 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. Due to the foregoing, it is advisable that the debtor be notified of the sale of the credit for the debtor to be obligated to cease making payments owed under the receivable to the previous holder thereof and to begin making payments to the new owner of the credit.

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 purposes of being securitized, however, articles of the Securities Law allow for the 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 sold for purposes of being securitized or otherwise must, in addition to complying 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 and 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 securitization.

18. **In what circumstances might the transfer of assets be challenged by a court in your jurisdiction?**

Various challenges may arise if one or more of the requirements of a true sale are not met, and the consequences thereof 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 recognized by a notary public. Given the fact that the parties signed the transfer agreement, a contract would exist between the parties and they would be reciprocally obligated 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.

19. **Are there data protection or confidentiality measures protecting obligors in a securitisation?**

[Not in the context of a securitization.]

20. **Is the conduct of credit rating agencies regulated?**

Issuers in securitizations 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: (a) the quality of the underlying assets, (b) credit enhancements, (c) that the transfer of the assets from the originator to the SPV complies with all requirements to be considered a true sale and (d) the insolvency remoteness of the SPV. Securities offered as a result of securitizations have received both local and international credit ratings.

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 to the SMV, in addition to other information and documentation, 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 any of the following in relation to the security or issuer being rated: (a) director, officer, executive or partner, (b) accountant or external auditor, (c) beneficial owner of more than 5% of shares outstanding, (d) creditor or debtor, and/or (e) sponsor, broker, distributor or trustee.

21. **Are there taxation considerations in your jurisdiction for originators, securitisation SPVs and investors?**

Panama's tax regime is territorial, which means that only profits, dividends, capital gains and other types of income generated from operations undertaken within the territory of Panama will be subject to the payment of income tax.

A. Special Purpose Vehicles

Regardless of whether the SPV that will issue the securities and receives 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.

B. Securities Offered

1. Taxation of Interest
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 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 they securities are registered with the SMV and, in addition, are placed through a securities exchange or through an organized market.

2. Taxation of Transfers

If the securities are registered with the SMV, any capital gains realized by a holder thereof on their sale or other transfer will be exempt from income tax in Panama, provided also that

the sale or transfer of the security is made through a securities exchange or another organized market.

If the securities are not sold through a securities exchange or another organized market, (i) the seller will be subject to income tax in Panama on capital gains realized on the sale of the securities calculated at a fixed rate of ten percent (10%); (ii) the buyer will be obligated to withhold from the seller an amount equal to five percent (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 (10) days following the date of withholding; (iii) 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 (iv) 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.

22. **To what extent does the legal and regulatory framework for securitisations in your jurisdiction allow for global or cross-border transactions?**

Our regulatory framework fully permits cross-border securitizations and many transactions have been carried out as such. SPVs organized under Panama laws have issued securities locally and used the funds to acquire receivables granted to debtors in other countries. Panamanian trusts have placed notes outside of Panama and the proceeds were used to purchase loans granted to obligors in Panama. Finally, SPVs constituted in foreign jurisdictions have offered bonds abroad and sums owed under those securities are secured and paid by receivables granted to Panamanian debtors.

23. **To what extent has the securitisation market in your jurisdiction transitioned from IBORs to near risk-free interest rates?**

Up to date, securitizations that have been carried out in Panama haven't evidenced a transition from interbank offered rates to near risk-free interest rates.

24. **How could the legal and regulatory framework for securitisations be improved in your jurisdiction?**

In our view, provisions in Panama's Civil Code, Commerce Code and other laws have served as sufficient basis for securitization transactions that have been carried out in Panama since the early 1990s and should continue to serve adequately for future securitizations.

Nevertheless, a law or statute that, while preserving the freedom of parties to contract and to set the terms and conditions of their transactions, regulates securitizations in order to streamline their execution and improve their cost-benefit component (by setting up predetermined minimum criteria for assets to be eligible for securitization, adopting sample

or form documentation, approving further tax incentives and make the securities more eligible for institutional investors, for example) should promote the more frequent use of these structures.

The securitization market in Colombia has progressed significantly since the creation of securitization companies (*sociedades titularizadoras*) and Chile has implemented a similar system with their *sociedades securitizadoras*, also with positive results.